ISSUE NO. 19

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 The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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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PROPOSAL NOTICE SECTION

BEFORE THE BURIAL PRESERVATION BOARD
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I through V, pertaining to repatriation of human skeletal remains and funerary objects and transfer of ARM 2.65.102, 2.65.103, 2.65.104, 2.65.105, 2.65.106, 2.65.107, 2.65.108 pertaining to protection of burial sites and scientific analysis	))))))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION AND TRANSFER

TO: All Concerned Persons

1. On Friday, November 12, 2010 at 10:00 a.m., the Burial Preservation Board of the State of Montana will hold a public hearing in Room 160 of the Mitchell Building, at 125 N. Roberts, Helena, Montana, to consider the proposed adoption and transfer of the above-stated rules.

2. The Burial Preservation Board 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 board no later than 5:00 p.m. on Friday, November 5, 2010, to advise us of the nature of the accommodation that you need. Please contact Shannon Lewis, Department of Administration, 125 N. Roberts, Room 155, P.O. Box 200101, Helena, Montana 59620-0101; telephone (406) 444-2032; fax (406) 444-6194; or e-mail slewis@mt.gov.

3. The proposed new rules provide as follows:

NEW RULE I MODEL PROCEDURAL RULES (1) The Burial Preservation Board adopts and incorporates by reference the following model rules, which may be found at http://sos.mt.gov:

(a) the Attorney General's model procedural rules ARM 1.3.211 through 1.3.224, and 1.3.226 through 1.3.233, including, as applicable, the appendix of sample forms in effect August 15, 2008; and

(b) the Secretary of State's model rules ARM 1.3.301 and 1.3.302, 1.3.304 and 1.3.305, 1.3.307 through 1.3.309, and 1.3.311 through 1.3.313 in effect August 1, 2008. These rules define model requirements for rulemaking under the Montana Administrative Procedure Act.

AUTH: 22-3-904, MCA
IMP: 22-3-904, 22-3-913, 22-3-914, MCA

Statement of Reasonable Necessity: Section 22-3-904, MCA, requires the Burial Preservation Board (board) to adopt rules necessary to provide for filing of repatriation claims and procedures for hearings and resolving multiple claims. The

rules must, at a minimum, address standards of evidence, standards of proof, and criteria for determining lineal descent and cultural affiliation. Hearings may not occur until the board has adopted such rules. The Attorney General's Model Rules cover the procedures for hearings and resolving claims and standards of evidence and proof in detail. The board is proposing to adopt the model forms, as applicable, because all the model forms may not apply to the board's activities. ARM 1.3.201(3) provides that agencies may adopt the Attorney General's model rules by incorporating them by reference.

Section 2-4-201, MCA, requires that each agency adopt rules describing its organization and procedures. The Secretary of State's Model Rules are proposed to be adopted to satisfy this statutory requirement. ARM 1.3.301(3) states that agencies may adopt the Secretary of State's Model Rules by incorporating them by reference.

NEW RULE II AGENCY AND MUSEUM INVENTORY OF CULTURALLY UNIDENTIFIABLE HUMAN SKELETAL REMAINS AND FUNERARY OBJECTS

(1) Culturally unidentifiable human skeletal remains or funerary objects refer to human remains and funerary objects in a museum or in the agency's possession for which no lineal descendant or cultural affiliation has been identified in the inventory process described in 22-3-911, MCA.

AUTH: 22-3-904, MCA
IMP: 22-3-904, 22-3-911, MCA

Statement of Reasonable Necessity: Section 22-3-911(1)(c), MCA, directs that an agency or museum shall complete an inventory identifying, among other things, the human skeletal remains or funerary objects that are not clearly identifiable as to cultural affiliation. The Montana Repatriation Act, 22-3-901, MCA, et seq., however, does not explain what culturally unidentifiable means. The new rule provides a definition, which was taken from the federal Native American Graves Protection and Repatriation Act (NAGPRA) regulations, 43 CFR 10.2(e)(2).

NEW RULE III CONTENTS OF A CLAIM FOR REPATRIATION (1) A written claim for repatriation must include a description of the claimant's cultural affiliation to the human skeletal remains or funerary objects and an explanation why an entity possessing the human skeletal remains or funerary objects does not have the right of possession.

(2) A claim failing to provide the above information must be dismissed and returned to the claimant. A claimant may file a revised claim.

AUTH: 22-3-904, MCA
IMP: 22-3-904, 22-3-912, MCA

Statement of Reasonable Necessity: Section 22-3-912, MCA, allows for the filing of claims for repatriation. This statute, however, is unclear regarding what minimum information a claim must contain and what happens if a claim is deemed insufficient.

New Rule III is necessary to provide the information that a claim must have and clarify that a claim omitting the necessary information must be dismissed, but that the claimant may refile their claim.

NEW RULE IV CRITERIA FOR DETERMINING LINEAL DESCENT AND CULTURAL AFFILIATION WHEN REVIEWING A REPATRIATION CLAIM (1) A lineal descendant is an individual tracing their ancestry directly and without interruption by :

(a) means of the traditional kinship system of the appropriate tribal or other cultural group; or

(b) the common law system of decendance to a known individual whose human skeletal remains or funerary objects are being requested under these rules.

(2) Cultural affiliation is a relationship of shared group identity that may be reasonably traced historically or anthropologically between a tribal group and an identifiable earlier tribe.

AUTH: 22-3-904, MCA
IMP: 22-3-903, 22-3-904, 22-3-912, MCA

Statement of Reasonable Necessity: As noted in the Statement of Reasonable Necessity for New Rule I, the board must adopt rules addressing criteria for determining lineal descent and cultural affiliation. The criteria for a lineal descendent are derived from the NAGPRA regulations, 43 CFR 10.14(b). The board, however, is very interested in receiving comments if individuals believe the board has erred or its criteria are incomplete. The cultural affiliation criteria are wholly derived from the definition of "cultural affiliation" in 22-3-903(6), MCA; the board has not amplified the statutory language. The board believes this definition accurately and adequately provides the criteria for determining cultural affiliation.

NEW RULE V DELAY OF REPATRIATION FOR SCIENTIFIC STUDY (1) If the hearing examiner determines that a possessing entity has provided evidence supporting a good faith effort regarding scientific study, the hearing examiner shall provide a reasonable period of delay, not to exceed 12 months from the date of the hearing examiner's order, to allow completion of the study before repatriation.

AUTH: 22-3-904, MCA
IMP: 22-3-904, 22-3-915, MCA

Statement of Reasonable Necessity: Section 22-3-915, MCA, allows the hearing examiner to order a reasonable delay of repatriation if the possessing entity has provided evidence supporting a good faith effort regarding a scientific study. The board strongly believes that a maximum of 12 months is sufficient for such a study. This period is the same maximum period allowed for scientific studies under the Human Skeletal Remains and Burial Site Protection Act, 22-3-801 et seq., MCA.

4. The department proposes to transfer the following rules:

OLD	NEW	
2.65.102	2.65.502	PROTECTION OF SITE
2.65.103	2.65.503	NOTICE AND REPORTING REQUIREMENTS
2.65.104	2.65.506	FIELD REVIEW
2.65.105	2.65.509	REMOVAL OF REMAINS OR BURIAL MATERIALS
2.65.106	2.65.512	DISPOSITION OF REMAINS AND BURIAL MATERIALS
2.65.107	2.65.515	PERMITS FOR SCIENTIFIC ANALYSIS
2.65.108	2.65.518	REPORTS AND BURIAL REGISTRY

Statement of Reasonable Necessity: The board proposes to transfer the above-stated rules in order to more logically arrange the rules.

5. 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 also be submitted to Shannon Lewis, Department of Administration, 125 N. Roberts, Room 155, P.O. Box 200101, Helena, Montana 59620-0101; telephone (406) 444-2032; fax (406) 444-6194; or e-mail slewis@mt.gov and must be received no later than 5:00 p.m. on Friday, November 12, 2010.

6. Michael Manion, Chief Legal Counsel for the Department of Administration, has been designated to preside over and conduct this hearing.

7. The Board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, email, 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.

8. An electronic copy of this proposal notice is available through the Burial Preservation Board's web site at http://burial.mt.gov. The Burial Preservation Board 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 Burial Preservation Board 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 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 165 (2001). Notification was sent to the sponsor of HB 165 by e-mail that the board was

beginning work on revising the content of the above-stated rules. The bill sponsor was provided a copy of this notice on May 7, 2010.

By: /s/ Reuben Mathias
Reuben Mathias, Chair
Burial Preservation Board

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

Certified to the Secretary of State October 4, 2010.

BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 8.99.901, 8.99.904, 8.99.908, and 8.99.912 pertaining to the award of grants and loans under the Big Sky Economic Development Program	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On November 4, 2010, at 9:30 a.m., the Department of Commerce will hold a public hearing in Room 228 of the Park Avenue Building, 301 South Park Avenue, at Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department of Commerce 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 Commerce no later than 5:00 p.m., on October 27, 2010, to advise us of the nature of the accommodation that you need. Please contact Alyssa Townsend-Hudders, Business Resources Division, Department of Commerce, 301 South Park Avenue, P.O. Box 200505, Helena, Montana, 59620-0505; telephone (406) 841-2792; fax (406) 841-2731; TDD (406) 841-2702; or e-mail ath@mt.gov.

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

8.99.901 DEFINITIONS (1) through (9) remain the same.

(10) "Eligible economic development organization" means an economic development organization that is located in a county that is not part of a certified regional development corporation region, and which meets the eligibility requirements established by the department and published by it in the Big Sky Economic Development Trust Fund Application Guidelines dated ~~2010~~ 2011.

(11) through (18) remain the same.

AUTH: 90-1-201, MCA
IMP: 90-1-201, MCA

8.99.904 INCORPORATION BY REFERENCE OF RULES GOVERNING SUBMISSION AND REVIEW OF APPLICATIONS (1) The department adopts and incorporates by reference the Big Sky Economic Development Trust Fund Application Guidelines dated ~~2010~~ 2011 as rules governing the submission and review of applications under the program. A copy of the guidelines may be obtained from the Department of Commerce, P.O. Box 200505, Helena, MT 59620-0505.

(2) remains the same.

AUTH: 90-1-204, MCA
IMP: 90-1-204, MCA

8.99.908 MAXIMUM AWARD AMOUNT (1) through (3) remain the same.

(4) Maximum award amounts to certified regional development corporations, tribal governments, and other eligible economic development organizations shall be established and published by the department in the Big Sky Economic Development Trust Fund Application Guidelines dated ~~2009~~ 2010.

AUTH: 90-1-204, MCA
IMP: 90-1-204, MCA

8.99.912 ELIGIBLE BUSINESS (1) Basic sector businesses and other businesses identified by the department in the Big Sky Economic Development Trust Fund Application Guidelines dated ~~2010~~ 2011 are eligible for financial assistance from funds that are awarded to local governments and tribal governments under this program.

AUTH: 90-1-204, MCA
IMP: 90-1-204, MCA

REASON: 17-5-703 and 90-1-201, MCA, et seq. created the Big Sky Economic Development Fund and assigned the administration of the fund to the Department of Commerce. The department is proposing these amendments to reflect the updated 2011 Guidelines. The Legislature mandated that the department adopt rules to implement the Big Sky Economic Development Program in 90-1-204, MCA.

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: Angela Nelson, Business Resources Division, Department of Commerce, 301 South Park Avenue, P.O. Box 200505, Helena, Montana 59620-0505; telephone (406) 841-2792; fax (406) 841-2731; or e-mail anelson@mt.gov, and must be received no later than 5:00 p.m., November 12, 2010.

5. Ty Jones, Legal Counsel, Department of Commerce, 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 the Department of Commerce, 301 South Park Avenue, P.O. Box 200501, Helena, Montana 59602-0501, by fax to (406) 841-2701, by e-mail to lgregg@mt.gov, 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 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.

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

/s/ G. MARTIN TUTTLE
G. MARTIN TUTTLE
Rule Reviewer

/s/ DORE SCHWINDEN
DORE SCHWINDEN
Director
Department of Commerce

Certified to the Secretary of State October 4, 2010.

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

In the matter of the amendment of ARM 24.126.510 endorsement, 24.126.701 inactive status and conversion, 24.126.904 minimum requirements for impairment evaluators, and the adoption of NEW RULE I prepaid treatment plans	))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On November 5, 2010, at 10:00 a.m., a public hearing will be held in room 439, 301 South Park Avenue, Helena, Montana, to consider the proposed amendment and adoption of the above-stated rules.

2. The Department of Labor and Industry (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 Board of Chiropractors (board) no later than 5:00 p.m., on October 29, 2010, to advise us of the nature of the accommodation that you need. Please contact Dennis Clark, Board of Chiropractors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2390; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdchi@mt.gov.

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

24.126.510 ENDORSEMENT (1) In order to receive a license by endorsement, license applicants shall provide proof of equal ~~credentials~~ licensure requirements from the state where the license applicant holds a current, active license. In instances where the applicant cannot demonstrate equal credentials, the applicant may obtain a license upon successful passage of the SPEC examination administered by the NBCE. All applications by endorsement are reviewed by the board on a case-by-case basis.

AUTH: 37-12-201, MCA
IMP: 37-1-131, 37-1-304, MCA

REASON: The board determined it is reasonably necessary to amend (1) to address confusion as to the meaning of "credentials." The board is replacing "credentials" with "licensure requirements" to clarify that the term designates what each state requires for licensure and not a licensee's entitlements. The board is adding the last sentence to clarify that the board considers all endorsement

applications to be nonroutine and reviews each application individually to determine the applicant's demonstration of equal credentials for licensure.

24.126.701 INACTIVE STATUS AND CONVERSION TO ACTIVE STATUS (1) remains the same.

(2) An individual licensed on inactive status may convert the inactive status license to active status by submission of an appropriate application, payment of the renewal fee for the year in question, evidence that ~~the licensee is in good standing in all jurisdictions in which the licensee holds or has held a license~~ any and all chiropractor licenses in other jurisdictions are unrestricted with no pending discipline, and evidence of one of the following:

(a) and (b) remain the same.

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

REASON: The board is amending this rule in response to recent public inquiry to clarify the board's intent as to the meaning of "good standing" of other licenses. Implementation cites are being amended to accurately reflect all statutes implemented through the rule.

24.126.904 MINIMUM REQUIREMENTS FOR BOARD-APPROVED PROGRAMS TO QUALIFY FOR CERTIFICATION AS AN IMPAIRMENT EVALUATOR (1) In order to qualify for board approval, programs shall include a minimum of 36 hours of classroom course work consisting of 24 hours of education in impairment rating from a college certified by the Council on Chiropractic Education, and 12 hours in a course on impairment rating utilizing the current edition of the ~~Journal of American Medical Association (JAMA) Guidelines~~ Guides to Evaluation of Permanent Impairment published by the American Medical Association.

AUTH: 37-1-131, 37-12-201, MCA
IMP: 37-1-131, 37-12-201, 37-71-711, MCA

REASON: The board determined it is reasonably necessary to amend this rule to eliminate confusion and maintain consistency with impairment rating terminology used in 39-71-711, MCA. Authority and implementation cites are being amended to accurately reflect all statutes implemented through the rule and provide the complete sources of the board's rulemaking authority.

4. The proposed new rule provides as follows:

NEW RULE I PREPAID TREATMENT PLANS (1) Licensed chiropractors accepting prepayment for services planned, but not yet delivered must:

(a) Establish an escrow account to hold all prepayment funds.

(i) Funds may be removed from the escrow account following the delivery of services, in such amounts equal to the chiropractor's usual and customary charges for like services, with any discounted percentage contained in a written contract.

(ii) Funds received in advance of the day services are delivered must be deposited into the escrow account in a timely manner.

(b) Maintain in the patient's file the following:

(i) A proposed treatment plan, including enumeration of all aspects of evaluation, management, and treatment planned to therapeutically benefit the patient relative to the condition determined to be present and necessitating treatment.

(ii) A contract outlining beginning and ending dates and a proposed breakdown of the proposed treatment frequency, types of modalities, and procedures included in the contracted treatment, methods of evaluating the patient's progress or serial outcome assessment plan, method of recording or assessing patient satisfaction, and any necessary procedures for refunding payments provided for any care not received within a reasonable amount of time.

(iii) A consent for treatment document specifying the condition for which the treatment plan is formulated, prognosis and alternate treatment options.

(2) The chiropractor is responsible for providing all treatment appropriate and necessary to address and manage the condition, including unforeseen exacerbations or aggravations within the chiropractor's licensure that may occur during the course of time for which the contract is active. This does not include alternative services procured by the patient or treatment by providers other than the treating chiropractor or those under the chiropractor's direct supervision.

(3) If nutritional products or other hard goods including braces, supports, or patient aids are to be used during the proposed treatment plan, the contract must state whether these items are included in the gross treatment costs or if they constitute a separate and distinct service and fee.

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

REASON: The board determined it is reasonable and necessary to adopt this new rule to address an increasing number of complaints and inquiries from the public regarding the prepayment of services and lack of refunds for services not received. The board concluded that it is in the public's best interest to require that all chiropractors who take money for services not yet rendered place the funds in an escrow account for safekeeping and accountability, and retain certain documents in the client's file. The board is delineating what should be included in a contract to ensure consistency with a 2009 amendment to the unprofessional conduct rule.

5. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Chiropractors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdchi@mt.gov, and must be received no later than 5:00 p.m., November 12, 2010.

6. An electronic copy of this Notice of Public Hearing is available through the department and board's site on the World Wide Web at www.chiropractor.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.

7. 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 Board of Chiropractors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; faxed to the office at (406) 841-2305; e-mailed to dlibsdchi@mt.gov; or made by completing a request form at any rules hearing held by the agency.

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

9. Anjeanette Lindle, attorney, has been designated to preside over and conduct this hearing.

BOARD OF CHIROPRACTORS
JOHN SANDO, DC, 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 October 4, 2010

BEFORE THE BOARD OF PROFESSIONAL ENGINEERS
AND PROFESSIONAL LAND SURVEYORS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the adoption NEW RULES I through IV pertaining to professional land surveyor scope of practice activities	))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

TO: All Concerned Persons

1. On November 9, 2010, at 1:00 p.m., a public hearing will be held in room 439, 301 South Park Avenue, Helena, Montana to consider the proposed adoption 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 Board of Professional Engineers and Professional Land Surveyors (board) no later than 5:00 p.m., on November 5, 2010 to advise us of the nature of the accommodation that you need. Please contact Brooke Jasmin, Board of Professional Engineers and Professional Land Surveyors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2351; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2309; e-mail dlibsdpels@mt.gov.

3. GENERAL STATEMENT OF REASONABLE NECESSITY: The board determined it is reasonably necessary to adopt proposed New Rules I through IV to address requests from both within and outside the profession of land surveying for clarification regarding whether certain activities (mostly arising as a consequence of developing technologies) require licensure as a professional land surveyor.

In particular, the board acknowledges receiving a number of questions and complaints regarding whether individuals using readily available consumer technologies were engaging in the unauthorized practice of land surveying. In response, the board formed an advisory group comprised of land surveyors, state, and local government agencies involved in land surveying issues, developers of geographic information systems (GIS), and global positioning system (GPS) users. Over the course of more than two years, the advisory group produced a consensus document, which formed the basic text of these proposed new rules.

The board therefore determined it is reasonable and necessary to propose new rules to provide clarification and guidance to licensees and the public regarding the scope of practice for licensed land surveyors.

4. The proposed new rules provide as follows:

NEW RULE I GENERAL PRINCIPLES (1) Boundary location and monumentation are considered the practice of land surveying.

(2) National Geodetic Survey (NGS) is considered authoritative; however, their land surveyors, when acting under government authority, are not required to be a professional land surveyor to perform geodetic control surveys.

(3) Numerical accuracy, for example, submeter, is not a basis for consideration as to whether a professional land surveyor is required.

(4) Consideration of what is being mapped is not a basis for determining whether a professional land surveyor is required. Consideration of what the information will be used for should determine whether a professional land surveyor is required. In other words, it is not what is mapped, but the intended use for the data that determines whether or not a professional land surveyor is required.

(5) Preparation of legal descriptions for transfer of interest in real property is limited to professional land surveyors.

(6) Anyone may use land surveying methods for their own personal needs on their own property. Examples include assessing probable property lines, topography, and locations of physical features.

(7) Anyone can use land surveying methods to determine dynamic perimeters such as fire fronts, weather fronts, moving vehicles, etc., for reporting to the public, posting on the Internet, or any other use not prohibited by these guidelines.

(8) These guidelines do not preclude surveys performed by professional engineers or other legally recognized professions or trades as allowed by state law or administrative rule.

AUTH: 37-1-131, 37-67-202, MCA
IMP: 37-1-131, 37-67-101, 37-67-301, MCA

NEW RULE II GEOMATICS DEFINITIONS (1) "Accuracy" may refer to expressed accuracy or implied accuracy.

(a) "Expressed accuracy" means designating a numerical value for spatial accuracy or spatial relationships between objects or data.

(b) "Implied accuracy" means designating things such as equipment, equipment operating procedures, field procedures, analysis, methodologies, etc. to support a spatial accuracy expectation.

(2) "Authoritative" means certifiably accurate, based on the expertise of one who is sanctioned by an established governmental authority.

(a) The following are examples of authoritative activities:

(i) the collection and evaluation of evidence with the intent to determine land boundary locations;

(ii) the collection, analysis, and evaluation of measurements, with the intent to certify the positional relationship of data sets to property boundaries, an elevation datum, or a geodetic control network;

(iii) the collection, analysis, and subsequent publication of positional information related to geodetic control; and

(iv) meeting or offering to meet a contractual spatial accuracy requirement, express or implied.

(b) Each of the authoritative activities identified as an example in (2)(a) must be performed by a professional land surveyor, with the following exceptions:

(i) activities that may be performed by a person other than a land surveyor, under the laws of this state or of the United States;

(ii) a geodesist recognized as an expert in the field of measurement science may perform activities described in (2)(a)(iii); and

(iii) a professional engineer may perform activities described in (2)(a)(iv).

(3) "Certification" means a written assurance, warranty, guarantee, or official representation that some act has or has not been done, or some event has occurred, or some legal formality has been complied with. Persons or entities providing certifications do so utilizing specific authority, licensure, or jurisdiction granted by law. Certification requires special knowledge, expertise and/or authority, generally held by a responsible official. The following are examples of certification:

(a) the certification that a professional land surveyor applies to a certificate of survey; and

(b) the certification of the locational accuracy of a Geographic Information System (GIS) product.

(4) "Control" may refer to geodetic control, mapping control, or survey control.

(a) "Geodetic control" means a set of permanently monumented control points, also commonly referred to as "stations," whose coordinates are established by geodetic surveying methodology.

(i) Geodetic control work may only be performed by a professional land surveyor or a federal agency designated to perform such surveys.

(ii) Geodetic control provides a common, consistent, and accurate reference system for establishing coordinates from which supplemental surveying, engineering, and mapping work is preformed and to which any geographic data may be tied.

(iii) All National Spatial Data Infrastructure (NSDI) framework data and users' applications data require geodetic control to register spatial data.

(iv) The official national common reference system is designated the National Spatial Reference System (NSRS). Mapping and surveying works may be connected to the NSRS by tying new projects to previously established control points that are part of the NSRS. The fundamental geodetic control for the United States is provided through the National Oceanic and Atmospheric Administration's National Geodetic Survey (NGS) managed by NSRS. Geodetic control includes horizontal and vertical control monuments that are part of the NSRS (the NGS database).

(b) "Mapping control" means any horizontal or vertical coordinate position used to control maps that are not included in the definitions of geodetic or survey control.

(i) Mapping control provides the framework for the spatial placement of nonauthoritative products such as aerial photography, parcel mapping, and Geographic Information Systems (GIS).

(ii) Mapping control may or may not require a professional land surveyor, depending upon the intended use of the products.

(iii) Mapping control is typically, though not necessarily, based on an official reference system or geodetic datum.

(iv) Mapping control may be accomplished with various levels of accuracy and by various methods depending upon the intended use of the products.

(v) Control for georeferencing GIS data, some aerial photography, resource mapping, and inventory mapping may not require supervision by a professional land surveyor.

(vi) Control for aerial photography for use in functions included in the practice of land surveying or engineering surveying (i.e. boundary determination or engineering design) must be preformed under the direct supervision of a professional land surveyor.

(c) "Survey control" means any horizontal or vertical coordinate position used to control fixed works of engineering or legal land boundaries. Survey control may only be performed by a professional land surveyor (or a federal agency designated to perform such surveys). Survey control may or may not be based upon any official reference system or geodetic datum. Survey control may be based on assumed coordinates, or geodetic control, or property corners, or Public Land Survey System (PLSS) corners, or randomly selected points. Survey control may be accomplished in various levels of accuracy and by various methods depending upon the use of the finished product. The following are examples of survey control:

(i) control for construction projects;

(ii) control for subdivision platting;

(iii) control for boundary surveys;

(iv) control created or tied for cadastral surveys for the Bureau of Land Management;

(v) control created or tied for geodetic ties for plats or surveys;

(vi) control created or tied for boundary surveys;

(vii) control created or tied for subdivision design or staking;

(viii) control created or tied for construction staking; and

(ix) control created or tied for American Land Title Association surveys.

(5) "Geomatics" means the science and technology dealing with the character and structure of geospatial information, its methods of capture, organization, classification, qualification, analysis, management, display, and dissemination, as well as the infrastructure necessary for the optimal use of this information.

(6) "Photogrammetry and remote sensing" means the art, science, and technology of obtaining reliable information from noncontact imaging and other sensor systems about the earth and its environment, and other physical objects and processes through recording, measuring, analyzing, and representation.

(7) "Spatial data" means information that identifies the geographic location and characteristics of natural or constructed features and boundaries on the surface of the earth. This information may be derived from, among other things, remote sensing, mapping, and surveying technologies. Spatial data may also be known as geospatial data.

AUTH: 37-1-131, 37-67-202, MCA
IMP: 37-1-131, 37-67-101, 37-67-301, MCA

NEW RULE III ACTIVITIES INCLUDED WITHIN SURVEYING PRACTICE

(1) Activities that must be accomplished under the responsible charge of a professional land surveyor, unless specifically exempted in [NEW RULE IV], include, but are not limited to the following:

(a) The creation of maps and georeferenced databases representing authoritative locations for boundaries, fixed works of engineering, or topography. Examples include:

(i) legal boundary surveys;

(ii) establishing or locating the extent, alignment, and acreage included in rights of way, easements, or other legal interests in real property;

(iii) engineering surveys for designs; and

(iv) as-built surveys.

(b) Preparing or offering to prepare a certificate of survey or plat.

(c) Preparing or offering to prepare legal descriptions or exhibits, and computation of associated acreage of real property boundaries, easements, or other legal interests in real property. Lands acquired for state highways are specifically exempted under 76-3-209, MCA.

(d) Original data acquisition or the resolution of conflicts between multiple data sources, when used for the authoritative location of features within data themes. Examples include:

(i) elevation and hydrography;

(ii) fixed works of engineering;

(iii) private and public boundaries; and

(iv) cadastral information.

(e) Original data acquisition by contract or second parties for authoritative purposes.

(f) Authoritative certification of positional accuracy of maps or measured survey data.

(g) Authoritative adjustments or authoritative interpretation of survey data.

(h) Geographic Information System (GIS)-based parcel or cadastral mapping used for authoritative boundary definition purposes wherein land title or development rights for individual parcels are or may be affected. Examples include:

(i) If the boundary of an administrative district is proposed to run "diagonally across section eight from the Northeast to the Southwest corners of said section" and a GIS-based map showing that line is adopted as the official representation of the boundary, that map must be prepared by, or under the direction of, a professional land surveyor.

(ii) If the boundary of an administrative district is proposed to run "one-half mile northeasterly of and parallel to County Road #4", and a GIS-based map showing that line is adopted as the official representation of the boundary, that map must be prepared by, or under the direction of, a professional land surveyor.

(iii) If a GIS-based map is used only to provide a graphical representation of that boundary, but authoritative determination of the boundary location is dependent upon survey of the described off-set line, preparation of the map need not be accomplished under the responsible charge of a professional land surveyor.

(i) Authoritative interpretation of maps, deeds, or other land title records to document or present evidence to assist in resolving conflicting boundaries.

(j) Acquisition and or verification of field data required to authoritatively position fixed works of engineering or cadastral data relative to control. Examples include:

(i) determination and identification of corner points; and

(ii) authoritative collection or calculation and compilation of geodetic coordinates of Public Land Survey System (PLSS) or any monument controlling a property line.

(k) Analysis, adjustment, or transformation of cadastral data with respect to geodetic control within a GIS, resulting in the certification of positional accuracy.

(l) Providing or offering to provide geodetic control/survey control and some types of mapping control.

(m) Establishing ground control and quality control proofing for remote sensing and photogrammetric products when used for authoritative purpose.

AUTH: 37-1-131, 37-67-202, MCA
IMP: 37-1-131, 37-67-101, 37-67-301, MCA

NEW RULE IV ACTIVITIES EXCLUDED FROM SURVEYING PRACTICE

(1) A distinction must be made between making and documenting original measurements in the creation of survey products, versus the copying, interpretation, or representation of those measurements. Further, a distinction must be made according to the intent, use, or purpose of measurement products to determine an authoritative location, versus the use of those products as a locational reference for planning, infrastructure management, and general information. The following items are not to be included as activities within the definition of land surveying:

(a) Items and activities exempted in 60-2-209, MCA and 76-3-209, MCA.

(b) The creation of any map not used for the authoritative location of property boundaries, the definition of the shape or contour of the earth, or the location of fixed works of engineering. Examples include but are not limited to maps:

(i) prepared by private firms or government agencies for use as guides to motorists, boaters, aviators, or pedestrians;

(ii) prepared for publication in a gazetteer or atlas as an educational tool or reference publication;

(iii) prepared for or by educational institutions for use in the curriculum of any course of study;

(iv) produced by any electronic or print media firm as an illustrative guide to the geographic location of any event; and

(v) prepared by laypersons for conversational or illustrative purposes, including advertising material and users guides.

(c) The transcription of previously georeferenced data into a Geographic Information System (GIS) or Land Information System (LIS) by manual or electronic means, and the maintenance thereof, provided the data are clearly not intended to indicate:

(i) the authoritative location of property or administrative boundaries, easements, rights of way, or other legal interest in real property;

(ii) the definition of the shape or contour of the earth; and

(iii) the location of fixed works of engineering.

(d) The transcription of public record data into a GIS- or LIS-based cadastre (tax maps and associated records) by manual or electronic means, and the maintenance of that cadastre, provided the data are clearly not intended to authoritatively represent property or administrative boundaries or easements, rights of way, or other legal interests in real property. Examples include:

(i) tax maps;

(ii) zoning maps; and

(iii) school district maps.

(e) The preparation of any document by any federal government agency that does not define real property boundaries. Examples include:

(i) civilian and military versions of quadrangle topographic maps;

(ii) military maps;

(iii) satellite imagery;

(iv) aerial photography; and

(v) orthoimagery.

(f) The incorporation or use of documents or databases prepared by any federal agency into a GIS/LIS. Examples include:

(i) census and demographic data;

(ii) quadrangle topographic maps; and

(iii) military maps.

(g) Inventory maps and databases created by any individual or organization, in either hardcopy or electronic form of physical features, facilities, or infrastructure that are wholly contained within properties to which they have rights or for which they have management or regulatory responsibility. The distribution of these maps and/or databases outside the organization must contain appropriate metadata clearly indicating that the data is not for design.

(h) Maps and databases depicting the distribution of natural resources or phenomena. Examples include, but are not limited to, maps prepared by:

(i) foresters;

(ii) geologists;

(iii) soil scientists;

(iv) geophysicists;

(v) biologists;

(vi) archeologists; and

(vii) historians.

(i) Maps and georeferenced databases depicting physical features and events prepared by any government agency where the access to that data is restricted by law. This includes georeferenced data generated by law enforcement agencies involving crime statistics and criminal activities.

(j) Engineering surveys performed by a professional engineer as specifically allowed under 37-67-101(4), MCA.

(k) Work ordinarily performed by persons who operate or maintain machinery or equipment, communication lines, signal circuits, electric power lines, or pipelines.

(l) The preparation of documents that create, assign, reference, or transfer interests in real property by reference to a legal description prepared by a professional land surveyor. Examples include, but are not limited to:

(i) contracts;

(ii) deeds;

(iii) easements;

(iv) certificates of location for mining claims;

(v) rights of way; and

(vi) similar documents, which may incorporate or make reference to:

(A) plats;

(B) certificates of survey;

(C) narrative legal descriptions; or

(D) exhibits prepared by a professional land surveyor.

(m) Operating and publishing data from a continuously operating reference station (CORS).

(n) Original data acquisition by contract or second parties for nonauthoritative purposes when the metadata is clearly labeled "Not for Design."

(o) The acquisition, preparation, processing, manipulation, or certification of final products or original data developed or collected by remote sensing or photogrammetric methods. Control may be derived from existing sources for remote sensing or photogrammetric products, where spatial accuracy is not critical and specific map accuracy standards are not required.

AUTH: 37-1-131, 37-67-202, MCA
IMP: 37-1-131, 37-67-101, 37-67-103, 37-67-301, MCA

5. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Professional Engineers and Professional Land Surveyors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2309, or by e-mail to dlibsdpels@mt.gov, and must be received no later than 5:00 p.m., November 17, 2010.

6. An electronic copy of this Notice of Public Hearing is available through the department and board's site on the World Wide Web at www.landsurveyor.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.

7. 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 Board of Professional Engineers and Professional Land Surveyors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2309, e-mailed to dlibsdpels@mt.gov, or made by completing a request form at any rules hearing held by the agency.

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

9. Mary Tapper, attorney, has been designated to preside over and conduct this hearing.

BOARD OF PROFESSIONAL ENGINEERS
AND PROFESSIONAL LAND SURVEYORS
DAVID ELIAS, PRESIDING OFFICER

/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 October 4, 2010

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

In the matter of the amendment of ARM 37.50.901 pertaining to interstate compact on the placement of children	)))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On November 13, 2010, the Department of Public Health and Human Services proposes to amend the above-stated rule.

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 November 5, 2010, 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 MT 59604-4210; telephone (406) 444-4094; fax (406) 444-1970; or e-mail dphhslegal@mt.gov.

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

37.50.901 INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

(1) The ~~d~~Department of ~~p~~Public ~~h~~Health and ~~h~~Human ~~s~~Services ~~hereby~~ adopts and incorporates by reference the regulations adopted by the ~~a~~Association of ~~a~~Administrators of the ~~i~~Interstate ~~c~~Compact on the ~~p~~Placement of ~~c~~Children as amended through ~~April 30, 2000~~ April 18, 2010. These regulations interpret the interstate compact on the placement of children and include clarifications of the applicability of the interstate compact on the placement of children with regard to the following:

(a) remains the same.

(b) interstate relocation ~~by foster parents~~ of family units;

(c) remains the same.

(d) interstate placements of children in ~~educational institutions, hospitals and institutions for the mentally ill or mentally defective~~ residential treatment facilities;

(e) remains the same.

(f) a ~~6-month~~ six-month time limit on placement authorization;

(g) and (h) remain the same.

(i) definition of a visit; ~~and~~

(j) applicability to guardianships~~.~~; and

(k) responsibility of states to supervise children.

(2) A copy of the regulations adopted by the ~~a~~Association of ~~a~~Administrators of the ~~i~~Interstate ~~c~~Compact on the ~~p~~Placement of ~~c~~Children as amended through ~~April 30, 2000~~ April 18, 2010, can be obtained from the Department of Public Health and Human Services, Child and Family Services Division, ~~1400 Broadway~~ 301 South Park Avenue, Room 568, P.O. Box 202951, Helena, MT 59620-2951.

AUTH: ~~41-3-1103,~~ 52-2-111, ~~53-4-111,~~ MCA
IMP: ~~41-3-1101,~~ 41-4-101, 52-2-111, ~~53-4-114,~~ MCA

4. The Department of Public Health and Human Services (the department) is proposing the amendment of ARM 37.50.901 pertaining to interstate compact on the placement of children.

Under 41-4-101, MCA, Article VII, the administrators of the Interstate Compact on the Placement of Children (ICPC) have the power to promulgate rules to carry out the terms and provision of the compact. The regulations promulgated by the Association of Administrators of the ICPC (AAICPC) as of April 18, 2010 are proposed to be adopted in ARM 37.50.901 for use in Montana.

ARM 37.50.901(1)(a) through (k) incorporate all new and amended regulations promulgated by the AAICPC since ARM 37.50.901 was last updated in 2001. The regulations include the following: Regulation 0.01 (forms) as amended on May 2, 2001, effective July 2, 2001; Regulation 1 (interstate relocation of family units) as amended on April 18, 2010, effective October 1, 2010; Regulation 3 (placements with parents, relatives, nonagency guardians, and nonfamily settings) as amended on May 2, 2001, effective July 2, 2001; Regulation 4 (residential placements) as amended on May 2, 2001, effective July 2, 2001; Regulation 5 (central state compact office) as amended on April 2002, effective June 27, 2002; Regulation 6 (permission to place child: time limitations, reapplication) as amended on May 2, 2001, effective July 2, 2001; Regulation 7 (priority placement) as amended on May 2, 2001, effective July 2, 2001; Regulation 9 (definition of a visit) as amended on April 2002, effective June 27, 2002; Regulation 10 (guardianships) as amended on April 2002, effective June 27, 2002; and Regulation 11 (responsibility of states to supervise children) as adopted on April 18, 2010, effective October 1, 2010.

The amendments to ARM 37.50.901 are necessary to incorporate changes made to the ICPC regulations at the AAICPC annual meetings held in 2001, 2002, and 2010.

For the ICPC regulations themselves, proposed changes are submitted to each state at least 30 days prior to the annual AAICPC business meeting. Voting on new regulations and amendments to existing ones is done at the meetings. The AAICPC regulations are incorporated into other states' rules to assist in the administration and enforcement of the ICPC statute, and because they are used in practice.

No fiscal impact is anticipated.

5. The department intends to apply these rules retroactively to October 1, 2010. A retroactive application of the proposed rules does not result in a negative impact to any affected party.

6. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to: Rhonda Lesofski, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena MT 59604-4210, no later than 5:00 p.m. on November 12, 2010. Comments may also be faxed to (406) 444-1970 or e-mailed to dphhslegal@mt.gov.

7. If persons who are directly affected by the proposed action 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 Rhonda Lesofski at the above address no later than 5:00 p.m., November 12, 2010.

8. If the agency receives requests for a public hearing on the proposed action from either 10 percent 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 25 based on 250 Department of Public Health and Human Services child protection specialists.

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 6 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 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.

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

/s/ Michelle Maltese
Rule Reviewer

/s/ Hank Hudson for
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State October 4, 2010.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 42.31.1002 relating to the hospital utilization fee	)))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On November 4, 2010, at 1:00 p.m., a public hearing will be held in the Third Floor Reception Area Conference Room 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., October 18, 2010, 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) 444-4375; or e-mail canderson@mt.gov.

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

ARM 42.31.1002 FEE (1) Each hospital in the state shall pay to the department a utilization fee ~~in the amount of $27.70 for each inpatient bed day for the period between January 1, 2007, and June 30, 2007~~ as specified in the schedules shown in 15-66-102, MCA.

AUTH: 15-66-104, MCA
IMP: 15-66-102, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.31.1002 to delete the utilization fee of $27.70 because it is no longer applicable. The law was changed in 2009, with the passage of Ch. 489, L. 2009, to provide for a different fee for each inpatient bed day of service for specified dates. The rule directs taxpayers to the statute where they can find the appropriate fee for a particular date.

Prior to this amended rule the administrative rule stated the actual fee rate for a specific period. The statute requires the fee to change periodically causing the department to change the administrative rule each time the fee rate changed, requiring constant amendments and changes to the administrative rules.

The practice of not listing the actual fee or tax rates but referencing the appropriate statute has become common rule practice for the department.

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) 444-4375; or e-mail canderson@mt.gov and must be received no later than November 19, 2010.

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) 444-4375, 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, Senator John Cobb, SB 118 (2007 Session) was contacted on September 15, 2010, by electronic mail.

/s/ Cleo Anderson	/s/ Dan R. Bucks
CLEO ANDERSON	DAN R. BUCKS
Rule Reviewer	Director of Revenue

Certified to Secretary of State October 4, 2010

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I and amendment of ARM 42.12.206, 42.12.208, 42.12.209, 42.12.210, and 42.12.212 relating to liquor license transfers, suspension, and revocation	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On November 8, 2010, at 1:30 p.m., a public hearing will be held in the Third Floor Reception Area Conference Room of the Sam W. Mitchell Building, at Helena, Montana, to consider the adoption and amendment of the above-stated rules.

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., November 1, 2010, 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) 444-4375; or e-mail canderson@mt.gov.

3. The proposed new rule does not replace or modify any section currently found in the Administrative Rules of Montana. The proposed new rule provides as follows:

NEW RULE I DEFINITIONS The following definitions apply to this subchapter:

(1) "Cross collateralization" means collateral for one loan also serving as collateral for other loans.

AUTH: 16-1-303, MCA
IMP: 16-4-401, 16-4-402, 16-4-404, 16-4-801, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule I to create a definition rule for subchapter 2 that will contain all terms used in the rules contained in this subchapter. The definition of "cross-collateralization" is necessary to enhance the liquor license applicant's understanding of secured loans.

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

42.12.206 PROHIBITION AND EXCEPTION REGARDING LEASING OF LICENSE (1) A license issued under the provisions of Title 16, chapter 4, parts 1 through 5, MCA, is a privilege personal to the licensee, and in no case shall the licensee lease the license to any other person.

(2) Golf course beer and wine licenses owned by the state, a unit of the university system, or a local government, fairground complex beer and wine licenses owned by a political subdivision of the state, and airport all-beverages licenses are exempt from this rule.

(3) The lessee of the licenses in (2) are required to qualify under 16-4-401, MCA.

AUTH: 16-1-303, MCA
IMP: 16-4-109, 16-4-208, 16-4-306, 16-4-401, 16-4-404, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.12.206 to include statutory changes made by the 2009 Legislature in House Bill 621 (Ch. 169, L. 2009). House Bill 621 allows an exception for a local government entity to acquire an existing license for exclusive use at a fairgrounds complex and allows the licensee to lease the license to any other person.

42.12.208 TEMPORARY OPERATING AUTHORITY (1) and (2) remain the same.

(3) Temporary operating authority will be issued for a 45-day period~~. An applicant may request an extension~~ and extended for an additional 45-day period if the application has not been processed within that time.

(4) through (6) remain the same.

AUTH: 16-1-303, MCA
IMP: 16-4-404, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.12.208 to ensure consistent and equitable treatment of liquor licensees in the application of liquor control laws. If an application has temporary operating authority and their application is still in processing, the department will automatically extend temporary operating authority for another 45 days without an extension request from the applicant.

42.12.209 TRANSFER OF A LICENSE TO ANOTHER PERSON (1) remains the same.

(2) A potential buyer of an ownership interest of 10% or more in a liquor license ~~or a potential buyer of 10% or more of stock in a business operated under the license~~ is required to submit an application for transfer of a liquor license ~~or transfer of shares of stock~~ pursuant to ARM 42.12.101. The applicant for ownership of ~~either~~ the ~~business or its stock~~ license must be notified in writing by the department that either temporary operating authority or conditional approval has been granted or such a transfer of the license is approved by the department before the buyer may pay to or in any way transfer any money or other valuable

consideration to the seller in payment for the business operated under the license ~~or stock~~. If money is paid to the seller on the granting of temporary operating authority or conditional approval and the application is later not approved, the money, with the exception of a reasonable amount considered earnest money, must be returned.

(3) through (5) remain the same.

(6) The buyer of the license can acquire the seller's alcoholic beverage inventory.

AUTH: 16-1-303, MCA
IMP: 16-4-401, 16-4-402, 16-4-404, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.12.209 to correct the language so that it reflects the statutory provision of 16-4-401, MCA, and to allow for the buyer of a license to acquire the seller's alcoholic beverage inventory.

42.12.210 COMPLETED TRANSACTIONS UNDER BONA FIDE SALES

(1) and (2) remain the same.

(3) An option to purchase represents an impermissible interference with the licensee's ability to control and operate the license. Such an option, with or without conditions, is prohibited because it constitutes an additional ownership interest in the license.

AUTH: 16-1-303, MCA
IMP: 16-4-401, 16-4-402, 16-404, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.12.210 to enhance a liquor licensee's understanding of options to purchase which will help eliminate any confusion.

42.12.212 LOAN STANDARDS (1) and (2) remain the same.

(3) The department will require any noninstitutional lender to complete documents authorizing examination and release of information, a personal history statement, and fingerprint cards on forms provided by the department, as well as any contract, purchase agreement, or other documents from the lender deemed necessary to assess the suitability of an applicant's source of funding as required in 16-4-401, MCA.

(a) A loan agreement may not restrict the movement or transfer of a license.

(b) Cross collateralization language is unenforceable as it relates to loans securing the liquor license as collateral.

(c) In the event of default, the lender's rights are protected under 16-4-801, MCA. Upon default exercised the license must be placed on nonuse status pending transfer to a qualified purchaser or temporary operating authority. The lender is prohibited from leasing the collateral.

(4) Institutional lenders may secure loans made to a license applicant or licensee with security interests on assets belonging to the license applicant or licensee. In securing the assets of a license applicant or licensee, an institutional

lender may limit the movement of the assets, including a liquor license.

(5) For loans made to a license applicant or licensee, an institutional lender may require loan guarantees and may secure guarantee agreements with assets of the guarantor.

(6) An institutional lender may require payment from loan guarantors without initially exhausting all remedies against the borrower under the following conditions:

(a) the guarantor must be an owner of applicant/licensee, i.e., partner, shareholder, member;

(b) the payment is made with the owner/guarantor's own funds or funds borrowed from an institutional source or department-approved noninstitutional source;

(c) if the guarantor is not an owner, payment may only be made as a loan to the owners or licensed borrower/entity. Funds used to loan the money for the payment under the guarantee, must be the guarantor's own funds or funds borrowed from an institutional source. The guarantor must be found suitable as a source of credit as part of the application or loan approval process by submitting a personal history statements and a complete set of fingerprint cards;

(d) as required by the Internal Revenue Code, a loan guarantor must annually elect to treat payments made under a loan guarantee agreement as loans, as paid in capital, or as other equity contributions;

(e) if the guarantor elects to treat the payments as loans to the licensee, the licensee must follow requirements for disclosing noninstitutional lenders; and

(f) prior department approval is not required on loans to a licensed entity by an approved (licensed) owner of the entity (shareholder, member, partner) under the following conditions:

(i) the loan is used to meet an obligation of the licensed entity that cannot be met with its existing operating accounts and reserves;

(ii) the funds loaned to the licensed entity must be those of the owner or funds borrowed from an institutional source;

(iii) the loan must be memorialized by an agreement between the licensed entity and owner. The loan agreement must meet the department's evaluation standards;

(iv) the borrower's and lender's financial records must accurately reflect the transaction; and

(v) failure to maintain adequate records of the transaction or source of funds loaned will be considered a violation of this rule.

(7) If the guarantor elects to treat payments as an equity contribution, and such election changes the percentage of ownership in the license, the licensee must notify the department at the time of the election to disclose the change in percentage.

AUTH: 16-1-303, MCA
IMP: 16-4-401, 16-4-402, 16-4-404, 16-4-801, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.12.212 to reflect the statutory amendments to 16-4-401, MCA, made by the 2007 Legislature in House Bill 113 (Ch. 197, L. 2007) and statutory amendments to 16-4-

801, MCA, made by the 2009 Legislature in House Bill 94 (Ch. 62, L. 2009). House Bill 113 established requirements for noninstitutional lenders to qualify and meet all requirements to hold ownership interest in the effect of default.

The addition of (3) is necessary to inform the public of the process of qualifying a noninstitutional lender.

The proposed rule also stipulates a noninstitutional loan agreement cannot restrict the movement or transfer of a license to reflect the department's current practice.

The remainder of the proposed amendments to ARM 42.12.212 are due to House Bill 94 which provides that a regulated lender can use language that is consistent with what the lender generally uses in loan documents, and that such language will not constitute control over the licensed business.

The rule amendments further detail the allowable practices and the requirements necessary for licensees and institutional lenders.

5. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to: Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-5828; fax (406) 444-4375; or e-mail canderson@mt.gov and must be received no later than November 12, 2010.

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

7. 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.

8. 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 5 above or faxed to the office at (406) 444-4375, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor, Representative Bill Wilson, HB 621 (2009 Session), Representative Bill McChesney, HB 113 (2007 Session), and Representative Walter McNutt, HB 94 (2009 Session) were contacted on March 3, 2010, and March 6, 2010, by electronic mail.

/s/ Cleo Anderson	/s/ Dan R. Bucks
CLEO ANDERSON	DAN R. BUCKS
Rule Reviewer	Director of Revenue

Certified to Secretary of State October 4, 2010

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I, II, and III relating to the functions and operation of the office of taxpayer assistance	)))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

TO: All Concerned Persons

1. On November 3, 2010, at 1:30 p.m., a public hearing will be held in the Third Floor Reception Area Conference Room of the Sam W. Mitchell Building, at Helena, Montana, to consider the adoption of the above-stated rules.

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., October 25, 2010, 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) 444-4375; or e-mail canderson@mt.gov.

3. The proposed new rules do not replace or modify any section currently found in the Administrative Rules of Montana. The proposed new rules provide as follows:

NEW RULE I DEFINITIONS The following definitions apply to terms used in this subchapter:

(1) "Complaint" means a taxpayer's allegation of improper or abusive behavior by an employee of the department.

(2) "Office of Dispute Resolution (ODR)" means the department's dispute resolution office. This office handles disputes that cannot be resolved at a lower level within the department.

(3) "Office of Taxpayer Assistance (OTA)" means the department's independent office that assists taxpayers and advocates on behalf of their needs.

(4) "Problem" means a taxpayer's procedural issue or dispute with the service or inefficiency of the Department of Revenue. It does not include issues of fact or law that are considered by the department's Office of Dispute Resolution.

AUTH: 15-1-201, 15-1-217, MCA
IMP: 15-1-211, 15-1-222, 15-1-223, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule I to provide definitions for the terms used in the rules related to the Taxpayer

Assistance Program, which are not defined in statute.

NEW RULE II PURPOSE (1) Section 15-1-223, MCA, creates within the Department of Revenue, the Office of Taxpayer Assistance (OTA). The OTA has five major purposes which are to:

(a) assist taxpayers with problems and provide easily understandable tax information related to:

(i) instructions and forms;

(ii) audits and corrections;

(iii) collections; and

(iv) appeal procedures.

(b) monitor compliance with the Taxpayer Bill of Rights, as required in 15-1-222, MCA;

(c) receive and evaluate complaints of improper or abusive behavior by employees and make recommendations to the director regarding appropriate actions to be taken;

(d) monitor and report any abuses in collection activities and make recommendations to the director of appropriate actions to be taken; and

(e) perform other functions that will assist taxpayers with their compliance of the Montana's tax laws.

AUTH: 15-1-201, MCA
IMP: 15-1-222, 15-1-223, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule II to provide clear and helpful information to taxpayers concerning the purposes of the Taxpayer Assistance Office. The rule outlines the primary functions of this office as it relates to services offered to the taxpayers who do business with the Department of Revenue.

NEW RULE III PROCEDURE (1) The OTA is independent of the department's divisions and reports directly to the director.

(2) The OTA intercedes on a priority basis on behalf of taxpayers when the department's normal procedures and communications with taxpayers break down, especially concerning citizen rights guaranteed by the Taxpayer Bill of Rights.

(3) The department seeks to resolve all questions and problems at the lowest possible level, especially through the regular activities of staff working directly with citizens. Whether staff is responsible for processing returns, conducting audits, appraising property, maintaining records, collecting taxes, or other work, all staff is expected to meet the needs of the public in a respectful manner consistent with relevant laws, rules, and procedures. When staff members are unable to answer questions or resolve problems, those matters are typically referred to division supervisors or specialists. In the limited cases where staff or supervisors cannot solve problems, the matter may be referred by the director to the OTA for handling.

(4) Referrals to the OTA are generally instances where the taxpayer has first tried unsuccessfully to resolve the problem through the department's normal channels. Referrals come from the director's office, legislators, and other agencies,

especially the Governor's Citizen Advocate Office, but normally go first through the director. The OTA also receives direct calls and referrals through the department's call center.

(5) The OTA works with the taxpayer until the problem is resolved and often convenes division and bureau experts to assist with additional reviews. The OTA compiles data on the number and type of taxpayer problems and complaints received and evaluates the actions taken to resolve these problems or complaints.

(6) The OTA works with the director's office, divisions, bureaus, and units to provide easily understandable information for taxpayers on taxes, audits, corrections, collections, and appeal procedures. It advocates for clarity and usefulness in all forms of communication, especially for clearer and simpler letters, forms, reports, and web site content.

(7) The OTA relies on the department's divisions, especially the Citizen Services and Resource Management Division and its call center, to answer taxpayer questions regarding:

(a) preparing and filing returns and reports;

(b) Montana statutes administered by the department,

(c) understanding correspondence and assessments;

(d) locating documents and payments;

(e) compiling data on problems received; and

(f) conducting taxpayer surveys to obtain evaluations of the quality of service provided by the department.

(8) The OTA receives, evaluates, and responds to complaints from taxpayers related to improper or abusive behavior by employees of the department within 60 days unless the period is mutually extended. The major points in a complaint must be made in writing and taxpayer conferences on these issues are informal and confidential. The complaints are recorded, unless requested otherwise**,** and a copy is provided to the taxpayer. The OTA reports its recommendations to the director and the taxpayer.

(9) The OTA monitors the department's collection activities, immediately addresses any abuses, and recommends to the director whether a collection activity should be stopped if the taxpayer has not had an adequate opportunity to discuss alternative means of making payments.

(10) The functions of the OTA are distinguished from the Office of Dispute Resolution (ODR), which is an adjudicatory office considering and resolving issues of fact and law for matters under the department's jurisdiction and finalizes the department's decisions on contested maters. In instances where a problem or complaint cannot be resolved through the OTA, this office provides guidance to the taxpayer concerning further proceedings before the ODR. Taxpayers are directed to the ODR rules and procedures found in ARM 42.2.613 through 42.2.621.

AUTH: 15-1-201, MCA
IMP: 15-1-222, 15-1-223, MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule III to provide the procedures that are utilized by the taxpayer and the OTA regarding referrals to the OTA. The rule explains the various areas of taxation that

the OTA can assist the taxpayers with, and addresses the various monitoring aspects of the office. The rule further explains the importance of resolving matters at the lowest possible level, and in the instances when this cannot be achieved, the necessary steps to move the matter forward.

In addition, the rule distinguishes the functions of the Office of Taxpayer Assistance from the Office of Dispute Resolution. The rule directs taxpayers to the rules governing the Office of Dispute Resolution if there is a need to file an appeal.

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) 444-4375; or e-mail canderson@mt.gov and must be received no later than November 12, 2010.

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) 444-4375, 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 of House Bill 257 (2007), Representative Bob Lake was contacted on October 1, 2010, by electronic mail.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Dan R. Bucks
DAN R. BUCKS
Director of Revenue

Certified to Secretary of State October 4, 2010

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 42.21.113, 42.21.123, 42.21.131, 42.21.137, 42.21.138, 42.21.139, 42.21.140, 42.21.151, 42.21.153, 42.21.155, 42.21.156, 42.21.157, and 42.22.1311 relating to property taxes and the trend tables for valuing property	))))))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On November 4, 2010, at 2:30 p.m., a public hearing will be held in the Third Floor Reception Area Conference Room of the Sam W. Mitchell Building, at Helena, Montana, to consider the amendment of the above-stated rules.

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., October 25, 2010, 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) 444-4375; or e-mail canderson@mt.gov.

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

42.21.113 LEASED AND RENTAL EQUIPMENT (1) Leased or rental equipment that is leased or rented on an hourly, daily, weekly, semimonthly, or monthly basis, but is not exempt under 15-6-219(5) or 15-6-202(4), MCA, will be valued in the following manner:

(a) For equipment that has an acquired cost of $0 to $500, the department shall use a four-year trended depreciation schedule. The trended schedule will be the same as ARM 42.21.155, category 1.

~~YEAR NEW/ACQUIRED~~	~~TRENDED % GOOD~~
~~2009~~	~~70%~~
~~2008~~	~~42%~~
~~2007~~	~~16%~~
~~2006 and older~~	~~8%~~

YEAR NEW/ACQUIRED	TRENDED % GOOD
2010	70%
2009	43%
2008	18%
2007 and older	8%

(b) For equipment that has an acquired cost of $501 to $1,500, the department shall use a five-year trended depreciation schedule. The trended schedule will be the same as ARM 42.21.155, category 2.

~~YEAR NEW/ACQUIRED~~	~~TRENDED % GOOD~~
~~2009~~	~~85%~~
~~2008~~	~~75%~~
~~2007~~	~~58%~~
~~2006~~	~~38%~~
~~2005 and older~~	~~22%~~

YEAR NEW/ACQUIRED	TRENDED % GOOD
2010	85%
2009	66%
2008	54%
2007	36%
2006 and older	21%

(c) For equipment that has an acquired cost of $1,501 to $5,000, the department shall use a ten-year trended depreciation schedule. The trended schedule will be the same as ARM 42.21.155, category 8.

~~YEAR NEW/ACQUIRED~~	~~TRENDED % GOOD~~
~~2009~~	~~92%~~
~~2008~~	~~89%~~
~~2007~~	~~83%~~
~~2006~~	~~75%~~
~~2005~~	~~67%~~
~~2004~~	~~59%~~
~~2003~~	~~47%~~
~~2002~~	~~37%~~
~~2001~~	~~29%~~
~~2000 and older~~	~~25%~~

YEAR NEW/ACQUIRED	TRENDED % GOOD
2010	92%

2009	84%
2008	81%
2007	73%
2006	65%
2005	57%
2004	47%
2003	36%
2002	29%
2001 and older	25%

(d) For equipment that has an acquired cost of $5,001 to $15,000, the department shall use the trended depreciation schedule for heavy equipment. The schedule will be the same as ARM 42.21.131.

~~YEAR NEW/ACQUIRED~~	~~TRENDED % GOOD~~
~~2010~~	~~80%~~
~~2009~~	~~65%~~
~~2008~~	~~58%~~
~~2007~~	~~56%~~
~~2006~~	~~50%~~
~~2005~~	~~44%~~
~~2004~~	~~41%~~
~~2003~~	~~38%~~
~~2002~~	~~36%~~
~~2001~~	~~36%~~
~~2000~~	~~29%~~
~~1999~~	~~25%~~
~~1998~~	~~24%~~
~~1997~~	~~24%~~
~~1996~~	~~25%~~
~~1995~~	~~22%~~
~~1994~~	~~21%~~
~~1993~~	~~22%~~
~~1992~~	~~21%~~
~~1991 and older~~	~~21%~~

YEAR NEW/ACQUIRED	TRENDED % GOOD
2011	80%
2010	58%
2009	52%
2008	43%
2007	41%
2006	34%
2005	31%
2004	30%

2003	30%
2002	26%
2001	25%
2000	22%
1999	18%
1998	20%
1997	19%
1996	19%
1995	15%
1994	16%
1993	17%
1992	16%

(e) For rental video tapes and digital video disks the following schedule will be used:

~~YEAR NEW/ACQUIRED~~	~~TRENDED % GOOD~~
~~2009~~	~~25%~~
~~2008~~	~~15%~~
~~2007 and older~~	~~10%~~

YEAR NEW/ACQUIRED	TRENDED % GOOD
2010	25%
2009	15%
2008 and older	10%

(2) through (4) remain the same.

5) This rule is effective for tax years beginning after December 31, ~~2009~~ 2010.

AUTH: 15-1-201, 15-23-108, MCA
IMP: 15-6-135, 15-6-138, 15-6-207, 15-6-219, 15-24-921, 15-24-922, 15-24-925, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 41.21.113 to demonstrate through the trend tables how the department arrives at market value as required by 15-8-111, MCA. Annually, the department updates these schedules to inform taxpayers of the current percentages used by the department when valuing and taxing their property. To determine the market value of personal property, the department has historically used and adopted the concept of trending and depreciation. The method by which trended depreciation schedules are derived is described in the existing rule, and that method is not being changed. The First Judicial District Court indicated in 1986 that the department must publish these trend tables annually and these amendments are in compliance with that order.

42.21.123 FARM MACHINERY AND EQUIPMENT (1) and (2) remain the same.

(3) For all farm machinery and equipment which cannot be valued under (1) and (2), the department shall try to ascertain the original FOB (free on board value) through old farm machinery and equipment valuation guidebooks. If an original FOB cannot be ascertained, the department may use trending to determine the FOB. The FOB or "trended" FOB will be used in conjunction with the depreciation schedule in (5) to arrive at a value that approximates average wholesale value.

(4) If the methods mentioned in (1) through (3) cannot be used to ascertain average wholesale value for farm machinery and equipment, or the value as calculated under (3) is higher than the most recent average wholesale value from the guide in (1), the owner or applicant must certify to the department the year acquired and the acquired price before that value can be applied to the schedule in (5).

(5) The trended depreciation schedule referred to in (2) through (4) is listed below and shall be used for tax year ~~2010~~ 2011. The schedule is derived by using the guidebook listed in (1) as the data base. The values derived through use of the trended depreciation schedule will approximate average wholesale value.

~~YEAR NEW/ACQUIRED~~	~~TRENDED % GOOD AVERAGE WHOLESALE~~
~~2010~~	~~80%~~
~~2009~~	~~75%~~
~~2008~~	~~71%~~
~~2007~~	~~68%~~
~~2006~~	~~64%~~
~~2005~~	~~58%~~
~~2004~~	~~54%~~
~~2003~~	~~47%~~
~~2002~~	~~42%~~
~~2001~~	~~38%~~
~~2000~~	~~36%~~
~~1999~~	~~33%~~
~~1998~~	~~33%~~
~~1997~~	~~30%~~
~~1996~~	~~28%~~
~~1995~~	~~28%~~
~~1994 and older~~	~~23%~~

YEAR NEW/ACQUIRED	TRENDED % GOOD AVERAGE WHOLESALE
2011	80%
2010	75%
2009	67%
2008	67%
2007	64%

2006	59%
2005	53%
2004	50%
2003	44%
2002	40%
2001	36%
2000	35%
1999	32%
1998	31%
1997	29%
1996	27%
1995 and older	24%

(6) remains the same.

(7) This rule is effective for tax years beginning after December 31, ~~2009~~ 2010.

AUTH: 15-1-201, MCA
IMP: 15-6-135, 15-6-138, 15-6-207, 15-6-219, 15-24-921, 15-24-922, 15-24-925, MCA

REASONABLE NECESSITY: See the reasonable necessity for ARM 42.21.113. The department seeks to amend this rule to determine a more accurate value in situations where an FOB or trended FOB value is greater than the most recent quick sale.

42.21.131 HEAVY EQUIPMENT (1) The wholesale market value of heavy equipment shall be the most current quick sale as shown in the "Green Guide" and "Green Guide for Older Equipment" or the on-line version of the Green Guide known as Equipment Watch, ~~for~~ as of January 1 of the ~~current~~ year of assessment. This guide may be reviewed in the department or purchased from the publisher and is incorporated by reference: Dataquest, 1290 Ridder Park Drive, San Jose, California 95131.

(2) For all heavy equipment which cannot be valued under (1), the department shall try to ascertain the original FOB (free on board value) through old heavy equipment valuation guidebooks. If an original FOB cannot be ascertained, the department may use trending to determine the FOB. The FOB or "trended" FOB will be used in conjunction with the depreciation schedule in (5) to arrive at a value which approximates wholesale value. The trend factors are calculated using the most recent Contractor's Equipment factors available in the Marshall Valuation Service Manual for the year of assessment. The Marshall Valuation Service Manual published by Marshall and Swift Publication Company, 915 Wilshire Boulevard, 8th Floor, P.O. Box 26307, Los Angeles, California 90026-0307, is adopted by reference.

(3) ~~For equipment that cannot be valued under (1) and (2), the value for heavy equipment shall be ascertained by trending the quick sale as found in the~~

~~guide in (1), for the same make and model. The trend factors are the same as those mentioned in (2).~~ A trended quick sale value shall be applied to equipment if:

(a) the equipment cannot be valued under (1) but a quick sale value is available for the same make and model with a different year new; and

(b) the equipment cannot be valued under (2) or the value as calculated under (2) is higher than the most recently published previous year quick sale for the same make, model and year new. The trended quick sale value for heavy equipment shall be ascertained by trending the quick sale as found in the guide in (1), for the same make and model with a different year new. The trend factors are the same as those mentioned in (2).

(4) remains the same.

(5) The trended depreciation schedule referred to in (2), (3), and (4) is listed below and shall be used for tax year ~~2010~~ 2011. The values derived through the use of these percentages approximate the "quick sale" values as calculated in the guidebooks listed in (1)

~~HEAVY EQUIPMENT TRENDED DEPRECIATION SCHEDULE~~

~~YEAR NEW/ACQUIRED~~	~~TRENDED % GOOD WHOLESALE~~
~~2010~~	~~80%~~
~~2009~~	~~65%~~
~~2008~~	~~58%~~
~~2007~~	~~56%~~
~~2006~~	~~50%~~
~~2005~~	~~44%~~
~~2004~~	~~41%~~
~~2003~~	~~38%~~
~~2002~~	~~36%~~
~~2001~~	~~36%~~
~~2000~~	~~29%~~
~~1999~~	~~25%~~
~~1998~~	~~24%~~
~~1997~~	~~24%~~
~~1996~~	~~25%~~
~~1995~~	~~22%~~
~~1994~~	~~21%~~
~~1993~~	~~22%~~
~~1992~~	~~21%~~
~~1991 and older~~	~~21%~~

HEAVY EQUIPMENT TRENDED DEPRECIATION SCHEDULE

YEAR NEW/ACQUIRED	TRENDED % GOOD WHOLESALE

2011	80%
2010	65%
2009	58%
2008	56%
2007	50%
2006	44%
2005	41%
2004	38%
2003	36%
2002	36%
2001	29%
2000	25%
1999	24%
1998	24%
1997	25%
1996	22%
1995	21%
1994	22%
1993	21%
1992	21%
Salvage	14%

(6) This rule is effective for tax years beginning after December 31, ~~2009~~ 2010, and applies to all heavy equipment.

AUTH: 15-1-201,15-23-108, MCA
IMP: 15-6-135, 15-6-138, 15-6-207, 15-6-219, 15-24-921, 15-24-922, 15-24-925, MCA

REASONABLE NECESSITY: See the reasonable necessity for ARM 42.21.113. Through the amendment in (3) the department is seeking a means to determine a more accurate value in situations where an FOB or trended FOB value is greater than the most recent quick sale. Through the addition of (5) the department is seeking to establish a means of fairly valuing equipment that is temporarily nonoperational.

42.21.137 SEISMOGRAPH UNITS AND ALLIED EQUIPMENT (1) through (3) remain the same.

(4) The trended depreciation schedules referred to in (1) through (3) are listed below and shall be used for tax year ~~2010~~ 2011.

		~~SEISMOGRAPH UNIT~~			
~~YEAR NEW/ACQUIRED~~	~~% GOOD~~	~~TREND FACTOR~~	~~TRENDED % GOOD~~	~~WHOLESALE FACTOR~~	~~WHOLESALE % GOOD~~
~~2010~~	~~100%~~	~~1.000~~	~~100%~~	~~80%~~	~~80%~~
~~2009~~	~~85%~~	~~1.000~~	~~85%~~	~~80%~~	~~68%~~
~~2008~~	~~69%~~	~~1.041~~	~~72%~~	~~80%~~	~~57%~~

~~2007~~	~~52%~~	~~1.088~~	~~57%~~	~~80%~~	~~45%~~
~~2006~~	~~34%~~	~~1.153~~	~~39%~~	~~80%~~	~~31%~~
~~2005~~	~~20%~~	~~1.211~~	~~24%~~	~~80%~~	~~19%~~
~~2004 and older~~	~~5%~~	~~1.314~~	~~7%~~	~~80%~~	~~5%~~

SEISMOGRAPH UNIT

YEAR NEW/ACQUIRED	% GOOD	TREND FACTOR	TRENDED % GOOD	WHOLESALE FACTOR	WHOLESALE % GOOD
2011	100%	1.000	100%	80%	80%
2010	85%	1.000	85%	80%	68%
2009	69%	0.983	68%	80%	54%
2008	52%	1.017	53%	80%	42%
2007	34%	1.064	36%	80%	29%
2006	20%	1.126	23%	80%	18%
2005 and older	5%	1.183	6%	80%	5%

~~SEISMOGRAPH ALLIED EQUIPMENT~~

~~YEAR NEW/ ACQUIRED~~	~~% GOOD~~	~~TREND FACTOR~~	~~TRENDED % GOOD~~
~~2010~~	~~100%~~	~~1.000~~	~~100%~~
~~2009~~	~~85%~~	~~1.000~~	~~85%~~
~~2008~~	~~69%~~	~~1.041~~	~~72%~~
~~2007~~	~~52%~~	~~1.088~~	~~57%~~
~~2006~~	~~34%~~	~~1.153~~	~~39%~~
~~2005~~	~~20%~~	~~1.211~~	~~24%~~
~~2004 and older~~	~~5%~~	~~1.314~~	~~7%~~

SEISMOGRAPH ALLIED EQUIPMENT

YEAR NEW/ ACQUIRED	% GOOD	TREND FACTOR	TRENDED % GOOD
2011	100%	1.000	100%
2010	85%	1.000	85%
2009	69%	0.983	68%
2008	52%	1.017	53%
2007	34%	1.064	36%
2006	20%	1.126	23%
2005 and older	5%	1.183	6%

(5) This rule is effective for tax years beginning after December 31, ~~2009~~ 2010.

AUTH: 15-1-201, MCA
IMP: 15-6-135, 15-6-138, 15-6-207, 15-6-219, 15-24-921, 15-24-922, 15-24-925, MCA

REASONABLE NECESSITY: See the reasonable necessity for ARM 42.21.113.

42.21.138 OIL AND GAS FIELD MACHINERY AND EQUIPMENT

(1) and (2) remain the same.

(3) The trended depreciation schedule referred to in (1) and (2) is listed below and shall be used for tax year ~~2010~~ 2011.

~~OIL AND GAS FIELD PRODUCTION EQUIPMENT TRENDED DEPRECIATION SCHEDULE~~

~~YEAR NEW/ ACQUIRED~~	~~% GOOD~~	~~TREND FACTOR~~	~~TRENDED % GOOD~~
~~2010~~	~~100%~~	~~1.000~~	~~100%~~
~~2009~~	~~95%~~	~~1.000~~	~~95%~~
~~2008~~	~~90%~~	~~1.041~~	~~94%~~
~~2007~~	~~85%~~	~~1.088~~	~~93%~~
~~2006~~	~~79%~~	~~1.153~~	~~91%~~
~~2005~~	~~73%~~	~~1.211~~	~~88%~~
~~2004~~	~~68%~~	~~1.314~~	~~89%~~
~~2003~~	~~62%~~	~~1.362~~	~~84%~~
~~2002~~	~~55%~~	~~1.387~~	~~76%~~
~~2001~~	~~49%~~	~~1.394~~	~~68%~~
~~2000~~	~~43%~~	~~1.408~~	~~61%~~
~~1999~~	~~37%~~	~~1.431~~	~~53%~~
~~1998~~	~~31%~~	~~1.438~~	~~45%~~
~~1997~~	~~26%~~	~~1.452~~	~~38%~~
~~1996~~	~~23%~~	~~1.471~~	~~34%~~
~~1995 and older~~	~~20%~~	~~1.500~~	~~30%~~

OIL AND GAS FIELD PRODUCTION EQUIPMENT TRENDED DEPRECIATION SCHEDULE

YEAR NEW/ ACQUIRED	% GOOD	TREND FACTOR	TRENDED % GOOD
2011	100%	1.000	100%
2010	95%	1.000	95%
2009	90%	0.983	88%
2008	85%	1.017	86%
2007	79%	1.064	84%
2006	73%	1.126	82%
2005	68%	1.183	80%
2004	62%	1.284	80%
2003	55%	1.328	73%
2002	49%	1.355	66%
2001	43%	1.363	59%
2000	37%	1.376	51%
1999	31%	1.398	43%
1998	26%	1.405	37%
1997	23%	1.419	33%
1996 or older	20%	1.437	29%

(4) and (5) remain the same.

(6) This rule is effective for tax years beginning after December 31, ~~2009~~ 2010.

AUTH: 15-1-201, MCA
IMP: 15-6-135, 15-6-138, 15-6-207, 15-6-213, 15-6-219, 15-24-921, 15-24-922, 15-24-925, MCA

REASONABLE NECESSITY: See the reasonable necessity for ARM 42.21.113.

42.21.139 WORK-OVER AND SERVICE RIGS (1) through (4) remain the same.

(5) The trended depreciation schedule referred to in (2) and (4) is listed below and shall be used for tax year ~~2010~~ 2011.

~~SERVICE AND WORKOVER RIG TRENDED DEPRECIATION SCHEDULE~~

~~YEAR/NEW ACQUIRED~~	~~% GOOD~~	~~TREND FACTOR~~	~~WHOLESALE FACTOR~~	~~TRENDED WHOLESALE % GOOD~~
~~2010~~	~~100%~~	~~1.000~~	~~80%~~	~~80%~~
~~2009~~	~~92%~~	~~1.000~~	~~80%~~	~~74%~~
~~2008~~	~~84%~~	~~1.041~~	~~80%~~	~~70%~~
~~2007~~	~~76%~~	~~1.088~~	~~80%~~	~~66%~~
~~2006~~	~~67%~~	~~1.153~~	~~80%~~	~~62%~~
~~2005~~	~~58%~~	~~1.211~~	~~80%~~	~~56%~~
~~2004~~	~~49%~~	~~1.314~~	~~80%~~	~~51%~~
~~2003~~	~~39%~~	~~1.362~~	~~80%~~	~~42%~~
~~2002~~	~~30%~~	~~1.387~~	~~80%~~	~~33%~~
~~2001~~	~~24%~~	~~1.394~~	~~80%~~	~~27%~~
~~2000 and older~~	~~20%~~	~~1.408~~	~~80%~~	~~23%~~

SERVICE AND WORKOVER RIG TRENDED DEPRECIATION SCHEDULE

YEAR/NEW ACQUIRED	% GOOD	TREND FACTOR	WHOLESALE FACTOR	TRENDED WHOLESALE % GOOD
2011	100%	1.000	80%	80%
2010	92%	1.000	80%	74%
2009	84%	0.983	80%	66%
2008	76%	1.017	80%	62%
2007	67%	1.064	80%	57%
2006	58%	1.126	80%	52%
2005	49%	1.183	80%	46%
2004	39%	1.284	80%	40%
2003	30%	1.328	80%	32%
2002	24%	1.355	80%	26%

2001 and older	20%	1.363	80%	22%

(6) This rule is effective for tax years beginning after December 31, ~~2009~~ 2010.

AUTH: 15-1-201, MCA
IMP: 15-6-135, 15-6-138, 15-6-219, 15-24-921, 15-24-922, 15-24-925, MCA

REASONABLE NECESSITY: See the reasonable necessity for ARM 42.21.113.

42.21.140 OIL DRILLING RIGS (1) remains the same.

(2) The department shall prepare a ten-year trended depreciation schedule for oil drilling rigs. The trended depreciation schedule shall be derived from depreciation factors published by Marshall and Swift Publication Company. The "% good" for all drill rigs less than one year old shall be 100%. The trended depreciation schedule for tax year ~~2010~~ 2011 is listed below.

~~DRILL RIG TRENDED DEPRECIATION SCHEDULE~~

~~YEAR NEW/ ACQUIRED~~	~~% GOOD~~	~~TREND FACTOR~~	~~TRENDED % GOOD~~
~~2010~~	~~100%~~	~~1.000~~	~~100%~~
~~2009~~	~~92%~~	~~1.000~~	~~92%~~
~~2008~~	~~84%~~	~~1.041~~	~~87%~~
~~2007~~	~~76%~~	~~1.088~~	~~83%~~
~~2006~~	~~67%~~	~~1.153~~	~~77%~~
~~2005~~	~~58%~~	~~1.211~~	~~70%~~
~~2004~~	~~49%~~	~~1.314~~	~~64%~~
~~2003~~	~~35%~~	~~1.362~~	~~48%~~
~~2002~~	~~30%~~	~~1.387~~	~~42%~~
~~2001~~	~~24%~~	~~1.394~~	~~33%~~
~~2000 and older~~	~~20%~~	~~1.408~~	~~28%~~

DRILL RIG TRENDED DEPRECIATION SCHEDULE

YEAR NEW/ ACQUIRED	% GOOD	TREND FACTOR	TRENDED % GOOD
2011	100%	1.000	100%
2010	92%	1.000	92%
2009	84%	0.983	83%
2008	76%	1.017	77%
2007	67%	1.064	71%
2006	58%	1.126	65%
2005	49%	1.183	58%
2004	39%	1.284	50%
2003	30%	1.328	40%

2002	24%	1.355	33%
2001 and older	20%	1.363	27%

(3) remains the same.

(4) This rule is effective for tax years beginning after December 31, ~~2009~~ 2010.

AUTH: 15-1-201, MCA
IMP: 15-6-135, 15-6-138, 15-6-207, 15-6-219, 15-24-921, 15-24-922, 15-24-925, MCA

REASONABLE NECESSITY: See the reasonable necessity for ARM 42.21.113.

42.21.151 TELEVISION CABLE SYSTEMS (1) through (3) remain the same.

(4) The trended depreciation schedules referred to in (2) and (3) are listed below and shall be in effect for tax year ~~2010~~ 2011.

~~TABLE 1: FIVE-YEAR "DISHES"~~

~~YEAR NEW/ ACQUIRED~~	~~% GOOD~~	~~TREND FACTOR~~	~~TRENDED % GOOD~~
~~2009~~	~~85%~~	~~1.000~~	~~85%~~
~~2008~~	~~69%~~	~~1.034~~	~~71%~~
~~2007~~	~~52%~~	~~1.075~~	~~56%~~
~~2006~~	~~34%~~	~~1.133~~	~~39%~~
~~2005 and older~~	~~20%~~	~~1.186~~	~~24%~~

TABLE 1: FIVE-YEAR "DISHES"

YEAR NEW/ ACQUIRED	% GOOD	TREND FACTOR	TRENDED % GOOD
2010	85	1.000	85%
2009	69	0.989	68%
2008	52	1.017	53%
2007	34	1.057	36%
2006 and older	20	1.115	22%

~~TABLE 2: TEN-YEAR "TOWERS"~~

~~YEAR NEW/ ACQUIRED~~	~~% GOOD~~	~~TREND FACTOR~~	~~TRENDED % GOOD~~
~~2009~~	~~92%~~	~~1.000~~	~~92%~~
~~2008~~	~~84%~~	~~1.034~~	~~87%~~
~~2007~~	~~76%~~	~~1.075~~	~~82%~~
~~2006~~	~~67%~~	~~1.133~~	~~76%~~
~~2005~~	~~58%~~	~~1.186~~	~~69%~~
~~2004~~	~~49%~~	~~1.275~~	~~62%~~
~~2003~~	~~39%~~	~~1.319~~	~~51%~~
~~2002~~	~~30%~~	~~1.342~~	~~40%~~

~~2001~~	~~24%~~	~~1.350~~	~~32%~~
~~2000 and older~~	~~20%~~	~~1.361~~	~~27%~~

TABLE 2: TEN-YEAR "TOWERS"

YEAR NEW/ ACQUIRED	% GOOD	TREND FACTOR	TRENDED % GOOD
2010	92%	1.000	92%
2009	84%	0.989	83%
2008	76%	1.017	77%
2007	67%	1.057	71%
2006	58%	1.115	65%
2005	49%	1.167	57%
2004	39%	1.255	49%
2003	30%	1.298	39%
2002	24%	1.320	32%
2001 and older	20%	1.328	27%

(5) This rule is effective for tax years beginning after December 31, ~~2009~~ 2010.

AUTH: 15-1-201, MCA
IMP: 15-6-135, 15-6-138, 15-6-207, 15-6-219, 15-24-921, 15-24-922, 15-24-925, MCA

REASONABLE NECESSITY: See the reasonable necessity for ARM 42.21.113.

42.21.153 SKI LIFT EQUIPMENT (1) and (2) remain the same.

(3) The depreciation schedules shall be determined by the life expectancy of the equipment and will normally compensate for the loss in value due to ordinary wear and tear, offset by reasonable maintenance, and ordinary functional obsolescence due to the technological changes during the life expectancy period.

~~DEPRECIATION TABLE FOR SKI LIFT EQUIPMENT~~

~~YEAR NEW/ ACQUIRED~~	~~% GOOD~~	~~TREND FACTOR~~	~~TRENDED % GOOD~~
~~2009~~	~~92%~~	~~1.000~~	~~92%~~
~~2008~~	~~84%~~	~~1.034~~	~~87%~~
~~2007~~	~~76%~~	~~1.075~~	~~82%~~
~~2006~~	~~67%~~	~~1.133~~	~~76%~~
~~2005~~	~~58%~~	~~1.186~~	~~69%~~
~~2004~~	~~49%~~	~~1.275~~	~~62%~~
~~2003~~	~~39%~~	~~1.319~~	~~51%~~
~~2002~~	~~30%~~	~~1.342~~	~~40%~~
~~2001~~	~~24%~~	~~1.350~~	~~32%~~
~~2000 and older~~	~~20%~~	~~1.361~~	~~27%~~

DEPRECIATION TABLE FOR SKI LIFT EQUIPMENT

YEAR NEW/ ACQUIRED	% GOOD	TREND FACTOR	TRENDED % GOOD
2010	92%	1.000	92%
2009	84%	0.989	83%
2008	76%	1.017	77%
2007	67%	1.057	71%
2006	58%	1.115	65%
2005	49%	1.167	57%
2004	39%	1.255	49%
2003	30%	1.298	39%
2002	24%	1.320	32%
2001 and older	20%	1.328	27%

(a) The taxpayer must initially list with the department:

(i) all equipment by year of installation; and

(ii) installed costs of that equipment.

(b) Each year thereafter, the taxpayer must list with the department:

(i) all additions or deletions from the previous year's list, with installed cost.

(4) This methodology is effective for tax years beginning after December 31, ~~2009~~ 2010.

AUTH: 15-1-201, MCA

IMP: 15-6-135, 15-6-138, 15-6-207, 15-6-219, 15-24-921, 15-24-922, 15-24-925, MCA

REASONABLE NECESSITY: See the reasonable necessity for ARM 42.21.113.

42.21.155 DEPRECIATION SCHEDULES (1) remains the same.

(2) The trended depreciation schedules for tax year ~~2010~~ 2011 are listed below. The categories are explained in ARM 42.21.156. The trend factors are derived according to ARM 42.21.156 and 42.21.157.

CATEGORY 1

~~YEAR NEW/ ACQUIRED~~	~~%GOOD~~	~~TREND FACTOR~~	~~TRENDED % GOOD~~
~~2009~~	~~70%~~	~~1.000~~	~~70%~~
~~2008~~	~~45%~~	~~0.932~~	~~42%~~
~~2007~~	~~20%~~	~~0.793~~	~~16%~~
~~2006 and older~~	~~10%~~	~~0.755~~	~~8%~~

YEAR NEW/ ACQUIRED	%GOOD	TREND FACTOR	TRENDED % GOOD
2010	70%	1.000	70%
2009	45%	0.963	43%

2008	20%	0.897	18%
2007 and older	10%	0.763	8%

CATEGORY 2

~~YEAR NEW/ ACQUIRED~~	~~% GOOD~~	~~TREND FACTOR~~	~~TRENDED % GOOD~~
~~2009~~	~~85%~~	~~1.000~~	~~85%~~
~~2008~~	~~69%~~	~~1.089~~	~~75%~~
~~2007~~	~~52%~~	~~1.112~~	~~58%~~
~~2006~~	~~34%~~	~~1.106~~	~~38%~~
~~2005 and older~~	~~20%~~	~~1.113~~	~~22%~~

YEAR NEW/ ACQUIRED	% GOOD	TREND FACTOR	TRENDED % GOOD
2010	85%	1.000	85%
2009	69%	0.957	66%
2008	52%	1.035	54%
2007	34%	1.058	36%
2006 and older	20%	1.052	21%

CATEGORY 3

~~YEAR NEW/ ACQUIRED~~	~~% GOOD~~	~~TREND FACTOR~~	~~TRENDED % GOOD~~
~~2009~~	~~85%~~	~~1.000~~	~~85%~~
~~2008~~	~~69%~~	~~0.966~~	~~67%~~
~~2007~~	~~52%~~	~~0.873~~	~~45%~~
~~2006~~	~~34%~~	~~0.876~~	~~30%~~
~~2005 and older~~	~~20%~~	~~0.865~~	~~17%~~

YEAR NEW/ ACQUIRED	% GOOD	TREND FACTOR	TRENDED % GOOD
2010	85%	1.000	85%
2009	69%	0.982	68%
2008	52%	0.949	49%
2007	34%	0.857	29%
2006 and older	20%	0.860	17%

CATEGORY 4

~~YEAR NEW/ ACQUIRED~~	~~% GOOD~~	~~TREND FACTOR~~	~~TRENDED % GOOD~~
~~2009~~	~~85%~~	~~1.000~~	~~85%~~
~~2008~~	~~69%~~	~~0.988~~	~~68%~~
~~2007~~	~~52%~~	~~0.966~~	~~50%~~
~~2006~~	~~34%~~	~~0.955~~	~~32%~~

~~2005 and older~~	~~20%~~	~~0.943~~	~~19%~~

YEAR NEW/ ACQUIRED	% GOOD	TREND FACTOR	TRENDED % GOOD
2010	85%	1.000	85%
2009	69%	0.990	68%
2008	52%	0.977	51%
2007	34%	0.956	33%
2006 and older	20%	0.945	19%

CATEGORY 5

~~YEAR NEW/ ACQUIRED~~	~~% GOOD~~	~~TREND FACTOR~~	~~TRENDED % GOOD~~
~~2009~~	~~85%~~	~~1.000~~	~~85%~~
~~2008~~	~~69%~~	~~1.043~~	~~72%~~
~~2007~~	~~52%~~	~~1.057~~	~~55%~~
~~2006~~	~~34%~~	~~1.078~~	~~37%~~
~~2005 and older~~	~~20%~~	~~1.108~~	~~22%~~

YEAR NEW/ ACQUIRED	% GOOD	TREND FACTOR	TRENDED % GOOD
2010	85%	1.000	85%
2009	69%	1.006	69%
2008	52%	1.049	55%
2007	34%	1.064	36%
2006 and older	20%	1.084	22%

CATEGORY 6

~~YEAR NEW/ ACQUIRED~~	~~% GOOD~~	~~TREND FACTOR~~	~~TRENDED % GOOD~~
~~2009~~	~~85%~~	~~1.000~~	~~85%~~
~~2008~~	~~69%~~	~~1.026~~	~~71%~~
~~2007~~	~~52%~~	~~1.048~~	~~54%~~
~~2006~~	~~34%~~	~~1.085~~	~~37%~~
~~2005 and older~~	~~20%~~	~~1.159~~	~~23%~~

YEAR NEW/ ACQUIRED	% GOOD	TREND FACTOR	TRENDED % GOOD
2010	85%	1.000	85%
2009	69%	1.013	70%
2008	52%	1.017	53%
2007	34%	1.048	36%
2006 and older	20%	1.072	21%

CATEGORY 7

~~YEAR NEW/ ACQUIRED~~	~~% GOOD~~	~~TREND FACTOR~~	~~TRENDED % GOOD~~
~~2009~~	~~92%~~	~~1.000~~	~~92%~~
~~2008~~	~~84%~~	~~1.031~~	~~87%~~
~~2007~~	~~76%~~	~~1.050~~	~~80%~~
~~2006~~	~~67%~~	~~1.072~~	~~72%~~
~~2005~~	~~58%~~	~~1.105~~	~~64%~~
~~2004~~	~~49%~~	~~1.134~~	~~56%~~
~~2003~~	~~39%~~	~~1.139~~	~~44%~~
~~2002~~	~~30%~~	~~1.138~~	~~34%~~
~~2001~~	~~24%~~	~~1.138~~	~~27%~~
~~2000 and older~~	~~20%~~	~~1.150~~	~~23%~~

YEAR NEW/ ACQUIRED	% GOOD	TREND FACTOR	TRENDED % GOOD
2010	92%	1.000	92%
2009	84%	0.995	84%
2008	76%	1.026	78%
2007	67%	1.045	70%
2006	58%	1.067	62%
2005	49%	1.100	54%
2004	39%	1.129	44%
2003	30%	1.133	34%
2002	24%	1.132	27%
2001 and older	20%	1.132	23%

CATEGORY 8

~~YEAR NEW/ ACQUIRED~~	~~% GOOD~~	~~TREND FACTOR~~	~~TRENDED % GOOD~~
~~2009~~	~~92%~~	~~1.000~~	~~92%~~
~~2008~~	~~84%~~	~~1.063~~	~~89%~~
~~2007~~	~~76%~~	~~1.086~~	~~83%~~
~~2006~~	~~67%~~	~~1.116~~	~~75%~~
~~2005~~	~~58%~~	~~1.152~~	~~67%~~
~~2004~~	~~49%~~	~~1.197~~	~~59%~~
~~2003~~	~~39%~~	~~1.206~~	~~47%~~
~~2002~~	~~30%~~	~~1.217~~	~~37%~~
~~2001~~	~~24%~~	~~1.225~~	~~29%~~
~~2000 and older~~	~~20%~~	~~1.239~~	~~25%~~

YEAR NEW/ ACQUIRED	% GOOD	TREND FACTOR	TRENDED % GOOD
2010	92%	1.000	92%
2009	84%	1.005	84%
2008	76%	1.069	81%

2007	67%	1.092	73%
2006	58%	1.123	65%
2005	49%	1.159	57%
2004	39%	1.203	47%
2003	30%	1.213	36%
2002	24%	1.224	29%
2001	20%	1.232	25%

(3) This rule is effective for tax years beginning after December 31, ~~2009~~ 2010.

AUTH: 15-1-201, MCA
IMP: 15-6-135, 15-6-138, 15-6-207, 15-6-219, 15-24-921, 15-24-922, 15-24-925, MCA

REASONABLE NECESSITY: See the reasonable necessity for ARM 42.21.113.

42.21.156 CATEGORIES (1) remains the same.

(2) Category 1 consists of computer systems, data processing equipment, computerized medical equipment, and video games. The index used will be the "Producer Price Index ~~for the 1972 Standard Industrial Classification Manual~~ Industry Data," ~~Code~~ #3674 Series Id PCU334413334413, "Semiconductors and Related Devices," published by the United States Department of Labor, Bureau of Labor Statistics. A four-year depreciation table will be used.

(3) Category 2 consists of calculating and accounting machines, cash registers, copiers, typewriters, vending machines, jukeboxes, fax machines, addressing machines, time recording machines, check endorsing machines, postage machines, electronic games, transcribing equipment, and other office and store machines. The index used will be the "Producer Price Index for ~~Commodity~~ Commodities ~~Grouping~~," ~~No. 1193~~ Series Id WPU1193, "Office and Store Machines and Equipment," published by the United States Department of Labor, Bureau of Labor Statistics. A five-year depreciation table will be used.

(4) Category 3 consists of citizens band radios, mobile telephones, PBX type systems, radio and television broadcasting and transmitting equipment, locally assessed phones and phone systems, all cable T.V. equipment not assessed by ARM 42.21.151, intercom equipment, mics, and sound systems. The index used will be the "Producer Price Index for ~~Commodity~~ Commodities ~~Grouping~~," ~~No. 1178~~ Series Id WPU1178, "Electronic Components and Accessories," published by the United States Department of Labor, Bureau of Labor Statistics. A five-year depreciation table will be used.

(5) Category 4 consists of specialized medical and dental equipment. The index used will be the "Producer Price Index for ~~Commodity~~ Commodities," ~~No. 11790533.18~~ Series Id WPU117905, "~~Medical X-Ray Unit~~ X-ray and Electromedical Equipment," published by the United States Department of Labor, Bureau of Labor Statistics. A five-year depreciation table will be used.

(6) Category 5 consists of hotel and motel furniture and equipment and also

includes apartment, home rental and nursing home furniture and fixtures. The index used will be the "Producer Price Index for ~~Commodity~~ Commodities ~~Grouping~~," ~~No. 12~~ Series Id WPU12, "Furniture and Household Durables," published by the United States Department of Labor, Bureau of Labor Statistics. A five-year depreciation table will be used.

(7) Category 6 consists of janitorial equipment, electronic testing equipment, coin-operated washers and dryers, video equipment and tapes ~~(other than class six property)~~, cameras, equipment used for beauty and barber shops (except beauty and barber chairs), exercise equipment, tanning beds, toning tables, and carpet and shampooing equipment, and ceramic molds. The index used will be the "Producer Price Index for ~~Commodity~~ Commodities ~~Grouping~~," ~~No. 15~~ Series Id WPU15, "Miscellaneous Products," published by the United States Department of Labor, Bureau of Labor Statistics. A five-year depreciation table will be used.

(8) Category 7 consists of repair shop tools. The index used will be the "Producer Price Index for ~~Commodity~~ Commodities ~~Grouping~~," ~~No. 113~~ Series Id WPU113, "Metalworking Machinery and Equipment," published by the United States Department of Labor, Bureau of Labor Statistics. A ten-year depreciation table will be used.

(9) Category 8 consists of all other commercial furniture and fixtures and includes but is not limited to medical and dental chairs and tables, theater equipment, stereo equipment, survey equipment, billboards, garbage bins, coin-op car wash equipment, coin-op pool tables, gas pumps, bar equipment, restaurant equipment and furniture and fixtures, bowling alleys and equipment (auto scorers should be valued using category 1), photo and developing equipment, mortuary equipment, safes, security alarm systems and port-a-potties. The index used will be the "Producer Price Index for ~~Commodity~~ Commodities ~~Grouping~~," ~~No. 122~~ Series Id WPU122, "Commercial Furniture," published by the United States Department of Labor, Bureau of Labor Statistics. A ten-year depreciation table will be used.

AUTH: 15-1-201, MCA
IMP: 15-6-138, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 41.21.156 in order to explain the source the department uses for calculating the trend tables for valuing personal property as required by 15-8-111, MCA. To determine the market value of personal property, the department has historically used and adopted the concept of trending and depreciation. The method by which trended depreciation schedules are derived is described in this rule. The method and source of information are not being changed. The United States Department of Labor, Bureau of Labor Statistics has made changes to their indexing system and now makes the information available on the internet which is where the department acquires the Producer Price Indexes used for these calculations.

42.21.157 PREPARATION OF TREND FACTOR SCHEDULES (1) remains the same.

(2) The data used to compute the trend factors are the monthly values of the "Producer Price Indexes" (PPI) specified in ARM 42.21.156. The values shall be

taken from the most recent on-line publications of the United States Department of Labor, Bureau of Labor Statistics ~~received by the Montana State Library~~ as of July 15.

(3) remains the same.

(4) The trend factors for a specific equipment group are quotients whose numerators are the most recent average annual PPI for the group and whose denominators are, in succession, the most recent average annual PPI, the average annual PPI for the period immediately preceding the most recent one, and so on, until a number of factors equal to the number of years of useful life have been calculated. In general, the trend factor to be applied to equipment in the group which is X years old (where X is less than or equal to the useful life of the equipment) is the quotient of the most recent average annual PPI and the average annual PPI for the (S-1)st period preceding the most recent one. The trend factor to be applied to equipment in the group which is older than the specified useful life L for the group is the quotient of the most recent average annual PPI for the group and the average annual PPI for the (L-1)st period preceding the most recent one. The following example is presented in order to make the mechanics of the calculation clear. Suppose that the trend factors to be used in year Y for an equipment group which has a three-year useful life are to be calculated. The calculation is to be based on the following hypothetical PPI data for the group:

Year	J	F	M	A	M	J	J	A	S	O	N	D
Y-1	91.1	90.8	91.3	91.2	90.6	90.1	N/A	N/A	N/A	N/A	N/A	N/A
Y-2	86.8	88.5	89.3	90.4	91.2	92.0	92.1	91.8	92.0	91.8	91.2	91.6
Y-3	84.1	84.2	84.4	84.7	84.7	84.7	84.2	84.3	84.7	85.1	85.6	86.4
Y-4	N/A	N/A	N/A	N/A	N/A	N/A	84.3	84.1	83.8	84.1	84.2	84.4

The July-June 12-month average values are:

$$\frac{92.1+91.8+92.0+91.8+91.2+91.6+91.1+90.8+91.3+91.2+90.6+90.1}{12} = 91.3$$

$$\frac{84.2+84.3+84.7+85.1+85.6+86.4+86.8+88.5+89.3+90.4+91.2+92.0}{12} = 87.4$$

$$\frac{84.3+84.1+83.8+84.1+84.2+84.4+84.1+84.2+84.4+84.7+84.7+84.7}{12} = 84.3$$

The trend factors are:

Age of Equip. in Years	Trend Factor
1	91.3/91.3 = 1.000
2	91.3/87.4 = 1.045
3 and older	91.3/84.3 = 1.083

AUTH: 15-1-201, MCA
IMP: 15-6-138, MCA

REASONABLE NECESSITY: The department proposes to amend ARM 41.21.157 to explain the source the department uses for calculating the trend tables for valuing personal property as required by 15-8-111, MCA. The United States Department of Labor, Bureau of Labor Statistics now makes the information available on the internet which is where the department acquires the Producer Price Indexes used for these calculations.

42.22.1311 INDUSTRIAL MACHINERY AND EQUIPMENT TREND FACTORS (1) through (2)(cj) remain the same.

(3) Tables 1 through 32 represent the yearly trend factors for each of the categories.

~~YEAR~~	~~TABLE 1 Airplane Mfg.~~	~~TABLE 2 Baking~~	~~TABLE 3 Bottling~~	~~TABLE 4 Brew/Dis.~~	~~TABLE 5 Candy Confect.~~
~~2009~~	~~1.000~~	~~1.000~~	~~1.000~~	~~1.000~~	~~1.000~~
~~2008~~	~~1.036~~	~~1.030~~	~~1.032~~	~~1.033~~	~~1.029~~
~~2007~~	~~1.079~~	~~1.072~~	~~1.077~~	~~1.079~~	~~1.071~~
~~2006~~	~~1.139~~	~~1.148~~	~~1.142~~	~~1.143~~	~~1.150~~
~~2005~~	~~1.198~~	~~1.201~~	~~1.201~~	~~1.202~~	~~1.202~~
~~2004~~	~~1.297~~	~~1.291~~	~~1.302~~	~~1.299~~	~~1.292~~
~~2003~~	~~1.346~~	~~1.340~~	~~1.350~~	~~1.343~~	~~1.339~~
~~2002~~	~~1.371~~	~~1.363~~	~~1.374~~	~~1.367~~	~~1.361~~
~~2001~~	~~1.376~~	~~1.372~~	~~1.381~~	~~1.376~~	~~1.370~~
~~2000~~	~~1.385~~	~~1.387~~	~~1.393~~	~~1.391~~	~~1.386~~
~~1999~~	~~1.411~~	~~1.415~~	~~1.419~~	~~1.417~~	~~1.413~~
~~1998~~	~~1.412~~	~~1.419~~	~~1.422~~	~~1.425~~	~~1.418~~
~~1997~~	~~1.423~~	~~1.434~~	~~1.433~~	~~1.439~~	~~1.433~~
~~1996~~	~~1.440~~	~~1.459~~	~~1.455~~	~~1.462~~	~~1.459~~
~~1995~~	~~1.460~~	~~1.480~~	~~1.477~~	~~1.490~~	~~1.482~~
~~1994~~	~~1.518~~	~~1.541~~	~~1.536~~	~~1.546~~	~~1.543~~
~~1993~~	~~1.558~~	~~1.588~~	~~1.576~~	~~1.582~~	~~1.591~~
~~1992~~	~~1.582~~	~~1.618~~	~~1.602~~	~~1.607~~	~~1.620~~
~~1991~~	~~1.593~~	~~1.640~~	~~1.618~~	~~1.624~~	~~1.642~~
~~1990~~	~~1.618~~	~~1.677~~	~~1.650~~	~~1.661~~	~~1.682~~

YEAR	TABLE 1 Airplane Mfg.	TABLE 2 Baking	TABLE 3 Bottling	TABLE 4 Brew/Dis.	TABLE 5 Candy Confect.
2010	1.000	1.000	1.000	1.000	1.000
2009	.980	0.988	0.987	0.990	0.990
2008	1.008	1.013	1.012	1.019	1.014
2007	1.049	1.054	1.057	1.064	1.055

2006	1.107	1.128	1.120	1.127	1.133
2005	1.165	1.180	1.178	1.185	1.184
2004	1.261	1.269	1.277	1.281	1.273
2003	1.309	1.317	1.324	1.325	1.319
2002	1.333	1.339	1.348	1.348	1.341
2001	1.338	1.348	1.354	1.357	1.349
2000	1.347	1.363	1.366	1.372	1.365
1999	1.372	1.390	1.393	1.397	1.392
1998	1.373	1.395	1.395	1.405	1.397
1997	1.384	1.409	1.406	1.419	1.412
1996	1.401	1.434	1.427	1.442	1.438
1995	1.420	1.455	1.449	1.469	1.460
1994	1.477	1.515	1.506	1.524	1.521
1993	1.515	1.561	1.547	1.560	1.567
1992	1.539	1.591	1.572	1.585	1.596
1991	1.549	1.612	1.588	1.602	1.618

~~YEAR~~	~~TABLE 6 Cement Mfg.~~	~~TABLE 7 Chemical Mfg.~~	~~TABLE 8 Clay Mfg.~~	~~TABLE 9 Contractor Eq.~~	~~TABLE 10 Creamery/Dairy~~
~~2009~~	~~1.000~~	~~1.000~~	~~1.000~~	~~1.000~~	~~1.000~~
~~2008~~	~~1.052~~	~~1.041~~	~~1.050~~	~~1.033~~	~~1.027~~
~~2007~~	~~1.098~~	~~1.088~~	~~1.095~~	~~1.065~~	~~1.071~~
~~2006~~	~~1.156~~	~~1.153~~	~~1.154~~	~~1.103~~	~~1.146~~
~~2005~~	~~1.213~~	~~1.211~~	~~1.209~~	~~1.153~~	~~1.203~~
~~2004~~	~~1.318~~	~~1.314~~	~~1.305~~	~~1.231~~	~~1.294~~
~~2003~~	~~1.371~~	~~1.359~~	~~1.352~~	~~1.267~~	~~1.339~~
~~2002~~	~~1.399~~	~~1.387~~	~~1.379~~	~~1.287~~	~~1.361~~
~~2001~~	~~1.408~~	~~1.394~~	~~1.389~~	~~1.297~~	~~1.371~~
~~2000~~	~~1.421~~	~~1.408~~	~~1.404~~	~~1.305~~	~~1.386~~
~~1999~~	~~1.445~~	~~1.431~~	~~1.427~~	~~1.327~~	~~1.414~~
~~1998~~	~~1.451~~	~~1.438~~	~~1.432~~	~~1.338~~	~~1.420~~
~~1997~~	~~1.466~~	~~1.453~~	~~1.447~~	~~1.353~~	~~1.434~~
~~1996~~	~~1.485~~	~~1.471~~	~~1.470~~	~~1.380~~	~~1.459~~
~~1995~~	~~1.512~~	~~1.500~~	~~1.498~~	~~1.402~~	~~1.484~~
~~1994~~	~~1.565~~	~~1.555~~	~~1.549~~	~~1.441~~	~~1.546~~
~~1993~~	~~1.600~~	~~1.587~~	~~1.586~~	~~1.477~~	~~1.588~~
~~1992~~	~~1.625~~	~~1.607~~	~~1.614~~	~~1.517~~	~~1.614~~
~~1991~~	~~1.639~~	~~1.619~~	~~1.631~~	~~1.546~~	~~1.634~~
~~1990~~	~~1.671~~	~~1.654~~	~~1.665~~	~~1.583~~	~~1.673~~

YEAR	TABLE 6 Cement Mfg.	TABLE 7 Chemical Mfg.	TABLE 8 Clay Mfg.	TABLE 9 Contractor Eq.	TABLE 10 Creamery/Dairy
2010	1.000	1.000	1.000	1.000	1.000
2009	.984	.983	.989	.994	.992
2008	1.029	1.017	1.035	1.023	1.014
2007	1.074	1.064	1.079	1.056	1.057
2006	1.131	1.126	1.137	1.093	1.132

2005	1.186	1.183	1.191	1.142	1.188
2004	1.289	1.284	1.286	1.220	1.278
2003	1.341	1.328	1.332	1.255	1.322
2002	1.368	1.355	1.358	1.275	1.344
2001	1.377	1.363	1.368	1.285	1.353
2000	1.390	1.376	1.383	1.293	1.368
1999	1.413	1.398	1.406	1.315	1.396
1998	1.419	1.405	1.411	1.326	1.402
1997	1.434	1.419	1.426	1.341	1.416
1996	1.452	1.437	1.448	1.367	1.440
1995	1.479	1.466	1.475	1.390	1.465
1994	1.531	1.520	1.526	1.428	1.526
1993	1.565	1.551	1.562	1.463	1.568
1992	1.590	1.571	1.590	1.503	1.594
1991	1.603	1.582	1.606	1.531	1.613

~~YEAR~~	~~TABLE 11 Elec. Pwr. Eq.~~	~~TABLE 12 Elec. Eq. Mfg.~~	~~TABLE 13 Cannery/Fish~~	~~TABLE 14 Flour, Cer. Feed~~	~~TABLE 15 Cannery/Fruit~~
~~2009~~	~~1.000~~	~~1.000~~	~~1.000~~	~~1.000~~	~~1.000~~
~~2008~~	~~1.014~~	~~1.026~~	~~1.032~~	~~1.032~~	~~1.025~~
~~2007~~	~~1.069~~	~~1.075~~	~~1.074~~	~~1.076~~	~~1.063~~
~~2006~~	~~1.157~~	~~1.151~~	~~1.150~~	~~1.147~~	~~1.132~~
~~2005~~	~~1.242~~	~~1.222~~	~~1.202~~	~~1.205~~	~~1.182~~
~~2004~~	~~1.359~~	~~1.331~~	~~1.296~~	~~1.301~~	~~1.267~~
~~2003~~	~~1.421~~	~~1.388~~	~~1.345~~	~~1.348~~	~~1.314~~
~~2002~~	~~1.444~~	~~1.411~~	~~1.369~~	~~1.371~~	~~1.335~~
~~2001~~	~~1.439~~	~~1.410~~	~~1.378~~	~~1.379~~	~~1.345~~
~~2000~~	~~1.449~~	~~1.420~~	~~1.393~~	~~1.394~~	~~1.359~~
~~1999~~	~~1.478~~	~~1.446~~	~~1.421~~	~~1.421~~	~~1.387~~
~~1998~~	~~1.471~~	~~1.441~~	~~1.425~~	~~1.427~~	~~1.392~~
~~1997~~	~~1.474~~	~~1.447~~	~~1.440~~	~~1.441~~	~~1.404~~
~~1996~~	~~1.482~~	~~1.461~~	~~1.466~~	~~1.463~~	~~1.433~~
~~1995~~	~~1.494~~	~~1.477~~	~~1.488~~	~~1.486~~	~~1.451~~
~~1994~~	~~1.573~~	~~1.548~~	~~1.549~~	~~1.546~~	~~1.507~~
~~1993~~	~~1.605~~	~~1.585~~	~~1.599~~	~~1.588~~	~~1.559~~
~~1992~~	~~1.616~~	~~1.602~~	~~1.630~~	~~1.613~~	~~1.596~~
~~1991~~	~~1.610~~	~~1.604~~	~~1.654~~	~~1.628~~	~~1.624~~
~~1990~~	~~1.621~~	~~1.622~~	~~1.692~~	~~1.662~~	~~1.662~~

YEAR	TABLE 11 Elec. Pwr. Eq.	TABLE 12 Elec. Eq. Mfg.	TABLE 13 Cannery/Fish	TABLE 14 Flour, Cer. Feed	TABLE 15 Cannery/Fruit
2010	1.000	1.000	1.000	1.000	1.000
2009	.988	.982	.987	.988	.992
2008	.991	.998	1.013	1.014	1.011
2007	1.046	1.047	1.054	1.058	1.050

2006	1.132	1.120	1.129	1.127	1.118
2005	1.215	1.189	1.180	1.184	1.167
2004	1.329	1.296	1.272	1.278	1.251
2003	1.390	1.351	1.321	1.325	1.297
2002	1.413	1.374	1.344	1.347	1.318
2001	1.408	1.372	1.353	1.355	1.328
2000	1.418	1.382	1.368	1.369	1.341
1999	1.446	1.407	1.395	1.397	1.369
1998	1.439	1.402	1.399	1.402	1.374
1997	1.442	1.409	1.414	1.416	1.386
1996	1.449	1.422	1.439	1.438	1.415
1995	1.461	1.438	1.461	1.460	1.433
1994	1.539	1.507	1.521	1.519	1.488
1993	1.570	1.543	1.570	1.560	1.539
1992	1.581	1.560	1.600	1.585	1.575
1991	1.575	1.561	1.624	1.599	1.604

~~YEAR~~	~~TABLE 16 Packing/ Fruit~~	~~TABLE 17 Laundry/ Clean~~	~~TABLE 18 Logging Eq.~~	~~TABLE 19 Packing/ Meat~~	~~TABLE 20 Metal Work~~
~~2009~~	~~1.000~~	~~1.000~~	~~1.000~~	~~1.000~~	~~1.000~~
~~2008~~	~~1.024~~	~~1.039~~	~~1.039~~	~~1.036~~	~~1.045~~
~~2007~~	~~1.059~~	~~1.082~~	~~1.076~~	~~1.077~~	~~1.085~~
~~2006~~	~~1.109~~	~~1.141~~	~~1.121~~	~~1.147~~	~~1.145~~
~~2005~~	~~1.155~~	~~1.192~~	~~1.171~~	~~1.197~~	~~1.195~~
~~2004~~	~~1.233~~	~~1.286~~	~~1.258~~	~~1.283~~	~~1.290~~
~~2003~~	~~1.275~~	~~1.333~~	~~1.303~~	~~1.326~~	~~1.331~~
~~2002~~	~~1.294~~	~~1.357~~	~~1.323~~	~~1.349~~	~~1.353~~
~~2001~~	~~1.306~~	~~1.365~~	~~1.332~~	~~1.359~~	~~1.356~~
~~2000~~	~~1.317~~	~~1.376~~	~~1.339~~	~~1.373~~	~~1.365~~
~~1999~~	~~1.345~~	~~1.402~~	~~1.364~~	~~1.399~~	~~1.384~~
~~1998~~	~~1.351~~	~~1.404~~	~~1.369~~	~~1.406~~	~~1.383~~
~~1997~~	~~1.362~~	~~1.416~~	~~1.380~~	~~1.422~~	~~1.397~~
~~1996~~	~~1.394~~	~~1.438~~	~~1.402~~	~~1.448~~	~~1.415~~
~~1995~~	~~1.411~~	~~1.461~~	~~1.421~~	~~1.473~~	~~1.439~~
~~1994~~	~~1.455~~	~~1.513~~	~~1.467~~	~~1.528~~	~~1.495~~
~~1993~~	~~1.508~~	~~1.554~~	~~1.508~~	~~1.573~~	~~1.533~~
~~1992~~	~~1.553~~	~~1.583~~	~~1.542~~	~~1.603~~	~~1.555~~
~~1991~~	~~1.587~~	~~1.600~~	~~1.566~~	~~1.627~~	~~1.569~~
~~1990~~	~~1.623~~	~~1.633~~	~~1.598~~	~~1.668~~	~~1.602~~

YEAR	TABLE 16 Packing/ Fruit	TABLE 17 Laundry/ Clean	TABLE 18 Logging Eq.	TABLE 19 Packing/ Meat	TABLE 20 Metal Work
2010	1.000	1.000	1.000	1.000	1.000
2009	.995	.987	.984	.991	.977
2008	1.015	1.020	1.016	1.023	1.014

2007	1.050	1.063	1.052	1.063	1.053
2006	1.099	1.120	1.096	1.133	1.112
2005	1.145	1.171	1.145	1.182	1.161
2004	1.222	1.263	1.230	1.266	1.253
2003	1.264	1.308	1.274	1.309	1.292
2002	1.283	1.333	1.294	1.331	1.314
2001	1.295	1.340	1.302	1.342	1.316
2000	1.305	1.351	1.310	1.356	1.325
1999	1.333	1.377	1.333	1.382	1.343
1998	1.339	1.379	1.338	1.388	1.343
1997	1.350	1.390	1.349	1.404	1.356
1996	1.382	1.412	1.371	1.429	1.373
1995	1.399	1.434	1.390	1.454	1.397
1994	1.442	1.486	1.434	1.509	1.451
1993	1.495	1.526	1.475	1.553	1.488
1992	1.540	1.555	1.507	1.583	1.510
1991	1.573	1.571	1.531	1.606	1.523

~~YEAR~~	~~TABLE 21 Mine Mill~~	~~TABLE 22 Paint Mfg.~~	~~TABLE 23 Petroleum~~	~~TABLE 24 Printing~~	~~TABLE 25 Paper Mfg.~~
~~2009~~	~~1.000~~	~~1.000~~	~~1.000~~	~~1.000~~	~~1.000~~
~~2008~~	~~1.049~~	~~1.041~~	~~1.047~~	~~1.027~~	~~1.038~~
~~2007~~	~~1.093~~	~~1.087~~	~~1.098~~	~~1.063~~	~~1.080~~
~~2006~~	~~1.141~~	~~1.150~~	~~1.168~~	~~1.122~~	~~1.135~~
~~2005~~	~~1.197~~	~~1.207~~	~~1.237~~	~~1.166~~	~~1.186~~
~~2004~~	~~1.298~~	~~1.309~~	~~1.344~~	~~1.244~~	~~1.285~~
~~2003~~	~~1.347~~	~~1.359~~	~~1.392~~	~~1.280~~	~~1.335~~
~~2002~~	~~1.373~~	~~1.387~~	~~1.419~~	~~1.301~~	~~1.361~~
~~2001~~	~~1.389~~	~~1.395~~	~~1.433~~	~~1.302~~	~~1.372~~
~~2000~~	~~1.399~~	~~1.408~~	~~1.451~~	~~1.313~~	~~1.380~~
~~1999~~	~~1.422~~	~~1.434~~	~~1.472~~	~~1.332~~	~~1.408~~
~~1998~~	~~1.429~~	~~1.438~~	~~1.479~~	~~1.333~~	~~1.412~~
~~1997~~	~~1.444~~	~~1.452~~	~~1.499~~	~~1.340~~	~~1.424~~
~~1996~~	~~1.468~~	~~1.474~~	~~1.524~~	~~1.362~~	~~1.452~~
~~1995~~	~~1.491~~	~~1.500~~	~~1.555~~	~~1.382~~	~~1.472~~
~~1994~~	~~1.537~~	~~1.558~~	~~1.612~~	~~1.433~~	~~1.522~~
~~1993~~	~~1.579~~	~~1.596~~	~~1.645~~	~~1.468~~	~~1.568~~
~~1992~~	~~1.613~~	~~1.623~~	~~1.661~~	~~1.491~~	~~1.604~~
~~1991~~	~~1.641~~	~~1.637~~	~~1.674~~	~~1.496~~	~~1.626~~
~~1990~~	~~1.678~~	~~1.670~~	~~1.717~~	~~1.518~~	~~1.658~~

YEAR	TABLE 21 Mine Mill	TABLE 22 Paint Mfg.	TABLE 23 Petroleum	TABLE 24 Printing	TABLE 25 Paper Mfg.
2010	1.000	1.000	1.000	1.000	1.000
2009	.996	.985	.981	.987	.985

2008	1.041	1.019	1.022	1.009	1.017
2007	1.085	1.064	1.072	1.044	1.058
2006	1.133	1.126	1.141	1.102	1.111
2005	1.188	1.182	1.208	1.146	1.161
2004	1.288	1.282	1.312	1.222	1.259
2003	1.337	1.330	1.359	1.258	1.308
2002	1.363	1.358	1.386	1.278	1.333
2001	1.379	1.366	1.400	1.279	1.344
2000	1.389	1.378	1.417	1.290	1.352
1999	1.412	1.404	1.437	1.308	1.379
1998	1.419	1.408	1.445	1.309	1.383
1997	1.434	1.422	1.464	1.317	1.395
1996	1.457	1.443	1.488	1.338	1.423
1995	1.480	1.469	1.519	1.358	1.442
1994	1.526	1.525	1.574	1.408	1.491
1993	1.568	1.563	1.606	1.443	1.536
1992	1.602	1.589	1.622	1.465	1.571
1991	1.629	1.603	1.635	1.470	1.592

~~YEAR~~	~~TABLE 26~~	~~TABLE 27~~	~~TABLE 28~~	~~TABLE 29~~	~~TABLE 30~~
	~~Refrigeration~~	~~Rubber~~	~~Steam Power~~	~~Textile~~	~~Warehousing~~
~~2009~~	~~1.000~~	~~1.000~~	~~1.000~~	~~1.000~~	~~1.000~~
~~2008~~	~~1.039~~	~~1.042~~	~~1.040~~	~~1.036~~	~~1.037~~
~~2007~~	~~1.084~~	~~1.083~~	~~1.090~~	~~1.072~~	~~1.073~~
~~2006~~	~~1.148~~	~~1.141~~	~~1.164~~	~~1.118~~	~~1.113~~
~~2005~~	~~1.203~~	~~1.188~~	~~1.226~~	~~1.160~~	~~1.152~~
~~2004~~	~~1.297~~	~~1.274~~	~~1.336~~	~~1.242~~	~~1.232~~
~~2003~~	~~1.344~~	~~1.319~~	~~1.385~~	~~1.278~~	~~1.276~~
~~2002~~	~~1.371~~	~~1.346~~	~~1.413~~	~~1.297~~	~~1.290~~
~~2001~~	~~1.382~~	~~1.350~~	~~1.418~~	~~1.302~~	~~1.295~~
~~2000~~	~~1.395~~	~~1.361~~	~~1.429~~	~~1.313~~	~~1.303~~
~~1999~~	~~1.423~~	~~1.382~~	~~1.452~~	~~1.332~~	~~1.327~~
~~1998~~	~~1.428~~	~~1.387~~	~~1.453~~	~~1.334~~	~~1.328~~
~~1997~~	~~1.443~~	~~1.402~~	~~1.464~~	~~1.345~~	~~1.333~~
~~1996~~	~~1.466~~	~~1.422~~	~~1.479~~	~~1.368~~	~~1.355~~
~~1995~~	~~1.492~~	~~1.449~~	~~1.503~~	~~1.387~~	~~1.367~~
~~1994~~	~~1.548~~	~~1.500~~	~~1.563~~	~~1.429~~	~~1.405~~
~~1993~~	~~1.589~~	~~1.535~~	~~1.596~~	~~1.466~~	~~1.452~~
~~1992~~	~~1.620~~	~~1.565~~	~~1.614~~	~~1.495~~	~~1.486~~
~~1991~~	~~1.638~~	~~1.581~~	~~1.622~~	~~1.513~~	~~1.507~~
~~1990~~	~~1.675~~	~~1.617~~	~~1.649~~	~~1.546~~	~~1.533~~

YEAR	TABLE 26	TABLE 27	TABLE 28	TABLE 29	TABLE 30
	Refrigeration	Rubber	Steam Power	Textile	Warehousing
2010	1.000	1.000	1.000	1.000	1.000

2009	.989	.982	.986	.983	.991
2008	1.023	1.018	1.020	1.014	1.022
2007	1.067	1.058	1.069	1.049	1.058
2006	1.129	1.115	1.141	1.094	1.097
2005	1.184	1.161	1.202	1.135	1.135
2004	1.277	1.245	1.310	1.215	1.214
2003	1.323	1.289	1.358	1.250	1.257
2002	1.349	1.315	1.385	1.269	1.272
2001	1.360	1.319	1.390	1.274	1.276
2000	1.373	1.330	1.402	1.284	1.284
1999	1.400	1.350	1.423	1.303	1.307
1998	1.406	1.355	1.425	1.305	1.309
1997	1.420	1.370	1.435	1.316	1.313
1996	1.443	1.389	1.450	1.339	1.335
1995	1.468	1.415	1.474	1.357	1.347
1994	1.523	1.465	1.532	1.398	1.385
1993	1.564	1.500	1.565	1.434	1.431
1992	1.594	1.529	1.583	1.462	1.464
1991	1.613	1.545	1.590	1.480	1.485

~~YEAR~~	~~TABLE 31 Woodworking~~	~~TABLE 32 Glass Mfg.~~
~~2009~~	~~1.000~~	~~1.000~~
~~2008~~	~~1.029~~	~~1.039~~
~~2007~~	~~1.062~~	~~1.087~~
~~2006~~	~~1.105~~	~~1.152~~
~~2005~~	~~1.147~~	~~1.215~~
~~2004~~	~~1.225~~	~~1.321~~
~~2003~~	~~1.262~~	~~1.374~~
~~2002~~	~~1.281~~	~~1.401~~
~~2001~~	~~1.293~~	~~1.408~~
~~2000~~	~~1.294~~	~~1.422~~
~~1999~~	~~1.316~~	~~1.448~~
~~1998~~	~~1.318~~	~~1.452~~
~~1997~~	~~1.324~~	~~1.464~~
~~1996~~	~~1.356~~	~~1.483~~
~~1995~~	~~1.370~~	~~1.508~~
~~1994~~	~~1.410~~	~~1.570~~
~~1993~~	~~1.458~~	~~1.605~~
~~1992~~	~~1.508~~	~~1.629~~
~~1991~~	~~1.537~~	~~1.638~~
~~1990~~	~~1.563~~	~~1.666~~

YEAR	TABLE 31 Woodworking	TABLE 32 Glass Mfg.
2009	1.000	1.000
2009	.988	.986

2008	1.011	1.018
2007	1.044	1.065
2006	1.086	1.128
2005	1.127	1.190
2004	1.203	1.294
2003	1.240	1.346
2002	1.259	1.372
2001	1.270	1.379
2000	1.271	1.392
1999	1.293	1.419
1998	1.295	1.422
1997	1.301	1.434
1996	1.333	1.453
1995	1.346	1.477
1994	1.385	1.537
1993	1.432	1.572
1992	1.481	1.595
1991	1.511	1.604

AUTH: 15-1-201, MCA
IMP: 15-6-138, 15-8-111, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.22.1311 to demonstrate through the trend tables how the department arrives at market value as required by 15-8-111, MCA.

Annually, the department updates these schedules to inform taxpayers of the current percentages used by the department when valuing and taxing their property. To determine the market value of industrial property, the department historically uses and adopts the concept of trending and depreciation. The method by which trended depreciation schedule are derived is described in the existing rule, and that method is not being changed.

The First Judicial District Court indicated in 1986 that the department must published these trend tables annually and these amendments are in compliance with that order.

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) 444-4375; or e-mail canderson@mt.gov and must be received no later than November 12, 2010.

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) 444-4375, 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, do not apply.

/s/ Cleo Anderson	/s/ Dan R. Bucks
CLEO ANDERSON	DAN R. BUCKS
Rule Reviewer	Director of Revenue

Certified to Secretary of State October 4, 2010

BEFORE THE TEACHERS' RETIREMENT SYSTEM
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 2.44.304 and 2.44.524 pertaining to the qualifications of the actuary engaged by the teachers' retirement system and the annual report of employment earnings by disabled retirees of the teachers' retirement system	))))))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 12, 2010, the Teachers' Retirement System of the State of Montana published MAR Notice No. 2-44-442 pertaining to the proposed amendment of the above-stated rules at page 1763 of the 2010 Administrative Register, Issue Number 15.

2. The board has amended 2.44.304 exactly as proposed. The board has amended the following rule as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

2.44.524 ADJUSTMENT OF DISABILITY ALLOWANCE FOR OUTSIDE EARNINGS (1) through (3) remain as proposed.

(4) A disabled member who is not required to submit an annual earnings statement by application of (3) ~~will be required to~~ must resume submitting annual earnings statements if the disabled member again becomes gainfully employed, and must continue to submit annual earnings statements until the disabled member again has not been gainfully employed and has reported no employment income for at least the three consecutive preceding years.

3. The board has thoroughly considered the comments received. A summary of the comments received and the board's responses are as follows:

COMMENT #1: The State Administration and Veterans' Affairs interim committee, pursuant to its statutory duties as provided in 5-5-228 and 5-5-215, MCA, through its legal counsel, David Niss, commented that the proposed amending language in Rule 2.44.524(4) indicating that a disabled member "will be required to resume submitting annual earnings statements" if the member again becomes gainfully employed implies that the retirement system board would take further action to effectuate that requirement. Mr. Niss suggested that if the requirement to resume submitting annual earnings statements is intended to be self-effectuating, the language should be changed to indicate that the member "must" resume submitting annual earnings statements if again gainfully employed.

RESPONSE #1: The retirement system agrees that the proposed language might be construed to indicate additional action will be taken by the retirement system to effectuate the requirement. As the retirement system's board intends that the requirement be self-effectuating, it agrees that the proposed language change is necessary.

By /s/ Denise Pizinni
Denise Pizzini
Rule Reviewer

By /s/ David L. Senn
David L. Senn
Executive Director
Teachers' Retirement System of the State of Montana

Certified to the Secretary of State October 4, 2010.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.55.102, 17.55.108, 17.55.111 and 17.55.114 pertaining to definitions, facility listing, facility ranking, and delisting a facility on the CECRA priority list; adoption of New Rules I through V pertaining to incorporation by reference, proper and expeditious notice, third-party remedial actions at order sites, additional remedial actions not precluded, and orphan share reimbursement; and repeal of ARM 17.55.101 pertaining to purpose	)	NOTICE OF AMENDMENT, ADOPTION, AND REPEAL (CECRA REMEDIATION)

TO: All Concerned Persons

1. On October 15, 2009, the Department of Environmental Quality published MAR Notice No. 17-296 regarding a notice of public hearing on the proposed amendment, adoption, and repeal of the above-stated rules at page 1730, 2009 Montana Administrative Register, issue number 19. On November 12, 2009, the department published MAR Notice No. 17-296 regarding a notice of extension of comment period on the proposed amendment, adoption, and repeal of the above-stated rules at page 2077, 2009 Montana Administrative Register, issue number 21. On April 15, 2010, the department published MAR Notice No. 17-296 regarding a notice of extension of comment period on the proposed amendment, adoption, and repeal of the above-stated rules at page 816, 2010 Montana Administrative Register, issue number 7.

2. In a letter dated November 16, 2009, a number of legislators requested that the department prepare an economic impact statement as provided for in 2-4-405, MCA. That statement was prepared by the department and sent to the Environmental Quality Council on February 16, 2010. A few commentors also requested that the department conduct an economic impact of the rules or delay final adoption of the rules until the economic impact was considered. The preparation of the economic impact statement responds to those comments as well. Because of the interest in the economic effect of the proposed rules, the department provided a supplemental comment period limited to accepting written comments on the proposed rules and rule amendments and their economic effects.

3. The department has amended ARM 17.55.111 and adopted New Rules III (ARM 17.55.110) and V (ARM 17.55.115) exactly as proposed; has declined to adopt the amendments to ARM 17.55.114; has repealed ARM 17.55.101 exactly as proposed; and has amended ARM 17.55.102, 17.55.108, and New Rules I (17.55.109), II (ARM 17.55.112) and IV (17.55.113) as proposed, but with the following changes (stricken matter interlined, new matter underlined):

17.55.102 DEFINITIONS In this subchapter the following terms have the meanings indicated below and are supplemental to the definitions in 75-10-701, MCA:

(1) remains as proposed.

(2) "Final permanent remedy" means, for purposes of 75-10-722, MCA, ~~all of~~ the remedial actions identified by the department in a record of decision and constructed after the record of decision is issued.

(3) remains as proposed.

(4) ~~"Imminent and substantial endangerment" means contaminant concentrations in the environment exist or have the potential to exist above risk-based screening levels adopted by the department in [NEW RULE I] or other statutory or regulatory cleanup levels.~~ "May present an imminent and substantial endangerment" and "may pose an imminent and substantial threat" mean that:

(a) except as provided in (b), concentrations of hazardous or deleterious substances in the environment exist above screening levels adopted by the department in [NEW RULE I (17.55.109)] or other statutory or regulatory cleanup levels;

(b) a concentration of a hazardous or deleterious substance in the environment in a concentration that exceeds a screening level adopted by the department in [NEW RULE I (ARM 17.55.109)] does not present an imminent and substantial endangerment or pose an imminent and substantial threat if:

(i) the department has determined pursuant to ARM 17.55.108(5) and (6) that the release does not present an imminent and substantial endangerment or pose an imminent and substantial threat to public health, safety, or welfare or the environment unless, based on significant new or different information received after the initial determination, the department makes a different determination; or

(ii) department-approved facility-specific cleanup levels developed in accordance with [NEW RULE IV (17.55.113)] for the parameters that exceed the screening levels are met.

(5) through (7) remain as proposed.

17.55.108 FACILITY LISTING (1) The department may list a facility on the CECRA priority list if the department determines there is a confirmed release or substantial threat of a release of a hazardous or deleterious substance that may pose an imminent and substantial threat ~~endangerment~~ to public health, safety, or welfare or the environment.

(2) through (4) remain as proposed.

(5) When evaluating whether to list a facility under (1) and (6), the department shall consider the following factors relevant to the facility, if information on such factors is known to the department:

(a) pathways for human or ecological exposure that:

(i) are completed;

(ii) using science-based evaluation methods acceptable to the department based on site-specific conditions, have a potential to be completed; or

(iii) otherwise have a reasonable potential to be completed;

(b) the quantity, concentration, toxicity, or mobility of the hazardous or deleterious substance;

(c) the sensitivity of the receptor population;

(d) documented bioaccumulative characteristics of the hazardous or deleterious substances released;

(e) established background or naturally occurring concentrations of hazardous or deleterious substances;

(f) extent of known releases of hazardous or deleterious substances;

(g) physical characteristics of the facility;

(h) actual impacts to state water and impacts to state water that, using science-based evaluation methods acceptable to the department based on site-specific conditions, have a potential to occur; and

(i) other relevant factors that indicate actual or potential harm or lack of actual or potential harm to public health, safety, or welfare or the environment.

(6) Despite the existence of a concentration of a hazardous or deleterious substance in the environment above screening levels adopted by the department in [NEW RULE I (17.55.109)], the department may make a written determination that the release does not pose an imminent and substantial threat to public health, safety, or welfare or the environment based on its evaluation of the factors in (5).

NEW RULE I (17.55.109) INCORPORATION BY REFERENCE (1) For the purposes of this subchapter, the department adopts and incorporates by reference:

(a) through (c) remain as proposed.

(d) U.S. Environmental Protection Agency, Regional Screening Levels for Chemical Contaminants at Superfund Sites (April 2009), except when:

(i) and (ii) remain as proposed.

(iii) comparing contaminant concentrations to the protection of ground water soil screening levels, the department will apply an appropriate adjustment based upon either the ratio of the department Circular DEQ-7 human health standard and the maximum contaminant level or the ratio of the department Circular DEQ-7 human health standard and the U.S. Environmental Protection Agency tapwater screening level found in (1)(d) to ensure that contaminants potentially leaching to ground water will not exceed Montana numeric water quality standards found in department Circular DEQ-7.

(e) through (3) remain as proposed.

(4) The reference adopted in (1)(c) through (1)(f) are to be used as screening levels and the department's use of these screening levels for purposes of ARM 17.55.108(1) does not establish these levels as cleanup standards.

(5) An exceedance of a screening level alone is not sufficient for the department to initiate condemnation proceedings under 75-10-720, MCA.

NEW RULE II (17.55.112) PROPER AND EXPEDITIOUS NOTICE (1) The department shall, as resources allow and considering the facility ranking, address facilities on the priority list required by ARM 17.55.108 in the manner provided in this rule. At a facility for which no administrative or judicial order under 75-10-711, MCA, has been issued, the department shall~~, as resources allow and considering the facility ranking,~~ take the following actions:

(a) ~~ensure that a person liable or potentially liable under 75-10-715, MCA, is expeditiously performing remedial actions as required by 75-10-711, MCA, by~~

~~requiring the establishment of a department-approved schedule for remedial actions. When establishing the schedule, the department shall consider the size and complexity of the facility and may approve, disapprove, or modify the schedule proposed by the person liable or potentially liable under 75-10-715, MCA~~ send a letter to a person liable or potentially liable under 75-10-715, MCA, explaining the required remedial actions and their bases and providing the opportunity to conduct the required remedial actions;

(b) ~~send a letter to a person liable or potentially liable under 75-10-715, MCA, providing the opportunity to conduct the required remedial actions~~ ensure that a person liable or potentially liable under 75-10-715, MCA, is expeditiously performing remedial actions as required by 75-10-711, MCA, by requiring the person to propose a schedule for remedial actions and department reviews. When proposing the schedule, the person liable or potentially liable under 75-10-715, MCA, shall evaluate and explain the size and complexity of the facility, the scope of the remedial action, the availability and normal timeframes associated with construction of the required remedial action features, permitting timeframes, specialty contractor availability and scheduling requirements (if applicable), typical climatic conditions as they related to the constructability of the remedial action and foreseeable delays in construction, and normal response time for requests to connect to utilities (as applicable). Based on that explanation, the department may approve, disapprove, or modify the schedule; and

(c) ensure that a person liable or potentially liable under 75-10-715, MCA, is properly performing the required remedial actions by reviewing work plans, reports, or other documents submitted by the person and identifying required revisions~~.~~, as follows:

(i) ~~T~~the person liable or potentially liable under 75-10-715, MCA, must be given, at a minimum, one opportunity to address all of the department's required revisions on each submittal~~.~~;

(ii) the person liable or potentially liable under 75-10-715, MCA, may request a meeting or conference call with the department to discuss the required revisions or alternatives to the required revisions. Such a request for a meeting or conference call must be made within seven business days of receiving the department's required revisions or the right to request such a meeting or conference call is waived;

(iii) if the department determines it is appropriate to modify its required revisions based on the meeting or conference call, the department shall document those modifications in writing;

(iv) ~~I~~if the department determines that its required revisions and any modifications, if applicable, were not adequately addressed in the revised document, the department shall incorporate its required revisions electronically into the document ~~so that it can be finalized~~ and shall either finalize the document itself or shall provide the person liable or potentially liable under 75-10-715, MCA, an opportunity to finalize the document with the department's revisions. If the department finalizes the document, upon request of the person liable or potentially liable under 75-10-715, MCA, the department shall remove from the final version of the document the name of the author who prepared the original version of the document. In addition, if the department finalizes the document, the department

shall include a statement on the cover page of the document such as: "The department finalized this document because all of its required changes were not incorporated. Although this document is designated a department version, the author of the original document holds a copyright on the original document, and may have intellectual property rights in all or a portion of this document. Further information regarding the original document is available in the department files" or equivalent language;

(v) when incorporating required revisions into a document, the department shall ensure that documents required by Montana law to be endorsed by a licensed professional are modified and endorsed by a duly licensed professional; and

(vi) the person liable or potentially liable under 75-10-715, MCA, may indicate its disagreement with the department's required revisions in a letter to be included in the department files, and may insert the following sentences in a footnote on the cover page of the document: "The department has required changes to this document to which [the person liable or potentially liable under 75-10-715, MCA] does not agree. See the department files for more information." The person liable or potentially liable under 75-10-715, MCA, may not in any other manner indicate its disagreement with the department's required revisions in the document itself. This includes, but is not limited to, the use of highlighting, italicizing, footnoting, and underlining.

(2) A person liable or potentially liable under 75-10-715, MCA, shall complete all remedial actions required by the department according to the department's approved schedule, unless an extension is requested and approved by the department. When considering a request for extension, the department shall consider the reason for such request including, but not limited to, consideration of force majeure events; shall document its decision regarding the requested extension in writing; and shall grant a reasonable request for an extension, unless the request for an extension would result in undue delay or pose an unacceptable risk to public health, safety, and welfare and the environment. If the department's review is delayed beyond what is provided for in the schedule, the department shall modify the schedule to account for that delay.

(3) If a person liable or potentially liable under 75-10-715, MCA, does not comply with the approved schedule, does not incorporate the department's required revisions on work plans, reports, or other documents, or does not perform remedial actions as required by the department, the department may determine that the person is not properly and expeditiously performing the appropriate remedial actions and may:

(a) issue a unilateral order ~~requiring~~ to the person liable or potentially liable under 75-10-711 ~~75-10-715~~, MCA;

(b) file a civil action as provided in 75-10-711 or 75-10-715, MCA;

(c) conduct the required remedial actions and seek cost recovery and penalties as provided in 75-10-711 or 75-10-715, MCA;

(d) file a cost recovery action as provided in 75-10-722, MCA; or

(e) and (4) remain as proposed.

(5) The provisions of this rule do not apply to facilities that are being addressed under the Voluntary Cleanup and Redevelopment Act.

NEW RULE IV (17.55.113) FACILITY-SPECIFIC CLEANUP LEVELS AND ADDITIONAL REMEDIAL ACTIONS ~~NOT PRECLUDED~~ (1) For purposes of assuring protection of public health, safety, and welfare, the department shall allow the calculation of facility-specific cleanup levels using exposure assumptions and risk levels acceptable to the department.

(2) For purposes of assuring protection of the environment, the department shall allow the calculation of facility-specific cleanup levels. The department shall approve risk and leaching determinations on a facility-specific basis using science-based assumptions acceptable to the department.

(3) Except as may otherwise specifically be provided for in a settlement agreement or administrative order on consent entered into under 75-10-723, MCA, ~~i~~if the department selects or approves a remedial action and subsequently determines that the remedial action ~~has failed or that additional remedial actions are required~~ does not attain a degree of cleanup of the hazardous or deleterious substance and control of a threatened release or further release of that substance that assures protection of public health, safety, and welfare and of the environment, the department shall require further remedial action at the facility by a person liable or potentially liable under 75-10-715, MCA. The department shall set forth in writing the basis for requiring any further remedial action.

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

A. ARM 17.50.102(2)

COMMENT NO. 1: One commentor acknowledged that the definition was important for purposes of knowing when the CECRA statute of limitations for cost recovery begins. However, the commentor believes the rules need to provide direction on how a remedy will be selected and recommends a comprehensive regulatory program be established to identify how a final remedy is selected. Another commentor indicated that the department should not adopt the National Contingency Plan (NCP) because it is based upon an entirely different federal program.

RESPONSE: The department identifies a final remedy using the criteria set forth in CECRA at 75-10-721, MCA. The department's Record of Decision (ROD) for a given facility identifies and documents how a final remedy is selected using these criteria. The definition of "record of decision," proposed in this rulemaking as a part of the changes to ARM 17.55.102(6), makes this clear. Adopting comprehensive rules, including the NCP, is outside the scope of this rulemaking.

COMMENT NO. 2: One commentor indicated that the proposed definition could have the effect of allowing the department to arbitrarily determine the time allowed to bring a cost recovery action. This commentor suggests that a legislative amendment is needed to correct any problems with the current statute of limitations. The commentor also suggests that delay in bringing a cost recovery action jeopardizes the department's primary source of funding for CECRA.

RESPONSE: As the commentor points out, the term "final permanent

remedy" is used in CECRA to determine when the six-year statute of limitations begins to run. The term was added to the statute in Chapter 490, Laws of 1995. The title of that bill included the following language: "CLARIFYING THE STATUTE OF LIMITATIONS FOR COST RECOVERY TO CONFORM TO THE FEDERAL COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT." Thus, the CECRA statute of limitations is intended to mirror the statute of limitations in CERCLA. Under CERCLA, the statute of limitations cannot begin to run until the record of decision is issued. *State of California v. Neville Chemical Company*, 358 F.3rd 661 (9th Cir. 2004). In order to make the definition mirror the federal provision, as was intended by the Legislature, the definition has been modified by deleting the words "all of" and adding language indicating that the statute cannot begin to run until the record of decision is issued and construction is initiated.

B. ARM 17.55.102(4) and 17.55.108 (comments on these two rules are grouped together because the comments on them were generally consistent and the department responses apply to both rules)

COMMENT NO. 3: Some commentors object to the definition of "imminent and substantial endangerment," arguing generally that the term expands CECRA or is not consistent with CECRA. Some commentors stated that the EPA interprets "endangerment" to mean an immediate threat or risk, and stated that the department should incorporate a similar definition. At least one commentor questioned the need for the rule. Relatedly, two commentors pointed out that 75-10-702, MCA, allows listing of sites that may pose an "imminent and substantial threat" and one asked for clarification on whether the department defines the terms differently and, if so, a description of those differences.

RESPONSE: CECRA uses the term "imminent and substantial endangerment" in at least four different sections. In 75-10-711(1), MCA, the term is used to help define one of the circumstances under which the department may take remedial action as whenever a release or threat of release "may present an imminent and substantial endangerment to the public health, welfare, safety or the environment" and in 75-10-711(8), MCA, to describe when the department can initiate judicial action. In 75-10-720, MCA, it is used to identify when the department may initiate condemnation proceedings. In 75-10-732, MCA, it is used in identifying when a facility is eligible for voluntary cleanup procedures.

CECRA uses the term "imminent and substantial threat" in at least three different sections. In 75-10-701(8), MCA, it is used to help define a "hazardous or deleterious substance" as one that "may pose an imminent and substantial threat to public health, safety, or welfare, or the environment." In 75-10-702, MCA, it is used to help determine when a facility may be listed on the CECRA Priority List. In 75-10-707(7), MCA, it is used as a basis for a court to support the department's request for a motion to compel compliance with an information or access order.

Despite the wide use of these terms in CECRA, the terms themselves are not defined. Therefore, as the agency charged with the implementation of the statute, the department is responsible for providing a reasonable interpretation of the terms. In addition, because 75-10-702, MCA, requires the department to adopt listing rules

based on imminent and substantial threat, adoption of the definition is a necessary part of the listing rules. The department has carefully reviewed the use of both of these terms in CECRA as well as how the department has administered the statute for the last twenty years and has determined that the two terms are meant to be used interchangeably within the statute. To ensure this is clear, the department has revised the rule to indicate the definition applies to both.

In interpreting the terms at issue, the department considered a variety of options. For example, the department could interpret the terms to mean that any amount of hazardous or deleterious substance in the environment, present above laboratory detection limits, may pose an imminent and substantial endangerment or threat. That interpretation, however, is overly conservative. The department is striving to provide a balance between the potential risk to human health and the environment and the concerns of the regulated community.

The commentors' arguments that the use of screening levels to help define "imminent and substantial" is a departure from established practice or represents an expansion of CECRA is in error. The department has been using these screening levels to define when an imminent and substantial endangerment may exist since at least January 2002, when the Voluntary Cleanup and Redevelopment Act Application Guide was published. Section 2.0 of that document indicates that "the department interprets 'imminent and substantial endangerment to public health, safety, or welfare or the environment' to mean contaminant concentrations in the environment exist or have the potential to exist above risk-based screening levels. Department-approved generic screening levels are provided in Section 5.2 of this guide. Facilities with contamination below these generic screening levels do not require further evaluation or remediation." The department has also interpreted and applied the existing listing rules, in place since 1999, by use of these screening levels. The proposed definition incorporates existing practice.

In determining the appropriate way to interpret "imminent and substantial threat" or "imminent and substantial endangerment" in the context of CECRA, the department evaluated how courts have interpreted CERCLA's use of the term "imminent and substantial endangerment" and found that those courts' interpretations are consistent with the department's interpretation of that term to mean exceedances of screening levels. In *United States v. Conservation Chemical Co.*, 619 F.Supp. 162 (W.D. Mo. 1985), an oft-cited CERCLA case, the court analyzed the phrase "imminent and substantial." "[A]n endangerment need not be an emergency in order for it to be imminent and substantial .... Thus, an endangerment is imminent if factors giving rise to it are present, even though the harm may not be realized for years." *Id*. at 193-194. The Conservation Chemical court went on to hold that: "if an error is to be made in applying the endangerment standard, the error must be made in favor of protecting public health, welfare and the environment. Thus just as the word 'imminent' does not require proof that harm will occur tomorrow, and the word 'endangerment' does not require quantitative proof of actual harm, the word 'substantial' does not require quantification of the endangerment ... Instead ... an endangerment is substantial if there is reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or threatened release of a hazardous substance if remedial action is not taken, keeping in mind that protection of the public health, welfare and the

environment is of primary importance." *Id*. at 194.

Superfund's primary protective function is what guides the department's use of screening levels in determining "imminent and substantial endangerment" and "imminent and substantial threat." Use of these screening levels is particularly applicable given the rights and obligations established in Mont. Const. art 2, § 3; and art 9, § 1.

In ongoing Superfund litigation at a site near Kalispell, the department presented its interpretation of "imminent and substantial endangerment" to the First Judicial District Court. That interpretation is consistent with the proposed rules. In that case, the Court agreed with the department's interpretation of the term, finding that "[s]creening levels are levels at which a contaminant of concern (COC) may pose an imminent and substantial endangerment to the public health, safety or welfare." *State of Montana ex rel the Department of Environmental Quality v. BNSF Railway Company, et al., BDV-2004-596, Findings of Fact, Conclusions of Law, and Order* (February 10, 2009).

Finally, specific Montana legislative findings support the department's interpretation of what conditions may pose an imminent and substantial endangerment to public health, safety, or welfare or the environment. For example, the legislature has directed, without reference to volumes or concentrations, that any release of petroleum (a defined hazardous or deleterious substance under 75-10-701(8)(d), MCA) "endanger[s] public health, and safety, groundwater quality, and other state resources." (75-11-301(3), MCA) One of the legislature's stated purposes for CECRA is to "provide remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." (75-10-706(2), MCA) At a minimum, that degradation may start when screening levels have been exceeded which the department interprets as potentially posing an imminent and substantial endangerment.

With this explanation, the department has attempted to be as responsive as possible to specific concerns about this definition and has made changes to the proposed rules where appropriate as indicated in the responses to later comments.

COMMENT NO. 4: A few commentors objected to the use of the term "potential to exist" in ARM 17.55.102, arguing that it is vague and provides no reasonable limitations on the department's discretion to identify a site.

RESPONSE: It is the department's goal to only consider sites for listing that may pose an imminent and substantial threat to public health, safety, and welfare and the environment. The department agrees that the term "potential to exist" is of little value in making this determination and has removed the term from the rule based upon these comments.

COMMENT NO. 5: Some commentors objected to the use of the term "contaminant" because it is not defined and at least one suggested the proper term is "hazardous or deleterious substance" which is a defined term under CECRA.

RESPONSE: The department agrees that "hazardous or deleterious substance" is a better term to use than "contaminant" and the rule has been revised accordingly.

COMMENT NO. 6: Some commentors objected to the definition proposed, arguing that sites should be addressed on a case-by-case basis and the department should consider more than just exceedances of screening levels when proposing a site for listing. At least one commentor suggested the use of this definition oversimplifies the term by not taking into account other factors. Other commentors stated that the proposed definition improperly replaces the risk assessment process. Commentors included a variety of factors they believe should be considered when making the determination, including background concentrations, pathways of exposure to the receptor population, sensitivity of the receptor population, the history of releases at the facility, staining of the ground, quantity and mobility of the contaminants, potential for bioaccumulation of the contaminant, and a variety of other factors. Other commentors stated that there is not a mechanism in the rules to ensure that the rules are applied consistently, expressed concern that the rules might be applied arbitrarily, and stated that the department must develop a record proving a risk before determining that there is an "imminent and substantial endangerment." Some commentors indicated listing should not be dependent on a NIOSH standard of "immediately dangerous to life and health" because it would not comply with Montana's constitutional requirement that the state maintain and improve a clean and healthful environment.

RESPONSE: Section 75-10-702, MCA, specifically states which facilities are eligible for listing under CECRA: those that have "a confirmed release or substantial threat of a release of a hazardous or deleterious substance that may pose an imminent and substantial threat to public health, safety, or welfare or the environment." Contrary to the commentor's statement, there is no requirement that the department prove risk before making this determination. At the time of listing, it is unlikely that the department will have complete information about the extent of the release at the facility. Listing the site allows the department to prioritize the need for remedial action and allocate resources to sites. The department should not be required to wait to list a site and initiate actions until the exhaustive list of suggested information has been acquired. Much of this information will not be obtained until a remedial investigation has been completed and the department has determined that it is more appropriate to get the site listed and ranked and then allow the person liable or potentially liable under 75-10-715, MCA, (hereinafter "LP") the opportunity to properly and expeditiously perform the required remedial actions. However, there may be sites proposed for listing where some or all of the information suggested by the commentors is available. In that case, it is appropriate to consider such information. For example, if known background concentrations at the facility exceed screening levels then background may be considered in place of screening levels. Therefore, in response to these comments, the department has identified a number of factors that it will consider when making a listing decision to the extent information about those factors is available, in addition to whether there are exceedances of the identified screening levels and did not adopt the referenced NIOSH standard. Although the factors could have been inserted in the definition, the department for clarity has placed the factors in ARM 17.55.108 and cross-referenced the factors in the definition. Included are most of the factors identified by the commentors. They do not include staining of the ground because a number of commentors were

concerned that a grease spot in a driveway not lead to CECRA listing. Again, however, it is important to note that sometimes when a facility is proposed for listing, the department may not have all the information in its possession to evaluate all the factors. Therefore, the department will consider the factors in determining whether an imminent and substantial endangerment or threat may exist to the extent appropriate information regarding those factors is known. The specificity of the factors included within the revised ARM 17.55.108 is intended to provide consistency in the application of the rules. Finally, this initial screening does not replace the risk assessment process. See comments below regarding facility-specific risk assessment.

COMMENT NO. 7: A number of commentors were concerned that using screening levels to make determinations regarding imminent and substantial endangerment would result in the use of those screening levels as de facto cleanup standards or presumptive cleanup levels or set a standard of care that could spur unnecessary private-party litigation. At least one commentor expressed concern that the need for remedial action is implied in the definition of "imminent and substantial endangerment." Other comments suggested that screening levels serve as a baseline tool to assess the potential for a threat and that site-specific cleanup levels should be allowed.

RESPONSE: It is not the department's intent that screening levels, used to determine when a facility may pose an imminent and substantial endangerment to public health, safety, or welfare or the environment, become de facto cleanup standards or presumptive cleanup levels for any purpose, including third-party litigation. It is clear from a close reading of all the comments that many commentors believe the department interprets an exceedance of a screening level as meaning there is actual harm. Screening levels serve as a baseline tool to assess whether the potential for harm exists. Although at least one commentor expressed concern that a situation that is an "imminent and substantial endangerment" implies a need for remedial action, an exceedance of screening levels indicates the need for further evaluation, which is included within the definition of "remedial action." (75-10-701(20), MCA) As pointed out by at least one commentor, an exceedance of a screening level simply indicates the need for further evaluation, which consists of evaluating the nature and extent of the hazardous or deleterious substances and the actual risk to public health, safety, or welfare environment, which is where the risk assessment process and the development of facility-specific cleanup numbers are employed. To address these concerns, the department has modified the term defined to be "may present an imminent and substantial endangerment" and "may pose an imminent and substantial threat." The department has also revised New Rule I to clearly state that screening levels are not cleanup standards, and has revised New Rule IV (ARM 17.55.113) to specifically provide for facility-specific cleanup levels. It is important to note that some LPs choose to use screening levels as cleanup levels in order to save the time and expense of calculating facility-specific cleanup levels. The rules will still allow this practice, while clarifying that use of those screening levels as cleanup levels is not necessarily required.

COMMENT NO. 8: Some commentors suggested the department should list

sites using EPA's Hazard Ranking System (HRS) or something similar such as an endangerment assessment. Other commentors said the department should not use the HRS as it would eliminate the responsibility of liable parties to cleanup contaminated sites that CECRA was established to address and that adoption of this approach would undermine the fundamental purpose of CECRA.

RESPONSE: CECRA is designed to address sites that may not be addressed under CERCLA, and therefore the criteria for listing a CECRA site may not be the same as the criteria under CERCLA. Under CERCLA, listing and ranking occur simultaneously. Under CECRA, a site is listed and then ranked. Using the HRS package on CECRA sites is unnecessary and would be expensive and overly burdensome at such an early stage in the process. The department has determined it is more appropriate to focus its resources on cleanup rather than the burdensome investigations that would be necessary under the commentor's proposal to list and rank sites at the same time. Section 75-10-702, MCA, specifically states which facilities are eligible for listing under CECRA: those that have "a confirmed release or substantial threat of a release of a hazardous or deleterious substance that may pose an imminent and substantial threat to public health, safety, or welfare or the environment." At the time of listing, it is unlikely that the department will have complete information about the extent of the release at the facility. Listing the site allows the department to prioritize the need for remedial action and allocate resources to sites. The department should not be required to wait to list a site and initiate actions until all the information provided for in the HRS has been acquired. The costs of such an investigation would be high and the department would be obligated to cost-recover these expenses. Finally, an endangerment assessment is typically based on information developed in the baseline risk assessment which is a process allowed under CECRA. The department has considered the HRS or an endangerment assessment and has rejected the use of both for listing purposes. See subsequent comments regarding risk assessment for additional response.

COMMENT NO. 9: Some commentors suggested that listing a site amounts to a de facto forfeiture of substantial assets and that the rules do not provide for due process for listing decisions.

RESPONSE: The department interprets the reference to a "forfeiture of substantial assets" to mean a taking. What is property for purposes of takings and what might be viewed as a property interest in evaluating due process are not the same (*Kafka v. Mont. Dep't of Fish, Wildlife & Parks*, 2008 MT 460 (2008)). Therefore, the department will respond to each portion of the comment separately.

The department has reviewed Montana law carefully regarding takings and has determined these rules do not constitute such a taking. CECRA requires LPs to clean up hazardous or deleterious substances for which they are responsible. The department does not require LPs to sacrifice all economically beneficial uses of their property in the name of the common good. Rather, CECRA is the tool the legislature has designed to "provide adequate remedies for the protection of the environmental life support system from degradation and [to] provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." (75-10-706, MCA) In addition, it is not the listing of a site that results in financial impacts to an LP. Rather, it is the existence of a confirmed release that may pose a

threat to human health and the environment, and the resulting obligation to remediate that release, which may impact an LP. See also, Response to Comment No. 29.

COMMENT NO. 10: Some commentors suggested that the department should track sites with confirmed or potential releases but only consider listing those that have been subjected to a rigorous screening process or that need to be evaluation for cleanup.

RESPONSE: The department already maintains a database tracking system for these types of sites. It is referred to as the "potential sites list" and has been in place since at least 1995. As of December 30, 2009, the potential sites list contains 286 sites, 162 of which need further evaluation and 124 of which have been closed by the department as needing no further action. Since 1999, the department has proposed nine of the "potential sites" for actual listing on the CECRA Priority List, using the criteria in the proposed rule. Seven of those sites were listed and two were not. The department's record shows that it is not proposing sites for listing excessively. Unfortunately, however, the department does not have the resources to evaluate potential sites for cleanup prior to their listing. Generally, investigation of sites to enable the department to determine whether cleanup is required is the job of the LPs. In fact, except in emergency situations, the department generally applies 75-10-711, MCA, to allow LPs the opportunity to conduct these investigations.

COMMENT NO. 11: A number of commentors expressed their concern that the definition would result in an increase in the department's work load.

RESPONSE: The department does not anticipate that use of this definition, including application of the factors contained in ARM 17.55.108(5), will increase the department's work load, because the definition and factors have been in use for at least eight years.

COMMENT NO. 12: A number of commentors expressed concern that the use of this definition would result in an increase in economic impact to businesses.

RESPONSE: The department interprets this comment to mean that if a business is an LP, that business may be impacted economically. The department is required to carry out its statutory duty to protect public health, safety, and welfare and the environment. Listing serves an important role in providing notice to the public of the potential human health and environmental threats. It also assists the department in allocating its resources and determining when to initiate action. However, in response to this and other comments, the department has amended the definition and ARM 17.55.108. These amendments should alleviate this concern.

COMMENT NO. 13: Some commentors suggested that the definition of "imminent and substantial endangerment" is overly broad and will result in minor release sites being listed that do not have an immediate environmental human health or welfare impact.

RESPONSE: ARM 17.55.108 specifically uses the term "may" when discussing the department's ability to list a facility. Such a listing is not required and, if a new release is being addressed by other statutory authority, the department

does not anticipate the need to go through the listing process for that release. For example, if a tanker truck spills a large volume of diesel on the highway, that release would need to be addressed immediately. While the release could potentially be listed, in reality such a listing would not occur because by the time the public participation requirements of the listing process were satisfied the release would likely be cleaned up. At sites where cleanup can be done quickly or the release is minor, the department does not anticipate listing; the listing process itself would take longer than the cleanup. In this case, the department would use other enforcement authorities, such as the Water Quality Act. In other cases, the department will make a determination that CECRA is the appropriate enforcement and cleanup authority before proposing to list a site according to these rules. In addition, there is no requirement that the threat be "immediate" in order for it to pose a risk. Therefore, the commentor's concern that sites will be listed which do not have an immediate environmental human health or welfare impact does not have a basis in CECRA. See also the previous response to comments regarding listing a grease spot in a driveway.

C. ARM 17.55.102(6)

COMMENT NO. 14: One commentor indicated that, under CERCLA, a record of decision is issued after a remedial investigation/feasibility study process is conducted along with any interim actions. The commentor suggests the department adopt a similar comprehensive program to ensure the record of decision is the document to chart the course for closure. Other commentors said the department should consider comprehensive rulemaking only if the legislature fully funds additional staffing for "such an enormous endeavor."

RESPONSE: The definition as written is clear that the Record of Decision is the final agency decision document that identifies and explains the final remedial actions selected by the department. The definition is sufficiently specific. Comprehensive rulemaking is not within the scope of this rulemaking proceeding.

D. ARM 17.55.111

COMMENT NO. 15: One commentor provided a comment on this rule change, suggesting that the department should maintain a separate list of sites that need to be evaluated for cleanup, that listing should be a tool of last resort, and that the department should promote voluntary cleanup. Other commentors said the listing rule should not be changed as listing a site under CECRA provides the department the ability to ensure that the investigation is conducted by those responsible for the potential contamination.

RESPONSE: While the department believes the first comment is outside the scope of the proposed change to the ranking rule, it notes that it already maintains a database tracking system for these types of sites. See response to comment No. 10. In addition, listing serves an important role in providing notice to the public of the potential human health and environmental threats. Finally, the department encourages voluntary cleanup through the use of the voluntary cleanup program.

COMMENT NO. 16: One commentor suggested that the department should allow consideration of carcinogenic risk approaching a $1x10^{-4}$ level rather than the $1x10^{-6}$ level provided by most of the screening levels.

RESPONSE: While the department believes this comment is outside the scope of the proposed change to the ranking rule, it notes that when facility-specific cleanup levels are calculated, the department allows for an increased cumulative risk level of $1x10^{-5}$. This is consistent with 75-5-301, MCA, which provides that state water quality standards for protection of human health must not exceed $1x10^{-5}$ for carcinogens other than arsenic. However, at the initial state of evaluating a site, it is appropriate to use screening levels based on a $1x10^{-6}$ risk level to determine whether a site warrants further evaluation because at the time that screening is done, it is probable that the department will not know how many carcinogenic substances exist at the facility. Therefore, comparing each hazardous or deleterious substance against a $1x10^{-6}$ screening level will help ensure that the cumulative risk does not exceed $1x10^{-5}$.

E. ARM 17.55.114

COMMENT NO. 17: One commentor suggested that requiring the payment of department costs prior to delisting may be inconsistent with CECRA and exceed the rulemaking authority provided for in 75-10-702, MCA. Another commentor stated that the proposed change alters the existing rule to state that delisting is only possible after the completion of the final long-term remedy and that this will significantly increase the time before facilities can be delisted. Another commentor suggested that the department change the word "completion" to "implementation" to allow delisting a site where the remedy has been implemented but will take years to complete. Another commentor stated it was not appropriate to consider the payment of costs in making a delisting decision, which should be based on environmental concerns. Otherwise a site could remain on the list forever due to outstanding costs. The commentor suggests that CECRA should follow CERCLA, which provides that the sole criterion for delisting a federal site is that "no further response is appropriate" to avoid the "taking" of a property's value not related to environmental concerns.

RESPONSE: Section 75-10-702(1)(a)(iv), MCA, provides that the listing rules must provide for delisting when further remedial action is no longer necessary. The statute does not authorize withholding of delisting if penalties are not paid, and ARM 17.55.114 already authorizes the department to withhold delisting if remedial action is not complete. The definition of "remedial action" in 75-10-701(20) includes administration and actions appropriate to respond to a release. This includes payment of costs. For these reasons, the department has not adopted the language on which the comment is based.

F. NEW RULE I

COMMENT NO. 18: One commentor suggested that the incorporation by reference of the documents establishes presumptive cleanup levels and another points out that screening levels are not cleanup standards.

RESPONSE: See earlier responses to similar comments. It is not the department's intent to establish cleanup levels by adopting screening levels. The department has revised this rule to clearly indicate that the referenced documents are to be used as screening levels and that their adoption does not establish cleanup standards.

COMMENT NO. 19: One commentor stated that the proposed rule does not adequately explain why an average statewide factor of 10 is appropriate to adjust non-carcinogenic screening levels.

RESPONSE: The EPA Regional Screening Levels (RSLs), which are incorporated by reference under New Rule I, are calculated under the assumption that only one contaminant is present and are "used when a potential site is initially investigated to determine if potentially significant levels of contamination are present to warrant further investigation such as an RI/FS." (http://www.epa.gov/reg3hwmd/risk/human/rb-concentration_table/index.htm). The application of a factor of 10 to non-carcinogens is consistent with the use of $1x10^{-6}$ screening levels for carcinogens. With each approach, the department conservatively evaluates whether as many as 10 carcinogens or 10 non-carcinogens potentially affecting the same organ or having the same critical health effect are present at a facility at levels of concern. If all concentrations are below these screening levels, the department can have a basis for confidence that cumulative risks do not exceed $1x10^{-5}$ or a hazard index of one for any organ or critical health effect. If any concentrations exceed these screening levels, further evaluation is necessary to determine whether cumulative excess risks actually exceed $1x10^{-5}$ or a hazard index of one for any organ or critical health effect. Without application of a protective factor of 10, screening levels based upon a non-carcinogenic hazard index of one could allow cumulative excess risks to an organ or a critical health effect to add up to several times the allowable risk level.

COMMENT NO. 20: One commentor stated that the proposed rule does not adequately explain or define the dilution attenuation factor (DAF) and why these factors are appropriate. Another stated that the DAF could be different for each site and that the department should apply an appropriate adjustment to contaminants instead of using an average DAF in order to evaluate each site individually.

RESPONSE: A DAF is the ratio of the original soil leachate concentration to the receptor point concentration. Therefore, the lowest possible value of DAF is one; a value of DAF=1 means that there is no dilution or attenuation at all and the concentration at the receptor point is the same as that in the soil leachate. High values of DAF on the other hand correspond to a high degree of dilution and attenuation. (Determination of Groundwater Dilution Attenuation Factors for Fixed Waste Site Areas Using EPACMTP, Background Document, EPA Office of Solid Waste, May 11, 1994).

Without the application of DAF, the assumption is essentially that a person would be drinking leachate directly from a contaminant source. This is an unrealistic assumption because some level of dilution and attenuation most certainly occurs. In addition, degradation for some substances also occurs but is not as readily quantifiable on a generic basis. The department evaluated precipitation and other

factors in Montana that contribute to dilution and attenuation as part of its Risk-Based Corrective Action Guidance for Petroleum Releases development and determined that a dilution attenuation factor of 10 was the most appropriate factor to apply generically to Montana. It is appropriate to use this factor when comparing concentrations to screening levels. However, if the department determines more work is needed, the DAF specific to a particular site can be calculated and used (even if it is greater than 10), in the same manner that facility-specific cleanup levels are calculated and applied during cleanup of a site.

COMMENT NO. 21: One commentor stated that the proposed rule does not adequately explain the adjustment to ground water soil screening levels.

RESPONSE: The RSL table provides either one or two soil screening levels based on protection of groundwater for most compounds. These soil screening levels are based on either protection of groundwater at the federal maximum contaminant level (MCL) or protection of groundwater at a risk-based tapwater consumption level. The department requires protection of groundwater at DEQ-7 human health standards (DEQ-7 HHS). For compounds with DEQ-7 standards equal to the MCL, the MCL-based soil screening level may be used. For compounds with DEQ-7 standards that differ from the MCL, the MCL-based soil screening level must be adjusted to assure protection of groundwater. For compounds without MCL-based soil screening levels but with a DEQ-7 standard and a tapwater consumption-based soil screening level, the soil screening level must be adjusted to assure protection of groundwater at the DEQ-7 standard. For example, if the DEQ-7 human health standard is 1 µg/L and the MCL (or tapwater RSL) is 5 µg/L and the soil screening level (SSL) (based upon 5 µg/L in the water) is 10 mg/kg, the ratio would be 1/5 with the resulting SSL of 2 mg/kg. The equation is:

DEQ-7 HHS/MCL (or tapwater RSL) = x/SSL

So: 1 µg/L / 5 µg/L = x/10 mg/kg

x = 2 mg/kg

The department has revised the rule to explain this process.

COMMENT NO. 22: Two commentors stated that the adoption of RBCA as a screening tool misapplies the RBCA process and one asked why the department has not incorporated Tier 2 and Tier 3 analysis into the regulatory process. The commentors suggest that the department should follow guidance developed by ASTM.

RESPONSE: The department does utilize the risk-based corrective action (RBCA) approach developed by the American Society for Testing and Materials (ASTM) (currently known as "ASTM International") for CECRA sites. ASTM's RBCA uses a tiered system to evaluate risks to human health posed from petroleum products released into the environment. Tier 1 lists contaminant concentrations that would not pose a threat to public health when only contaminant concentrations and simple site information is known about a site. This is typically the situation for sites

that would go through the CECRA listing process. In some instances, particularly for smaller releases, it may be much easier and less expensive for the LP to rely on Tier 1. Tiers 2 and 3 use a progressively more complex and site-specific analysis after more data is known about site conditions. The Tier 2 and 3 processes are available for all CECRA sites when there is sufficient site-specific information available, which typically occurs after a site is listed. The department considers Tier 2 to be the development of site-specific screening levels instead of Tier 1 generic screening levels. Tier 3 is a facility-specific risk assessment and fate and transport analysis.

ASTM is not a regulatory entity and did not evaluate specific regulatory requirements for individual states. For groundwater contamination, ASTM allows contamination to potentially be present in groundwater as long as it does not reach a receptor at concentrations that could harm that receptor. A common example cited in ASTM RBCA is where contaminated soil leaches contamination downward to groundwater, the groundwater then flows to a well that is pumped out and the groundwater is then consumed by a person. As long as the water being consumed has lower levels than are harmful to human health, it is acceptable for the groundwater closer to the source to have higher concentrations that are harmful to human health. This does not comply with Montana's water quality standards found in DEQ-7. Therefore, the department allows Tier 2 and 3 evaluations so long as any facility-specific screening or cleanup levels do not impact any groundwater above DEQ-7 standards. The department has considered the suggestion that it strictly follow ASTM's RBCA approach and rejects it for these reasons.

Finally, in reviewing this comment, the department found a few nonsubstantive areas in the RBCA document itself that warranted clarification. These edits were necessary because some portions of text in the original document did not reflect the fact that the 2009 version eliminated numerical ceiling concentrations for total gasoline range and diesel range fractions in soil that were present in the 2007 version, and replaced them with narrative conditions that affect beneficial use.

The edits, which were also made when the document was adopted in ARM 17.56.507 and ARM 17.56.608, are:

1. The following text was added to the Executive Summary on Page vii:

Additional Changes

Four sections in this version contain minor edits from the original September 2009 version of RBCA. These edits are not substantive and update language that did not accurately explain the change made in replacing the numerical ceiling concentrations for total gasoline range and diesel range fractions in soil with narrative conditions that affect beneficial use. These edits made to pages 10, 14, 15, and 16 are discussed in detail on DEQ's Internet web page.

2. The following text was added as the first paragraph to the Odors as a Significant Risk to Public Welfare/Nuisance Condition section on Page 10.

Previous versions of Montana Tier 1 Risk-Based Corrective Action Guidance for Petroleum Releases included numerical ceiling concentrations for total gasoline range and diesel range fractions in soil to protect public welfare. This version addresses public welfare and nuisance condition based on site-specific considerations rather than a numerical concentration for soil. Numerical ceiling concentrations are still included for total purgeable hydrocarbons (TPH) and total extractable hydrocarbons (TEH) in groundwater, as depicted in footnotes for Table 3.

3. The first paragraph of the Development of Tier 1 Lookup Tables starting on Page 14 was edited as follows:

DEQ calculated Tier 1 RBSLs for exposure pathways commonly associated with petroleum releases. RBSLs for surface soil were calculated for the soil leaching to groundwater pathway, and for the direct-contact pathway assuming residential and commercial land use. RBSLs for subsurface soil were calculated for the soil leaching to groundwater pathway, and for the direct contact pathway to account for exposure of receptors during any excavation/construction at a site. ~~Additionally, RBSLs for non-target COC fractions in soil include beneficial use (aesthetic) considerations.~~ For each of the three distance to groundwater categories in Tables 1 and 2, the RBSLs DEQ published reflect the lowest COC concentration calculated for ~~any~~ either of the ~~three~~ two Tier 1 exposure scenarios (i.e., for the soil leaching to groundwater pathway~~,~~ or through direct contact~~, or based on beneficial use considerations~~). Appendix C is a comprehensive soil RBSL table presenting the RBSLs calculated for both direct contact~~,~~ and leaching to groundwater~~, and beneficial use considerations~~.

4. The fourth paragraph of the Derivation of RBSLs section on Page 15 was edited as follows:

Soil RBSLs were calculated for each petroleum fraction using the chemical fate and transport model used for the target compounds. These soil RBSLs are designed to be protective of groundwater below releases, so that contaminants leaching from contaminated soil will not cause groundwater to exceed groundwater RBSLs. ~~Ceiling concentrations were also developed to assure that total concentrations of all non-target COCs do not interfere with the beneficial uses of the soil or groundwater.~~

5. The first paragraph of the Models Used to Generate Tier 1 RBSLs section on Page 16 was edited as follows:

DEQ staff calculated Tier 1 RBSLs for the soil leaching to groundwater pathway using the "VS2DT Solute Transport in Variably Saturated Porous Media" model (United States Geological Survey), combined with the "Hydrologic Evaluation of Landfill Performance" (HELP) model, which was used to estimate water infiltration rates. Direct contact RBSLs were

calculated using equations developed by the United States Environmental Protection Agency (EPA) and the Massachusetts Department of Environmental Protection. The specific assumptions used in DEQ's Tier 1 soil leaching to groundwater models are discussed in Appendix D. The assumptions used in the direct contact modeling, including those associated with the fraction-surrogate approach, are discussed in Appendix E. ~~Information regarding the beneficial use criteria is also provided in Appendix E.~~ Since Tier 1 RBSLs are intended for use at a variety of releases throughout the state, the assumptions of Tier 1 provide for a wide margin of safety, and are therefore conservative.

COMMENT NO. 23: Two commentors stated that the EPA Region 3 Biological Technical Assistance Group (BTAG) freshwater sediment screening benchmarks are based on a no observable effect level and that an exceedance of this level should not be interpreted as an imminent and substantial endangerment. The commentors argued that use of the BTAG numbers also does not consider background, and one noted that Region 3 includes the eastern United States, which has different characteristics than Montana.

RESPONSE: Using no observable effect levels is consistent with the department's approach to using screening levels. If the department is considering whether a site should be listed or whether no action is needed without further evaluation, the department must ensure that even if several contaminants are present at their screening levels (in this case BTAG levels) the contaminants will not be adversely affecting the environment. Again, if any contaminants are above those levels, further evaluation would be required. It is the department's intent that these initial determinations be conservative because no further evaluation will be conducted at facilities that meet the screening levels. Montana is located in EPA Region 8, which currently has no sediment screening numbers and uses many of the same reference values relied upon by Region 3 BTAG. In determining what sediment screening levels to use in the rule, the department considered and evaluated the 2006 EPA Region 3 Biological Technical Assistance Group (BTAG) values, the 2008 National Oceanic and Atmospheric Administration (NOAA) Screening Quick Reference Tables (SQRTs), and Washington's 2003 Development of Freshwater Sediment Quality Values for Use in Washington State. DEQ determined the EPA Region 3 BTAGs provide the most comprehensive contaminant list and usually the most protective screening levels. Therefore, the Region 3 values are appropriate for use in evaluating sediment data at CECRA sites. These values were designed to facilitate consistency in screening level ecological risk assessments. While the department agrees that Region 3 may have different characteristics, the freshwater screening levels are designed to help identify ranges of contaminants in sediments where adverse effects on benthic organisms may occur. The intended purpose of these screening benchmarks is as a Tier 1 screening tool to indicate if sediment contaminant concentrations may indicate potential adverse effects. Based on the evaluation of screening references described above, the department is not aware of any specific differences that would make the Region 3 screening levels inappropriate for Montana. Please see previous responses to comments regarding situations where known background

concentrations at a facility exceed screening levels.

COMMENT NO. 24: Some commentors suggested that the regional screening levels should not be used but should be replaced with a ranking process modeled after the HRS.

RESPONSE: See department's response to comments above regarding the use of screening levels and why the use of a process similar to HRS is not warranted under CECRA.

COMMENT NO. 25: One commentor reiterated its comments regarding use of objective standards determining "imminent and substantial endangerment."

RESPONSE: See department's responses to comments above regarding the consideration of other factors when determining imminent and substantial endangerment.

COMMENT NO. 26: Two commentors indicate that the proposed rule explains the use of an action level for arsenic in surface soil based on an average statewide background derived from the use of statistical methodology. Action levels vary across Montana and the department should use site-specific background levels instead of the 40 parts per million (ppm) level referenced in the Montana arsenic paper.

RESPONSE: The department's Action Level for Arsenic in Surface Soil of 40 ppm is based upon an evaluation of background arsenic concentrations across the state. Without use of this state-specific level for screening purposes, the department would use the regional screening level of 0.39 ppm which is more conservative and could result in the listing of sites unnecessarily. The department agrees that the use of site-specific background for screening is appropriate if such data exists and ARM 17.55.108 has been amended to reflect this. However, in the absence of site-specific background data, use of the Montana action level for arsenic of 40 ppm is more appropriate than use of the regional screening level of 0.39 ppm.

G. NEW RULE II

COMMENT NO. 27: One commentor stated that the department should be required to comply with the rule regardless of whether "resources allow."

RESPONSE: The rule was not meant to imply that the department would address a site without sending a proper and expeditious letter if resources do not allow, but the department agrees that the rule as proposed can be read that way. The rule has been modified to clearly indicate that the "resources allow" language applies to when the department addresses the site.

COMMENT NO. 28: One commentor stated that there are many reasons a schedule might change and to require that it be maintained does not recognize the inherent uncertainties in remediation work. Other commentors said the department should not establish the schedule without input from the LPs or should mutually agree to the schedule, and that there are no criteria for developing the schedule.

RESPONSE: The department did not intend that it establish the schedule without input from the LPs. The term "requiring the establishment of a department-approved schedule" was intended to mean that the LP proposes the schedule subject to department approval. The department has clarified this language, indicating that the LP submits the proposed schedule to the department and explains the basis for the schedule using factors suggested by various commentors, subject to department approval. In order to provide additional clarity to the rule, the department has also made the following revisions. First, subsections (1)(a) and (1)(b) were reversed so that it is clear that the first step in the process is for the department to send the letter providing LPs the opportunity to conduct the work. Second, subsection (2) was revised to indicate that the department will consider requests for extensions in the schedule, will grant reasonable requests if they do not cause undue delay or pose a risk to human health or the environment, and will not attribute delays in the schedule to the LPs if the delay should be attributable to the department.

COMMENT NO. 29: One commentor stated that because an administrative or judicial order is not a prerequisite to support the department's requirements, the LP is without any recourse or due process to seek review of the department's direction.

RESPONSE: The rule addresses sites that are being addressed under the provisions of 75-10-711, MCA, and are not yet under administrative or judicial order. In responding to this and other comments on New Rule II, the department also revised the rule to clarify that it also applies to the undertaking of the work itself and not just the submittal of documents. The rule provides informal due process by providing the LP with opportunity for input during the process.

If the LP does not comply with the department's direction, the department may determine the LP is not properly and expeditiously performing the required remedial actions and may conduct the work itself, issue an administrative order, seek an injunction, or seek a penalty under 75-10-715(3), MCA. In each of these instances the LP would have formal due process rights.

COMMENT NO. 30: One commentor stated that if the department believes there is evidence to support listing of a site or to take remedial actions at that site, the department should issue an order or file a claim. If issuance of an order or filing a claim cannot be supported, the department should work cooperatively with a LP to reach consensus upon a work plan or schedule.

RESPONSE: Section 75-10-711, MCA, requires that the department offer LPs the opportunity to properly and expeditiously perform remedial action before issuing an order. Therefore, this comment is not supported by the plain language of CECRA. However, the department has modified (3) of the rule to correct an error in (a) indicating that 75-10-721, MCA, authorizes the department to issue a unilateral order and has added citations to the same statute in (b) and (c) because that statute authorizes the department to file a civil action for penalties. In addition, LPs have the opportunity to conduct voluntary cleanup under the provisions of the Voluntary Cleanup and Redevelopment Act. Finally, the rule has been revised to address concerns over the schedule in response to subsequent comments, making it clear

that the department will work with LPs to reach agreement on documents, when possible, but that ultimately it is the department's responsibility to determine whether the documents meet regulatory requirements.

COMMENT NO. 31: If federal CERCLA actions are underway at a site, this rule would be contrary to the National Contingency Plan requirements for state participation. The rule should be revised to provide that the department is not authorized to "informally" impose changes to documents, require adherence to a schedule, or take remedial action at any facility or site where administrative or judicial action has commenced under CERCLA or another federal law.

RESPONSE: Montana has independent authority under CECRA. In addition, 75-10-711(9), MCA, provides that the department may take a remedial action at a CERCLA site if the department determines it is necessary to carry out the purposes of CECRA.

CERCLA (federal superfund) actions may occur at CECRA priority list sites, in particular, emergency removal actions. When the department is aware that EPA or a LP is conducting work under CERCLA at a CECRA priority list site, the department alerts EPA and the LP to CECRA requirements that would facilitate a no further action determination by the department under CECRA. In these instances, during its review, the department identifies inaccuracies, deficiencies, and compliance needs in documents produced as part of the CERCLA work, but it does not require changes to documents because the department is not acting as the lead agency. Instead, the department indicates that if CECRA requirements are not met, the department will revisit the site after CERCLA work is complete and additional work may be required. This provides LPs with the opportunity to address all concerns at one time and not run the risk of redoing work. This approach does not conflict with the National Contingency Plan.

For national priorities list (NPL) sites where EPA is the lead agency, the department provides its comments concerning documents and schedules to EPA. As the lead agency, EPA then requires the LP to conduct the necessary CERCLA actions. The department intends to continue this approach for NPL sites.

COMMENT NO. 32: Three commentors object to the department not having to work within a schedule.

RESPONSE: The department strives to review documents within 30 days of receipt and 60 days if the document is voluminous. In some instances, the department has experienced staff turnover and some reviews must wait until a new project officer is hired. In addition, project officers work on multiple sites and other priorities may delay review. The department has implemented management changes in response to HJR 34 and audit recommendations to facilitate more timely reviews. The department may also have changes to review schedules for some of the same reasons that LPs have expressed in previous comments. The department has revised (1) to indicate that the schedule includes timeframes for department reviews and (2) to indicate that the department will consider requests for extensions in the schedule, will grant reasonable requests, and will not attribute delays in the schedule to the LPs if the delay should be attributable to the department.

COMMENT NO. 33: One commentor stated that the rule ignores one of the stated purposes of CECRA, which is to encourage voluntary cleanup. The commentor claims reliance on only this purpose of CECRA improperly creates an emergency situation, which is already provided for in statute.

RESPONSE: This rule applies to sites being addressed under 75-10-711, MCA, which provides for cleanup without an administrative order. To make it clear that the department is encouraging voluntary cleanup, the department has modified the rule to explicitly state that it does not apply to sites being addressed by the Voluntary Cleanup and Redevelopment Act. The other revisions the department has made to the rules clarify that they are not addressing an emergency situation, which is addressed in 75-10-712 and 746, MCA.

COMMENT NO. 34: Two commentors are concerned that the department utilize appropriately qualified persons to review and establish schedules that require specialized training and skills to understand, such as construction schedules.

RESPONSE: As explained above, LPs will propose the schedule and explain the basis for the proposed schedule. To the extent that there are special considerations at play in establishing the schedule, the LPs are allowed to explain those issues. However, the department does not believe that specialized training and skills are typically required to review a construction schedule and, to the extent they are, the department has an in-house remediation construction bureau to provide assistance.

COMMENT NO. 35: Two commentors believe the department should provide for good faith negotiation of the schedule and that the rule should expressly incorporate the concept of force majeure.

RESPONSE: As discussed above, the department has modified the rule to make it clear that LPs propose the schedule and the basis for the proposed schedule subject to department review and approval. In addition, the department has incorporated the concept of force majeure in subsection (2)(a).

COMMENT NO. 36: Some commentors object to the department changing documents prepared by environmental consultants. Two of the commentors requested that the department prepare a legal analysis of the department modifying work product prepared by consultants and then publishing and using those work products.

RESPONSE: There has been some confusion about how the department handles the issue of modifying documents and the rule has been clarified to help address these comments. As noted by one commentor, this practice has been in place since December 2005 and the department has found that it has saved time and money for both it and the LPs. Prior to this policy being in place, it was not unusual for one document to go through five or more iterations before it was approved. This protracted loop of negotiating comments on documents led to a slowdown in cleanup, inefficiencies, and excessive use of resources. The November 2006 HJR34 Study Report recommended that the department develop a framework for more timely and consistent use of its enforcement authority, which this rule does. It also helps address the concern that the department respond to LP

submittals in a timely fashion. By requiring the submittal of electronic documents, the department may use the "redline/strikeout" method of commenting, which has noticeably shortened the response time on documents. The following is the process currently in use, unless otherwise provided for in an administrative or judicial document or order:

1. The department requires that a LP prepare a document and provides a scope of work for the document and deadline for submitting the document.
2. The LP is required to submit the requested document following the scope of work and in the timeframe required.
3. The department provides comments on the document and allows at least one opportunity for the LP to revise the document.
4. The LP may request a meeting to discuss the comments. This allows for technical dialogue between the LP and the department on the document. If appropriate, more than one meeting may occur.
5. If the department determines changes to its comments are warranted as a result of the meeting, it issues a written revision.
6. The LP submits the revised document.
7. If the department determines its required comments were not incorporated into the revised document, the department may incorporate its required revisions electronically into the document and either finalize the document or allow the LP to finalize the document with the department's revisions.
8. If the department finalizes the document itself, it will remove the consultant's name, upon request of the LP. In addition, the LP has the ability to indicate its objection to the changes via a letter which is included in the site files.

The department allows the LP to express its objections to the changes so that the LP's rights are preserved. However, the department does not allow multiple objections to be placed in the document itself because it often affects the readability and clarity of the document depending on the size and number of objections. In addition, it is the department's role to determine whether a document meets regulatory requirements and provides the information necessary to ultimately select a final remedy at the facility. A document riddled with underlining, objections, and footnotes may prevent the department from relying upon its contents in making final decisions, making the document worthless. When a revised document is submitted that does not include the department's required revisions, the department has the authority to reject that document, hire its own consultant to prepare the necessary document, and cost recover the expense of this work from the LP. However, the department rejected that option in favor of the one outlined in the revised rule and has determined that this approach strikes an appropriate balance between the LP's concerns and the department's regulatory needs. It is clear from the comments on the rule that more detail is needed in the rule to address concerns of the commentors that the rule appears to allow the department to unilaterally make changes on the first draft of a document that is submitted by a LP and to reflect the current practice. Therefore, in response to the comments on this rule, each step in this process has been clarified in the revised rules. In response to the concern that consultants be allowed to maintain ownership or copyright of their original work

product, if the department finalizes the document it will include a statement on the cover page of the report such as "the department finalized this document because all of its required changes were not incorporated. Although this document is designated a department version, the author of the original document holds a copyright on the original document, and may have intellectual property rights in all or a portion of this document. Further, information regarding the original document is available in the department files." The rule has been revised to include this requirement. This will ensure that third parties who may ultimately read the document are on notice that the department's version is a derivative of the consultant's document. In addition, it helps alleviate the concern that consultants have expressed about responsibility for document preparation. In addition, the department has revised the rule to provide that an LP can insert language into the document indicating its disagreement with the department's required revisions. Finally, CECRA includes protection for remedial action contractors in 75-10-718, MCA. Those protections are not based on who prepared the document but are available to all remedial action contractors so long as they conduct work in a manner that is not negligent or that constitutes intentional misconduct.

COMMENT NO. 37: Two commentors request that the department solicit input on the proposed rule from the Montana Board of Professional Engineers and Professional Land Surveyors. Another commentor expressed concern about the department modifying documents prepared by professional engineers.

RESPONSE: The department has never modified a document that is required by Montana law to be prepared by a licensed professional and therefore there is no need to solicit input from the state's professional licensing board. The department has revised the rule to clarify that if any document required by Montana law to have a licensed professional's endorsement needs modification, the department will ensure a duly licensed professional makes the changes and includes that professional's endorsement. See previous responses to comments regarding the department's process for revising documents submitted by LPs and the ability to indicate disagreement with the department's required revisions.

COMMENT NO. 38: One commentor claimed that changing the work product of licensed professionals is arbitrarily done without the opportunity for technical dialogue. Another commentor stated that while it is reasonable for the department to comment on documents and recommend different language, it is a problem when the department insists on a change to the document that the professional who prepared the document disagrees with. This commentor argues that the department is assuming responsibility for the entire content of the document when it mandates changes that are unacceptable to the professional who prepared the document. Another believes the rule will discourage reputable contractors from conducting CECRA actions. Another is concerned about how a consultant can claim ownership of a work product if it is altered by the department.

RESPONSE: Please see previous responses to comments regarding the opportunity for technical dialogue and the revision of documents prepared by a licensed professional. Reputable contractors understand the need to address deficiencies and get comments properly incorporated so that documents can be

approved and the work carried out. It has been the department's experience that its own consultants appreciate the clarity and efficiency that commenting in redline format provides. Ultimately this saves the LP money and gets to cleanup more quickly. Also, the department is the regulating entity and retains the final authority as to the contents of a department-required document. In terms of ownership of the document, it is important to note that the department requires the preparation of documents by LPs. Those LPs may hire consulting firms to prepare the documents but they become public information and are used by the department for decision-making purposes. Finally, please see previous responses to comments regarding the department's process for revising documents, including its publication of altered documents as department documents, as well as how the department ensures third parties are on notice regarding any ownership or copyright the consultant has in the document.

COMMENT NO. 39: One commentor objected to the rule, claiming it is a departure from the intent of CECRA to allow private parties to perform the work. Another believes it removes any incentive for LPs to cooperate with the department.

RESPONSE: The rule formalizes the process that has been in place since December 2005 and is not a departure from CECRA. As stated above, this rule applies to sites being addressed under 75-10-711, MCA. It is a reasonable approach to interpreting the language in the statute regarding proper and expeditious remedial action by balancing regulatory oversight with a LP's conductance of work. The department is unclear how it removes the incentive for a LP to cooperate with the department. If cooperation is not forthcoming, the department may conduct the work itself and cost recover, issue an administrative order, seek a judicial order, or seek a penalty under 75-10-715(3), MCA. In response to this comment, the department has revised the rule to clarify its authority. In addition, the rule does not apply to sites being addressed by the Voluntary Cleanup and Redevelopment Act. Finally, in responding to this comment, the department noted a typographical error in the rule and corrected it in subsection (3)(a).

COMMENT NO. 40: One commentor believes the rule exceeds the powers granted by CECRA because there is no requirement that the schedule be realistic or that requested modifications cannot be unreasonably withheld. Two expressed concern that a process for adjusting the schedule be available for delays caused by the state.

RESPONSE: Please see responses above. The department has revised the rule regarding schedule establishment and requested extensions regarding the schedule. The department also revised the rule to provide for adjustments in the schedule if delays are attributable to the department.

COMMENT NO. 41: One commentor stated that the proposed rule does not address the issues raised by the 2008 Performance Audit, which suggested that the department institute best management practices such as long-term planning, management controls, etc.

RESPONSE: Rationale for the proposed rule was partially based on the

November 2006 HJR 34 Study Report, not the 2008 Performance Audit. The November 2006 HJR 34 Study Report recommended that the department develop a framework for more timely and consistent use of its enforcement authority, which this rule does. As an aside, the department notes that Legislative Audit Division followed up on the 2008 Performance Audit and, in a memorandum dated December 7, 2009, found that eight report recommendations have either been implemented or implementation is ongoing; due to the timing of the audit, one report recommendation regarding orphan share has not been implemented but is under consideration by the department.

COMMENT NO. 42: One commentor stated that multiple iterations on documents is normal and that providing only one opportunity to address a revision is onerous. Another commentor suggested the word "one" be removed to allow for more than one revision.

RESPONSE: Please see responses above regarding the number of iterations of a document contemplated under the revised rules. In response to this and other comments, the department clarified that it will provide "at least one" opportunity to revise the document. Since implementing the policy in December 2005, the department is no longer reviewing four, five, or more drafts of the same document; documents are being approved in a timely manner; and work is progressing more quickly. The department's experience in the last five years has proven that this approach is legitimate and is effective.

COMMENT NO. 43: One commentor acknowledged that the process for providing modifiable documents is already in place and that it does not need to be incorporated into formal rulemaking.

RESPONSE: Please see preceding response. The department agrees that the process for providing modifiable documents to the department is already in place. Also, the department is incorporating this process into rule to ensure that the department's revision process is transparent and clear to all parties.

H. NEW RULE III

COMMENT NO. 44: One commentor does not agree that a person not subject to an order should be allowed to conduct remedial actions at a facility if the third party's action could interact with a remedial action subject to an order until the final permanent remedy has been completed. The commentor stated that work plans are inherently inconsistent with the statutory scheme set out in CECRA as there is no way for the department or LPs to conduct remediation when at any given time in the process, a third party could be granted permission to begin its own remedial action.

RESPONSE: CECRA requires "the written permission" of the department if a "person who is not subject to an administrative or judicial order" wishes to "conduct any remedial action at any facility that is subject to an administrative or judicial order issued pursuant" to CECRA (75-10-706(3), MCA). In adopting this new rule, the department is implementing the requirements of this CECRA provision.

Under the new rule, the department will not provide written permission to a

third party remedial action unless the department determines "(a) the proposed remedial action will not conflict with ongoing work at the facility; [and] (b) the proposed work, if conducted in the manner described in the document, will not spread, worsen, or otherwise exacerbate the contamination." Therefore, the commentor's first concern is already addressed within the rule, because to obtain the department's permission, a third party remedial action cannot conflict with the ongoing remedial action required under order.

If the commentor is suggesting that no third party remedial actions should be conducted at all, or should not be conducted until the final permanent remedy is completed, this would require a statutory change. Because CECRA requires "written permission," which implies that the department should grant this permission in certain situations, the department must lay out a process for obtaining this permission. The department cannot draft a rule that withholds permission for all third party remedial actions, or prohibit these actions until all of the final permanent remedy is complete.

The department also disagrees with that these third party work plans are completely inconsistent with CECRA's statutory scheme. CECRA plainly provides for third party remedial action with the department's written permission. In addition, the Montana Supreme Court has recognized that third parties have a right to conduct work using restoration damages, even at facilities that are under CECRA order. See *Sunburst School District No. 2 v. Texaco, Inc.*, 165 P.3d 1079 (Mont. 2007).

COMMENT NO. 45: One commentor stated that at some facilities, work plans have been prepared and have not received approval for several months or years. Under this rule, the department may not review the work plans and provide approval which is not conducive to cleanup.

RESPONSE: Comment noted. The commentor refers to work plans submitted by a LP; however this rule establishes a process for implementing 75-10-706(3), MCA, and only applies to parties who are not subject to the order. In addition, see previous responses to comments regarding schedules for department review.

COMMENT NO. 46: One commentor stated that parts of the rule establish a process but that certain elements require specific statutory authority. The same commentor indicated there is no enforcement ability in either the rule or the statute and therefore both require further legislative authorization to have any force.

RESPONSE: Most of the new rule's provisions are process-related. Section (2) does outline information that is required in the work plan so that the department can determine whether to grant the permission or request revisions to the work plan and a standard for providing permission for the proposed work. This requirement clearly related to the permission requirement and within the department's authority to adopt rules to implement CECRA in 75-10-702, MCA.

The department acknowledges that CECRA does not contain an explicit enforcement mechanism for the CECRA requirement that third parties obtain written permission to conduct work at sites subject to CECRA judicial or administrative orders. Because CECRA contains this requirement for written permission, the

department is clearly spelling out what is required to obtain this permission. The department agrees with the commentor that an enforcement mechanism under CECRA would require legislative authorization. However, other avenues of potential enforcement, such as injunction, may be available to the department to enforce the provisions of 75-10-706(3), MCA, if the department determined such an action was appropriate.

COMMENT NO. 47: One commentor stated that the term "other relevant factors are considered by the department" should be stricken as it is vague. The commentor also stated that some members of the regulated community have experienced the department's unwillingness to prescribe actions allowed by CECRA on a site because those action have not been done before, which leads to frustration.

RESPONSE: It is difficult to anticipate every situation that may arise when the department is determining whether to delist a facility; therefore, the department has included the term "other relevant information or conditions" to provide the flexibility to consider all relevant information when making a delisting determination. When the department selects a remedial action, it must ensure that the remedial action complies with the factors outlined in 75-10-721, MCA, which includes consideration of new or innovative technology.

I. NEW RULE IV

COMMENT NO. 48: One commentor believes this rule contradicts other rule amendments that provide for the department to select a final permanent remedy in a record of decision.

RESPONSE: The department's directive in CECRA is to ensure protection of public health, safety and welfare and the environment. The final remedy for a site is identified in a record of decision prepared by the department. However, the department also approves interim actions as well as remedies proposed in voluntary cleanup plans outside of the record of decision. The November 2006 HJR 34 Study Report recommended that the department increase its approval of interim remedial actions. This rule addresses the report's "paralysis by analysis" metaphor and, by allowing sites to be reopened, encourages the department to approve interim or other remedial actions with a lesser degree of certainty as to the outcome.

COMMENT NO. 49: Two commentors stated that the rule is unfair if the department overrules the technical analysis and findings of the consultant and is allowed to experiment with different remedial technologies until a successful remedy is achieved.

RESPONSE: When selecting or approving a remedial action, the department carefully considers the supporting documents, including the technical analysis and findings presented by the LP. To ensure the opportunity for technical dialogue on required documents, NEW RULE II (ARM 17.55.112) has been revised to specifically provide for it. However, the department is the regulating entity and retains the authority to select or approve something different if warranted by the record or the department's own experts. The goal is not to experiment but rather to

get to a decision-point faster to ensure protection of human health and the environment. The department has considered the comments on this rule and determined no changes are needed as a result of this comment.

COMMENT NO. 50: One commentor stated that CECRA already authorizes the department to require remedial action, and CECRA presumes that prior to a final remedy other appropriate remedial actions will be required. Once the department issues a record of decision, the ability to seek cost recovery is triggered and the department cannot by rule affect legal mechanisms established by statute.

RESPONSE: This rule does not propose nor intend to modify the applicable statute of limitations outlined in CECRA. Rather, the goal is to allow the department to approve interim or other remedial actions faster, without having the benefit of full information that is available at the end of the RI/FS process when a record of decision is issued, or to require additional actions if new information indicates that such actions are warranted.

COMMENT NO. 51: One commentor stated that the rule is subjective because the term "failed" lacks definition. The commentor agrees that if a remedy is not performing as expected that actions need to be taken to ensure the success of a remedy and that the term "failed" should encompass concepts such as progress toward remedial action objectives.

RESPONSE: There are a variety of reasons a remedy may be considered a "failure." Some of those are attributable to the remedial action objectives such as reducing contaminant concentrations by 50%. Others may be that the remedy ultimately does not comply with environmental requirements, criteria and limitations, such as a failure to meet DEQ-7 water quality standards. This underscores the importance of identifying the goal of a remedial action before it is selected or approved. In response to this comment as well as other comments on this rule, the department has revised the rule to replace "failure" with a reference to protectiveness of public health, safety and welfare and the environment, using language from 75-10-721(1), MCA.

COMMENT NO. 52: One commentor believes that the rule creates uncertainty because even if the department approves a remedy, issues a record of decision, and the remedy is completed, the department may decide to start the process over, which allows continual reopeners of remedial action plans. This may create a disincentive for the department to thoroughly analyze remedies since, if one remedy does not work, the department can try again with something new. This will frustrate the goal of achieving final remediation plans.

RESPONSE: This rule is meant to directly address the November 2006 HJR 34 Study Report which recommended that the department take steps to avoid "paralysis by analysis," which it partially described as the perception that the department is slow to approve interim or other remedial actions because of the fear of remedy failure or that the department will be precluded from requiring additional actions. This rule addresses this issue by providing that, should remediation fail to be effective, the department may require additional remediation. Therefore, approval of interim or other actions may be made with a lesser degree of certainty

than if the department could not require additional actions. The rule is an appropriate balance of two goals: approving interim or other remedial actions faster while moving toward final cleanup. In addition, the applicable statute of limitations as well as the statutory requirements that the department's costs be reasonable and consistent with CECRA will ensure the department is not continually reopening a remedial action plan.

COMMENT NO. 53: One commentor indicated the rule is vague because there are no standards for determining when a final remedy can be reopened and that the circumstances in which a reopener is appropriate should be defined.

RESPONSE: As explained above, there are a variety of reasons why a remedy may not be successful. However, to make it clear that the failure is based on a failure to be adequately protective or comply with environmental laws, the rule has been revised in response to these comments. As revised, the rule reflects statutory criteria and provides predictability.

COMMENT NO. 54: One commentor indicated that the rule should be modified so as not to constrain the department's settlement powers and provided suggested language. For example, if a LP had a settlement agreement with the department to perform a particular remedy in exchange for a release of future liability, the rule should not constrain such a settlement.

RESPONSE: The rule is not meant to constrain the department's administrative settlement authorities and the rule has been clarified in response to this comment to indicate that this rule may not necessarily apply if there is a judicial or administrative order issued at the facility.

J. NEW RULE V

COMMENT NO. 55: One commentor stated that this rule essentially restates the 2009 statutory change to CALA and wanted to ensure that it was not the department's intent to say that costs incurred before a stipulated agreement was signed were not reimbursable.

RESPONSE: Section 75-10-744(3), MCA, is clear that it is the written petition to initiate the allocation process that triggers cost eligibility. This rule does not change the statutory provision.

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL QUALITY

/s/ John F. North
JOHN F. NORTH
Rule Reviewer

By: */s/ Richard H. Opper*
RICHARD H. OPPER, DIRECTOR

Certified to the Secretary of State, October 4, 2010.

BEFORE THE BOARD OF BARBERS AND COSMETOLOGISTS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 24.121.301 definitions, 24.121.1509 implements and equipment, 24.121.2101 continuing education, and 24.121.2301 unprofessional conduct	))))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On April 15, 2010, the Board of Barbers and Cosmetologists (board) published MAR notice no. 24-121-8 regarding the public hearing on the proposed amendment of the above-stated rules, at page 837 of the 2010 Montana Administrative Register, issue no. 7.

2. On May 10, 2010, a public hearing was held on the proposed amendment of the above-stated rules in Helena. Several comments were received by the May 18, 2010, deadline.

3. The board has thoroughly considered the comments received. A summary of the comments received and the board's responses are as follows:

Comments 1 through 10 reference proposed amendments to ARM 24.121.1509(11):

COMMENT 1: Two commenters stated that because teeth whitening products are approved by the U.S. Food and Drug Administration (FDA) through the Food, Drug, and Cosmetic Act (FD&C) to be sold as over-the-counter (OTC) retail cosmetic products, and are available for purchase at various retail locations and from television shopping channels, they should be available for purchase from salons. The commenters suggested the board amend the rule to prohibit only those teeth whitening products that are not prepackaged, self-administered, and not FDA/FD&C approved for OTC sale and use.

RESPONSE 1: The board notes that this rule amendment does not prohibit the sale of teeth whitening products in salons and shops. The board further explains that when a licensee assists a customer with the teeth whitening process, the product is then no longer considered self-administered.

COMMENT 2: One commenter stated that it would be a restriction of trade to forbid salons from selling teeth whitening products.

RESPONSE 2: The board disagrees and notes that this rule amendment does not prohibit the sale of teeth whitening products in salons and shops.

COMMENT 3: Two commenters stated that they have had their teeth whitened at a Montana salon, administered the product themselves, and were very satisfied with the results.

RESPONSE 3: The board points out that one commenter referred to salon personnel performing teeth whitening services. The board further notes that this amendment would not allow an individual to obtain teeth whitening services in a salon, as the board considers provision of these services outside the scope of practice of licensees under the board's jurisdiction.

COMMENT 4: One commenter noted that a department hearing examiner issued a proposed finding of fact in a recent teeth whitening case that a salon license allowed the salon owner to sell OTC cosmetic products and that such products may be applied to the customer.

RESPONSE 4: The board agrees that such findings of fact were made in that case.

COMMENT 5: Two commenters noted that the BleachBright teeth whitening product is a self-administered, OTC cosmetic retail product that is not restricted in its sale to dentists or medical doctors. The commenters asserted that BleachBright does not differ appreciably from the chemistry of many other currently available OTC whitening products.

RESPONSE 5: The board notes that it takes no issue when the teeth whitening product is self-administered by a nonlicensee, but if the product is provided as a service in a salon, it is no longer considered self-administered.

COMMENT 6: One commenter admitted selling BleachBright in the commenter's salon since January 2009, and asserted that it has been a great product and has not caused any client harm. The commenter stated that cosmetologists are always looking for products that enhance their clients' beauty and that this product has been a good source of revenue for the salon.

RESPONSE 6: The board responds that when any licensee uses a product, it must be within the scope of practice for that licensee, and cautions that not every beauty enhancement product will fall within the scope of practice for this board's licensees. The board further notes that the sale of teeth whitening products may continue to be a good revenue source, since the rule amendment does not restrict these products from being sold in salons.

COMMENT 7: A commenter admitted offering clients the use of a blue LED light in the commenter's salon and stated that the light is classified by the FDA as a class 1 medical device, which is the same as a toothbrush. The commenter asserted that the board interprets the definition of the practice of dentistry at 37-4-101, MCA, to include services or procedures that alter the color or physical condition of teeth, which would mean that a mother would need a license to brush her children's teeth.

RESPONSE 7: The board declines to interpret the Board of Dentistry's rules or laws, as they are outside this board's jurisdiction.

COMMENT 8: One commenter asserted that teeth whitening products can be used both correctly and incorrectly by consumers, but that the procedure poses no more risk than many other OTC products available. The commenter stated that it is not in the public's best interest to limit trained cosmetologists from providing teeth whitening services to the public and noted that cosmetologists currently perform many procedures with various chemicals that may be harmful without the proper training, including dying or bleaching hair or eyebrows or microdermabrasion.

RESPONSE 8: The board agrees that teeth whitening products can arguably be used both correctly and incorrectly by consumers. The board responds that cosmetologists are not trained to perform teeth whitening services, as there is no curriculum in school or tests on these services, and the board does not regulate teeth whitening services or products. The board points out that dying and bleaching hair and microdermabrasion are services within the scope of practice for Montana licensed cosmetologists, and that cosmetologists receive proper instruction, training, and testing on these services, and such services are regulated by the board.

COMMENT 9: One commenter opined that the board's enabling statute mentions esthetics, beauty culture, and beautification of the hair and body, and that teeth whitening falls under that category.

RESPONSE 9: The board disagrees that teeth whitening is within any of the board's enabling statutes through the definitions of esthetics, beauty culture, or beautification of the hair and body.

COMMENT 10: One commenter supported the rule change as a way to limit patient risks by prohibiting nondentists from providing tooth bleaching in nondental settings. The commenter asserted that nondental personnel lack the knowledge, resources, education, and license necessary to provide dental exams.

RESPONSE 10: The board appreciates all comments made during the rulemaking process.

COMMENT 11: One commenter opposed the change to ARM 24.121.2101(6), and stated that it is impossible to open and make available all approved continuing education (CE) to all instructor licensees because of proprietary information and trade laws.

RESPONSE 11: The board agrees with the commenter and is amending this rule to address the concerns regarding franchise agreements.

COMMENT 12: One commenter agreed with amending ARM 24.121.2101(8), so that instructor licensees, not schools, would be required to maintain CE records.

RESPONSE 12: The board appreciates all comments made during the rulemaking process.

COMMENT 13: One commenter opposed adding (12) to ARM 24.121.2101, which would prohibit licensees from repeating CE courses for credit within three years. The commenter stated that both the cosmetology industry and CE courses change constantly, and provided the example that Redken RAK and Symposium delivers new education every two years. The commenter asserted that the board should not prevent instructors from delivering new or improved information to students in any three-year period.

RESPONSE 13: The board notes that following the amendment, instructors will still be able to repeat a course, but the board will not assign CE credit for courses repeated within three years.

4. The board has amended ARM 24.121.301, 24.121.1509, and 24.121.2301 exactly as proposed.

5. The board has amended ARM 24.121.2101 with the following changes, stricken matter interlined, new matter underlined:

24.121.2101 CONTINUING EDUCATION - INSTRUCTORS/INACTIVE INSTRUCTORS (1) through (5) remain as proposed.

(6) All approved education must be open and available to all instructor licensees, unless it violates a franchise agreement.

(7) through (20) remain as proposed.

BOARD OF BARBERS AND COSMETOLOGISTS
WENDELL PETERSEN, 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 October 4, 2010

BEFORE THE BOARD OF MASSAGE THERAPY
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 24.155.301 definitions, and the adoption of NEW RULES I and II continuing education, unprofessional conduct	)))))	NOTICE OF AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On May 27, 2010, the Board of Massage Therapy (board) published MAR notice no. 24-155-3 regarding the public hearing on the proposed amendment and adoption of the above-stated rules, at page 1239 of the 2010 Montana Administrative Register, issue no. 10.

2. On June 17, 2010, a public hearing was held on the proposed amendment and adoption of the above-stated rules in Helena. Several comments were received by the June 25, 2010, deadline.

3. The board has thoroughly considered the comments received. A summary of the comments received and the board's responses are as follows:

COMMENT 1: One commenter supported the proposed amendment to the definitions rule, ARM 24.155.301, stating that the amendment is fair because it aligns the policies of the board on lapsed, expired, and terminated licenses with other licensing agencies.

RESPONSE 1: The board believes that this amendment is a fair and accurate implementation of the Legislature's intent.

COMMENT 2: Several commenters were generally in favor of New Rule I on continuing education (CE). A few of the commenters suggested that the board amend (5) to include correspondence courses with online courses, rather than with CE obtained through books and audio tapes.

RESPONSE 2: The board agrees that the suggested change is a logical and appropriate amendment, and the board is amending New Rule I accordingly.

COMMENT 3: One commenter specifically addressed New Rule II. Generally in favor of this new rule, the commenter opined that the board can only perform inspections in conjunction with discipline. Out of concern for client privacy, the commenter suggested that the board establish guidelines for such inspections.

RESPONSE 3: The board will place the topic of inspections and inspection guidelines on a future meeting agenda. The board acknowledges they may very well be faced with these issues in the future.

COMMENT 4: One commenter addressed the discussion of breast massage and spa techniques at a recent board meeting, and made suggestions as to the board's regulation in these areas.

RESPONSE 4: The board notes that these comments are outside the scope of this rules notice, but may be placed on a future meeting's agenda.

4. The board has amended ARM 24.155.301 exactly as proposed.

5. The board has adopted NEW RULE II (24.155.901) exactly as proposed.

6. The board has adopted NEW RULE I (24.155.801) with the following changes, stricken matter interlined, new matter underlined:

NEW RULE I CONTINUING EDUCATION REQUIREMENTS (1) through (5) remain as proposed.

(a) courses, seminars, or workshops taken in person, by correspondence, or online or by other electronic means;

(b) and (c) remain as proposed

(d) ~~correspondence courses,~~ books~~,~~ or audio tapes documented by notes summarizing the course content; and

(e) through (7) remain as proposed.

BOARD OF MASSAGE THERAPY
MICHAEL EAYRS, 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 October 4, 2010

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

In the matter of the amendment of ARM 24.101.403 fees, 24.101.413 renewal dates and requirements, and 24.171.401 fees	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On July 15, 2010, the Department of Labor and Industry (department) published MAR notice no. 24-171-30 regarding the public hearing on the proposed amendment of the above-stated rules, at page 1590 of the Montana Administrative Register, issue no. 13.

2. On August 9, 2010, a public hearing was held on the proposed amendment of the above-stated rules in Helena. No comments were received by the August 17, 2010 comment deadline.

3. The department has amended ARM 24.101.403, 24.101.413, and 24.171.401 exactly as proposed.

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 October 4, 2010

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the adoption of NEW RULE I pertaining to the carbon monoxide detector standard	)))	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On April 29, 2010, the Department of Labor and Industry (department) published MAR notice no. 24-320-244 regarding the public hearing on the proposed adoption of the above-stated rule, at page 978 of the 2010 Montana Administrative Register, issue no.8.

2. On May 24, 2010, a public hearing was held on the proposed adoption of the above-stated rule in Helena. Several comments were received by the June 1, 2010, deadline.

3. The department has thoroughly considered the comments received. A summary of the comments received and the department's responses are as follows:

COMMENT 1: Two commenters stated that the new rule should allow combination smoke detector and carbon monoxide detectors.

RESPONSE 1: The department notes that the rule does not prohibit the use of combination smoke detector/carbon monoxide detectors as long as the carbon monoxide detector is compliant with UL 2034.

COMMENT 2: One commenter opined that the detector placement requirements of the new rule are unmanageable in most rentals, because of the proximity between the kitchen and common area to the bathroom and bedrooms. The commenter questioned why a detector must be placed in the hallway, and instead suggested that carbon monoxide detectors be placed inside the bedrooms.

RESPONSE 2: The department notes that the new rule requires that detectors are installed outside each separate sleeping area in the immediate vicinity of the bedrooms, so that the alarm can detect the gas prior to its entry into the bedroom (sleeping area), and yet still be close enough to effectively alarm the occupants.

COMMENT 3: A commenter stated that it is very difficult to install new wiring in a hallway of a mobile home, as required by the new rule.

RESPONSE 3: The department explains that the rule does not require "hard wiring" of detectors and that battery-operated detectors (not requiring wiring) are allowed.

COMMENT 4: One commenter suggested amending the detector location language of (1)(a) to require "one detector per habitable level of the residence," and that "habitable" be defined to mean upstairs, main level, and occupied basements.

RESPONSE 4: The department notes that detection is designed to be focused around sleeping areas where people will require the most proximate alarm, especially based on the nature of the physiological effects that carbon monoxide has on mammals.

COMMENT 5: A commenter opined that the new rule unfairly targets landlords and the requirements should apply to all residential owners and commercial buildings.

RESPONSE 5: The department determined that the enabling legislation of 70-24-303, MCA, only directs the requirement to "dwelling units," as defined in the Landlord Tenant Act. The promulgation of a rule that required carbon monoxide detectors in all residences and commercial buildings would exceed statutory authority and be unenforceable.

COMMENT 6: One commenter opposed the new rule because it cannot be enforced by city building inspectors.

RESPONSE 6: The department notes that the enabling legislation of 70-24-303, MCA, prescribes the enforcement mechanism which specifically states that the rule is not to be enforced by the state building code, but only as provided in Title 70, chapter 24, part 4, which provides remedies under the Landlord Tenant Act.

COMMENT 7: Two commenters opposed the new rule, stating that there will be an increase in false detector readings that will impose a burden on public safety services and tenants if they have to pay for multiple responses to false readings, or for plumbers or other professionals to detect or locate the carbon monoxide source.

RESPONSE 7: The department notes that proper selection of a carbon monoxide detector and compliance with the UL 2034 standard should reduce false readings.

COMMENT 8: Two commenters requested clarification on the location or necessity of installing detectors in (1) a multi-family apartment building with a central combustible heat source, located in a mechanical room separate from the individual apartments; (2) a multi-family apartment building with a combustible heat source, located in an individual apartment; (3) a multi-family apartment building with all electric heat and appliances; and (4) a multi-family apartment building with an attached garage.

RESPONSE 8: The department concluded that the new rule clearly states that dwelling units containing fuel-fired appliances or having attached garages need to have detectors installed.

COMMENT 9: A commenter asked how to remain in compliance with the rule if the size of the dwelling unit prohibits compliance with the detector manufacturer's installation directions for minimum space clearance from a furnace.

RESPONSE 9: The department points out that the new rule rule requires the general location of installation with relation to sleeping areas and bedrooms. The manufacturer's installation instructions may vary from unit to unit, especially when specifying installation specifications NOT related to installation location.

COMMENT 10: One commenter stated the rule does not account for multiple rooms sharing a hallway and opined that when three bedrooms share the same small hallway, it is just as effective to have one detector as to have three and no reason to incur additional expenses in purchasing the additional detectors.

RESPONSE 10: The department notes that that the rule requires detectors to be installed outside of each separate sleeping area in the immediate vicinity of the bedrooms, which allows some economy when bedrooms are grouped together. If three bedrooms are grouped together, one detector placed outside the vicinity of the three bedrooms will suffice in lieu of three detectors (one in each bedroom).

COMMENT 11: A commenter suggested that the rule allow for the location of a detector at the door leading to an attached garage in dwelling units that have noncombustible (electric) heating systems because, in this case, carbon monoxide could only come from the attached garage.

RESPONSE 11: The department notes that detection is designed to be focused around sleeping areas where people will require the most proximate alarm, especially based on the nature of the physiological effects that carbon monoxide has on mammals. Although placement near the garage door as suggested would allow for more proximate detection, that location may not be close enough to sleeping areas to sound a sufficient alarm in many home or apartment layouts.

COMMENT 12: One commenter stated that requiring detectors on each level of the dwelling unit is excessive and suggested that requiring one detector per floor of a structure will provide safety and limit excessive cost.

RESPONSE 12: The department notes that detection is designed to be focused around sleeping areas where people will require the most proximate alarm, especially based on the nature of the physiological effects that carbon monoxide has on mammals.

COMMENT 13: One commenter stated that a subject as critical to health and safety as carbon monoxide requires more complexity than can be addressed in the single paragraph of the proposed new rule. Property managers, owners, and tenants will have many questions to ask about the rule's application, which is not addressed in the proposed rule.

RESPONSE 13: The department notes that the new rule relies on two additional sources of information to guide property managers, owners, and tenants with their questions which are the UL 2034 standard and the individual detector's manufacturer's installation instructions.

COMMENT 14: One commenter stated that the rule should allow either a plug-in type or a battery type device and not hard-wired types, as the latter are cost prohibitive.

RESPONSE 14: The department notes that the rule does not require "hard wiring" of detectors and that battery operated detectors (not requiring wiring) are allowable.

COMMENT 15: A commenter stated that, since detector manufacturers stand to profit from requiring an abundance of detectors, the rule should state where detectors are to be placed instead referring to manufacturer's instructions.

RESPONSE 15: The department determined that the new rule clearly requires detectors outside of each separate sleeping area in the immediate vicinity of the bedrooms. Reference to the manufacturer installation instructions will provide further details on how to install the detector, such as battery installation and proper anchoring into various wall/ceiling materials.

COMMENT 16: One commenter asserted there are a limited number of, if any, cases of carbon monoxide poisoning in a properly finished dwelling.

RESPONSE 16: The department notes that the enabling legislation of 70-24-303, MCA, only directs the requirement to "dwelling units," as defined under the Landlord Tenant Act. The rule does not address the quality of properly finished dwellings, as not all dwellings are properly finished and even when they are, fuel-fired appliances can develop venting problems over time, and door seals between the garage and dwelling unit can be removed or deteriorate, especially when there is a lack of proper maintenance or other unquantifiable variables.

COMMENT 17: A commenter stated that tenants should be responsible for maintaining carbon monoxide detectors and any costs associated with responding to false alarms.

RESPONSE 17: The department notes that the new rule does not dictate responsibility for maintenance and any costs associated with responding to false alarms to any person.

COMMENT 18: One commenter noted that people with respiratory problems need the alarm to sound on carbon monoxide detectors at 30 PPM in 60 minutes, rather than at 70 PPM in 60 minutes.

RESPONSE 18: The department notes that the rule sets the minimum standards for the carbon monoxide detectors, provided by the UL 2034 standard, and does not prohibit individuals from exceeding the minimum standard.

COMMENT 19: One commenter suggested that the best location for detectors is near the ceiling of hallways to prevent access by children.

RESPONSE 19: The department concluded that detectors should be installed outside each separate sleeping area in the immediate vicinity of the bedrooms, and as long as the manufacturer of the specific detector allows for ceiling installation and the location is compliant with the rule, the rule requirement would be satisfied.

4. The department has adopted NEW RULE I (24.320.301) exactly as proposed.

/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 October 4, 2010

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

In the matter of the adoption of New Rules I through X pertaining to permissive licensing of drop-in child care facilities	))))	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On May 13, 2010, the Department of Public Health and Human Services published MAR Notice No. 37-511 pertaining to the public hearing on the proposed adoption of the above-stated rules at page 1165 of the 2010 Montana Administrative Register, Issue Number 9.

2. The department has adopted New Rule I (37.95.1101), IV (37.95.1120), VII (37.95.1150), VIII (37.95.1160), IX (37.95.1170), and X (37.95.1180) as proposed.

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

NEW RULE II (37.95.1105) APPLICANT REQUIREMENTS FOR DROP-IN DAY CARE CENTERS (1) remains as proposed.

(2) An applicant for a drop-in day care center license shall:

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

(b) meet the requirements of ARM 37.95.106 regarding the submission to the department of:

(i) remains as proposed.

(ii) an annual approved inspection report from public health authorities certifying the satisfactory completion of training or a certificate of approval following inspection by local health authorities in accordance with ARM 37.95.205, 37.95.206, 37.95.207, 37.95.210, 37.95.214, 37.95.215, ~~37.95.220, 37.95.221,~~ 37.95.225, 37.95.226, and 37.95.227.

(c) and (d) remain as proposed.

AUTH: 52-2-704, MCA
IMP: 52-2-702, 52-2-721, 52-2-722, 52-2-723, 52-2-724, 52-2-731, MCA

NEW RULE III (37.95.1110) DROP-IN DAY CARE CENTER PLAN OF OPERATION (1) The plan of operation must include:

(a) through (h) remain as proposed.

(i) assurances as to how the program intends to comply with the safety requirements required by ARM 37.95.121;

(j) assurances as to how the program intends to comply with the health care requirements of ARM 37.95.139 and health habits of ARM 37.95.184;

(k) assurances as to how the program intends to comply with the storage and administration of medications required by ARM 37.95.182 and the first aid requirements of ARM 37.95.183;

(l) assurances as to how the program intends to comply with the staff records requirements of ARM 37.95.160;

(i) and (j) remain as proposed but are renumbered (m) and (n).

AUTH: 52-2-704, MCA
IMP: 52-2-702, 52-2-723, 52-2-724, 52-2-731, MCA

NEW RULE V (37.95.1130) EMERGENCY CARDS AND HEALTH HISTORY FORMS (1) and (2) remain as proposed.

(3) If the center does not allow enrollment of children without medical verification of immunization status, and the parent or legal guardian does not have verification of the child's immunization status, then the parent or legal guardian shall indicate in writing that to the best of the parent's or legal guardian's knowledge and belief, the child is up to date with the schedule of immunizations for the child's age~~;~~. This acknowledgement may suffice as verification of immunization status.

(4) remains as proposed.

AUTH: 52-2-704, MCA
IMP: 52-2-702, 52-2-723, 52-2-731, MCA

NEW RULE VI (37.95.1140) EMERGENCY SAFETY REQUIREMENTS

(1) In addition to the requirements imposed by the fire marshal or the fire marshal's designee, and the requirements of ARM 37.95.121, the following criteria for emergency safety must also be met:

(a) the operator shall ~~ensure~~ record that staff members and children practice procedures at least monthly to be used in the event of a fire or other emergency requiring escape from the center;

(b) through (c)(ii) remain as proposed.

(2) Telephone numbers of the hospital, police department, fire department, ambulance, and the Emergency Montana Poison Control Center (800) 222-1222 must be posted by each telephone.

AUTH: 52-2-704, MCA
IMP: 52-2-702, 52-2-731, 52-2-734, 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 comment was received supporting the regulation of drop-in care facilities.

RESPONSE #1: The department thanks the commenter for their support.

COMMENT #2: One commenter asks the department to clean up the current set of day care facility rules before finalizing and implementing the proposed rules under this rule package.

RESPONSE #2: The department is publishing these new rules for a new category of licensure. The rule referred to by the commenter is outside the scope of these rules.

COMMENT #3: A commenter is concerned that the mandatory licensure of drop-in child care facilities will have an impact on registered sanitarian duties.

RESPONSE #3: Under this set of proposed new rules, the licensure of drop-in child care facilities is not mandatory; rather it is a permissive licensure. However, if a drop-in child care facility does request licensure, it is the responsibility of the local health department to inspect the facility under the authority and responsibilities outlined in 52-2-735, MCA, as it is for any other day care center operation.

COMMENT #4: A commenter, while concerned with some of the provisions of the new rules, understands the department is subject to certain statutory limitations that exist for this category of care.

RESPONSE #4: The department appreciates the comment.

COMMENT #5: One commenter supports language giving licensing staff authority to determine whether drop-in care centers should be licensed as a regular-based facility. The commenter would like to see specific language to this extent incorporated into the rule.

RESPONSE #5: The department already has this authority under 52-2-741, MCA, and exercises that authority when appropriate. There is no need to add additional language to this rule package.

COMMENT #6: One comment was received requesting clarification regarding the definitions of "regular" versus "irregular" as stated in New Rule I (37.95.1101).

RESPONSE #6: Regular basis is defined in 52-2-703, MCA and irregular, intermittent, and occasional basis is defined in New Rule I (37.95.1101). For purposes of these rules, drop-in child care is defined as irregular, intermittent care which occurs on an occasional basis. Care in traditional day care settings is much more structured and occurs with regularity.

COMMENT #7: One comment was received suggesting the inclusion of before and after school programs in the definition of drop-in care.

RESPONSE #7: The department disagrees. While after school programs can fall into the category of care not requiring licensure, this rule is specifically designed to address the permissive licensure outlined in 52-2-721, MCA. The statute does not specifically address the before and after school issue. To add this to the proposed rule would be exceeding the scope of the enabling legislation.

COMMENT #8: One commenter indicates that licensing of drop-in care facilities should not be elective.

RESPONSE #8: Section 52-2-721, MCA, mandates that the department develop rules for the permissive licensure of these facilities. Therefore, requiring drop-in day care centers to become licensed is not within the department's authority.

COMMENT #9: One commenter points out that the inclusion of ARM 37.95.220 and 37.95.221 into New Rule II (37.95.1105) is not appropriate as these sections have been repealed. Therefore, the commenter requests that the department remove the references.

RESPONSE #9: The department agrees and will amend this rule accordingly.

COMMENT #10: One commenter requests that the department should add references to ARM 37.95.121, 37.95.139, 37.95.160, 37.95.182, and 37.95.183 because it is assumed by the commenter that these rules are enforced through the local health departments.

RESPONSE #10: The department agrees and will include references to those specific ARM cites as part of the facilities plan of operation outlined in New Rule III (37.95.1110). While local health departments may be reviewing these regulations as part of their duties under 52-2-735, MCA, they do so with regard to day care centers and only then in a limited capacity.

COMMENT #11: Two comments were received disagreeing with the language in New Rule II (37.95.1105) which allows "exemptions" to child immunizations.

RESPONSE #11: Section 52-2-704, MCA requires the department to provide a process for "exceptions" to the immunization requirements for regular-based centers. The department is not providing for exemption from those requirements. New Rule V (37.95.1130) specifies the department's expectations with regard to a center's responsibilities surrounding requirements for immunizations. The department supports immunization for vaccine preventable illnesses.

COMMENT #12: Two comments were received requesting that the department include references to ARM 37.95.611 from this rule.

RESPONSE #12: The department disagrees. The proposed rules are minimum requirements for licensure of drop-in day care centers. Drop-in day care centers

may choose to exceed any of the minimum requirements outlined by these rules including offering support service space.

COMMENT #13: One commenter suggests the department's proposal should include a reference to ARM 37.95.106 as it pertains to the number of fire and evacuation drills.

RESPONSE #13: New Rule II(2)(a)(i) (37.95.1105) excludes ARM 37.95.106 as it pertains to the number of fire and evacuation drills, however, New Rule VI(1)(a) (37.95.1140) requires that staff members and children practice procedures at least monthly to be used in the event of a fire or other emergency requiring escape from the center. Due to the irregular nature of the drop-in day care center, a monthly "drill" was established whereas other day care centers must conduct and document eight emergency evacuation practices each month. The department will strengthen the rule by requiring a record of the "drills".

COMMENT #14: One commenter is concerned because references to ARM 37.95.602 and 37.95.613 pertaining to plans of operation, types of activity materials, and equipment are not included in this rule.

RESPONSE #14: The operator of this type of facility must submit a plan of operation listing the types of materials and equipment to be used and the schedule of activity for the children. The department believes the language in New Rule III (37.95.1110) is sufficient. When considering the purpose and rationale for providing care in drop-in day care centers, it is not unreasonable to expect that the services provided will not be as formal or elaborate as those provided in traditionally licensed day care centers. Drop-in day care centers are not intended to replace traditional day care centers, but to supplement child care services on an irregular, intermittent, or occasional basis.

COMMENT #15: One comment was received expressing concern about the department's exclusion of night care in New Rule II (37.95.1105). The concern focused on the need to ensure quality care during night time hours.

RESPONSE #15: The rules as proposed are intended to be minimum standards only. Programs choosing to license as drop-in day care centers must submit a plan of operation which will describe all services provided by the center. If the facility chooses to provide night care service, this service must be outlined in the plan of operation as specified in New Rule III (37.95.1110) and must be approved by the department.

COMMENT #16: One comment asks the department to include a requirement for an infection control plan that would be approved by the local health department.

RESPONSE #16: The department sees merit in this suggestion and in an effort to ensure facilities will have an infection control plan that is reasonable, a reference to ARM 37.95.184 has been added to New Rule III (37.95.1110) but does not go so far

as to indicate that the plan must be approved by the local health department. Such a requirement would exceed the requirements for regular-based day care centers.

COMMENT #17: One comment indicates that New Rule IV (37.95.1120) is confusing and that perhaps the department could use a different format or formula to make the issue of indoor and outdoor space more definitive.

RESPONSE #17: The language is consistent with what is currently used in regular-based child care facilities when dealing with variances between indoor and outdoor space. Department staff plans to use the existing measure to determine compliance should this become an issue in drop-in day care facilities.

COMMENT #18: One commenter states that New Rule V(2) and (3) (37.95.1130) appear to conflict. The commenter could not tell whether the rule requires proof of immunization status.

RESPONSE #18: Section 52-2-704, MCA requires the department to provide for "exceptions" (not exemptions) to the department's immunization requirements for drop-in day care centers. The department believes by implementing the rule as proposed, we have accomplished the statutory mandate. However, the department has rewritten the rule to clarify the intent.

COMMENT #19: A commenter feels the language in New Rule V(2) (37.95.1130) pertaining to public notice of immunization policy is insufficient. The commenter would like to see the rule require that notification be posted on an 8.5" by 11" placard.

RESPONSE #19: The department believes the rule is sufficient and consistent with other regulatory directives regarding posting of information.

COMMENT #20: A commenter suggests that the language in New Rule V(3) (37.95.1130) is not sufficient to protect children from vaccine preventable illnesses.

RESPONSE #20: Please refer to the responses in comment #11 and comment #18 above. The department believes the measures discussed will be sufficient.

COMMENT #21: A commenter recommends that additional emergency numbers should be required to be posted as provided in ARM 37.95.613(6).

RESPONSE #21: The department believes the rule as written is sufficient, but in order to be consistent with regular child care licensing standards has added some of the language from ARM 37.95.613(6) to New Rule VI (37.95.1140). It is unreasonable to expect a drop-in day care center to post the parent's numbers, so this language was not added to New Rule VI (37.95.1140).

COMMENT #22: One commenter suggested that the information required by New Rule VI (37.95.1140) should be updated every 12 months and should be posted in the centers.

RESPONSE #22: The department agrees emergency information should be kept up to date. New Rule II (37.95.1105) requires drop-in care facilities to be subject to annual fire marshal inspections while New Rule VI (37.95.1140) mandates that recommendations from this annual inspection and additional emergency safety requirements be met. Additionally, the language specified in New Rule VI(1)(c)(ii) (37.95.1140) indicates posting of the annual inspections is required.

COMMENT #23: One commenter requests that drop-in day care facilities be subject to the same food service requirements as regular-based day care facilities.

RESPONSE #23: The rule as proposed requires that children be fed meals and snacks. The difference between drop-in and regular child care centers is that the proposed rule allows the facility to opt out of preparing meals within the facility and may require parents to supply meals for their children. The provision of snacks and meals is a reasonable requirement, but due to the irregular nature of care, this can be a difficult task for a program operator. As such, the department has adopted the requirement that parents supply the meal and or snack if the facility opts out of preparing it themselves.

COMMENT #24: One comment indicates that the requirements contained in New Rule VIII (37.95.1160) are unclear.

RESPONSE #24: Please see the response to comment #23 above.

/s/ John Koch
Rule Reviewer

/s/ Laurie Lamson for
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State October 4, 2010.

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

In the matter of the adoption of new rule I regarding the nonproprietary nature of utility executive compensation	)))	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On April 15, 2010, the Department of Public Service Regulation, Montana Public Service Commission published MAR Notice No. 38-2-208 pertaining to the public hearing on the proposed adoption of the above-stated rule at page 875 of the 2010 Montana Administrative Register, Issue No. 7.

2. The commission has adopted New Rule I (ARM 38.2.5031), but with the following changes from the original proposal, new matter underlined, deleted matter interlined.

RULE I (38.2.5031) PUBLIC UTILITY EXECUTIVE COMPENSATION (1) If the commission is in possession of executive compensation information, the commission will not afford proprietary, confidential treatment to the compensation of the three highest-paid, Montana-based employees. ~~Each year, jurisdictional public utilities shall submit to the commission, the names and total company compensation including,~~ Total compensation includes, but is not limited to base salary, short-term (annual) incentive plan benefits, long-term incentive plan benefits, stock options, any supplemental benefit plans and perquisites, and compensation from the public utility affiliates of their executive management personnel in Montana. ~~Executive management personnel in Montana are those persons whose responsibilities are material to the public interest determinations of the commission and whose total compensation exceeds $100,000 per year.~~ The total compensation ~~utility executive total compensation~~ information of the three highest-paid, Montana-based utility employees will ~~not be treated as confidential information and will~~ not be protected from public disclosure through issuance of a protective order by the commission. If a public utility or a public utility employee contends that the circumstances of the privacy of an employee's particular compensation warrants issuance of a protective order despite the wording set forth above, the utility or employee may seek issuance of a protective order and set forth the circumstances that may justify issuance of such an order.

~~(2) When a protective order is requested for salary information because the duties of the position are not material to the public interest determination by the commission, the commission will not issue a protective order if the position's duties include any of the following:~~

~~(a) Oversee diverse activities for multiple work units or major organizational functions and which have responsibility for integrating work or multiple organizational units to align them with the company's established goals and objectives;~~

~~(b) Secure and allocate human and financial resources to accomplish goals; and~~

~~(c) Develop and establish organizational standards, goals, objectives, business plans and evaluate organizational performance.~~

~~(3)~~ (2) Adoption of this rule does not preclude the commission from seeking and securing other information from regulated businesses.

AUTH: 69-3-103, MCA
IMP: 69-3-102, 69-3-106, 69-3-201, 69-3-203, 69-3-330, MCA

3. The commission has thoroughly considered the comments and testimony received. A summary of the comments received and the commission's responses are as follows:

Comment 1:

Cedron Jones of Helena, Montana provided oral comments at the rulemaking hearing. Mr. Jones supported the proposed rule but proposed that the commission remove the criteria that the rule covers only those management personnel who are located in Montana. Mr. Jones reasoned that with the growth in private equity firms, the commission may be regulating private firms at some point in the future and, if that were the case, the Securities and Exchange Commission rules on disclosure of employee compensation would not apply.

Mr. Jones asserted that persons working for publicly regulated utilities should have no expectation of privacy regarding their income, just like government employees.

Lastly, Mr. Jones maintains that a key element of trust in government is open government, that is, easy public access to any and all information held by the government, therefore if the commission has executive salary information, the public should have access to such information.

Response 1:

The commission concludes that the revised rule adopted herein appropriately responds to, and is supportive of, the concerns expressed by Mr. Jones. The adopted rule would provide access to the compensation information of the three highest-paid, Montana-based public utility employees if such information is in the possession of the commission. The commission is persuaded that the public no longer recognizes that a subjective expectation of privacy as regards his/her salary is reasonable for the highest-paid, Montana-based utility employees.

Comment 2:

Bob Brock, representative of the International Brotherhood of Electrical Workers (the IBEW) appeared in support of the proposed rule at the May 18 hearing. The IBEW represents the vast majority of utility and telecommunication workers in the state of Montana. Mr. Brock stated that executive compensation of all of the cooperatives in Montana was available when the co-ops file their Form 990s each year in compliance with Internal Revenue Service regulations. In addition, compensation information for labor organization members is available through the U.S. Department of Labor. It is no secret what linemen in Montana receive as it is often available through the U.S. Dept. of Labor's database of collective bargaining agreements. The IBEW feels that the executive compensation information available to the commission should also be available to the general public.

Response 2:

The commission concludes that the revised rule adopted herein appropriately responds to, and is supportive of, the comments of Mr. Brock. The adopted rule would provide access to the compensation information of the three highest-paid, Montana-based public utility employees if such information is in the possession of the commission. The commission is persuaded that the public no longer recognizes that a subjective expectation of privacy as regards his/her salary is reasonable for the highest paid, Montana-based utility employees.

Comment 3:

Both oral testimony and written comments were received from counsel for Montana Dakota Utilities Co. (MDU) and Mountain Water Company (MW) (collectively, MDU/MW). MDU/MW maintain that the commission misapprehends the controlling issue on the subject of executive compensation. MDU/MW contend that the commission mistakenly believes that the utility industry is protecting the compensation information as such information is proprietary. The commission's notice of rulemaking indicates that the commission is considering adopting a rule regarding the nonproprietary nature of executive utility compensation. The primary basis for the utilities' refusal to publicly disclose the salaries and wages of their employees is that their employees are entitled under Art. II, sec. 10 of the Montana Constitution to maintain the privacy of their financial affairs. MDU/MW contend that the proposed rule violates the constitutionally protected individual right of privacy belonging to each of the utilities' Montana employees. The Proposed Rule I is not a "public's right to know" issue, for it does not address information in the possession of the commission; rather, what it does is require information that is in the possession of utilities to be produced for public scrutiny. Section (1) of the proposed rule is a demand for compensation information in the possession of the utilities and does not involve the Montana Constitution Article II, sec. 9 balancing test, *viz.,* whether the person's right of privacy clearly exceeds the public's right to know. The commission's proposed rule exceeds the commission's jurisdiction in that it determines that the utility employees do not have a constitutional right of privacy that maintains the privacy of their compensation.

An individual has a constitutionally recognized right to maintain the privacy of information under Article II, sec. 10 of the Montana Constitution if: (1) the individual has a reasonable expectation of privacy, and (2) society is willing to recognize the expectation as reasonable. *Missoulian v. Bd. of Regents,* 207 Mont. 513, 675 P.2d 962 (1990). The reasonableness of the expectation is reflected in the fact that individual tax records are confidential under both Montana and federal law. *See* Section 15-30-511, MCA; 26 U.S.C. § 6103. MDU/MW further state that the Montana Supreme Court has held that employee specific financial data must be protected against public disclosure when the state of Montana reviews financial information in an administrative proceeding. *Montana Healthcare Association v. State Fund,* 256 Mont. 146, 152, 845 P.2d 113 (1992). Counsel for MDU/MW could envision one or more public utility executives' compensation becoming an issue in a rate case, but he hadn't seen such a circumstance yet. The proposed rule attempts to set broad brush policy when the issue (compensation disclosure) is fact-specific and must be addressed on a case-by-case basis.

MDU/MW state that previous iterations of the proposed rule limited public disclosure to the "Top Ten" compensated Montana employees of each jurisdictional utility. The noticed proposed rule abandoned the Top Ten approach and mandates disclosure of all salary and benefits when "[T]otal compensation including, but not limited to base salary, short-term (annual) incentive plan benefits, long-term incentive plan benefits, stock options, and supplemental benefit plans and perquisites, exceeds $100,000 per year." Proposed Rule I(1). This change has the effect of broadening the scope of the proposed rule, not narrowing the scope from the prior iterations. Mountain Water believes that when health and other benefits are added, the $100,000 total compensation threshold probably equates to about a $60,000 to $70,000 per year salary or wage. As many as 20 of Mountain Water's Montana employees might be subject to the commission's proposed reporting requirement. MDU believes that under the broadened definition, it would have to publicly disclose salary and wage information for nearly 60 of its Montana employees, 40 of which would be bargaining unit employees.

MDU/MW also maintain that the scope of executives under the proposed rule to include any employee "position material to the public interest determination by the commission" is unworkable. The commission has supplied no definition of this amorphous concept in the proposed rule. MDU/MW contend that it will be impossible to apply the concept on a case-by-case basis in a contested case proceeding, which Proposed Rule I(2) appears to address. Since discovery in a contested case proceeding occurs long before the commission makes a decision, there is no way to determine what the commission's "public interest determination" will be in that particular proceeding.

Response 3:

The commission's revised rule eliminates the original wording requiring annual filings of executive compensation information, as well as the "material-to-the-public-interest" standard from the originally proposed rule. The revised adopted rule discards the $100,000 per year criteria and reduces the number of possible employees affected. The commission also eliminated the description of executive functions concluding that focusing on the three highest-paid, Montana-based public utility employees would include persons that possessed the requisite authority to perform executive-type tasks. The commission finds that these contemplated requirements in the original rule were unworkable, as was contended by several commenters. The revised rule does contemplate that the commission will be in possession of compensation information, e.g., during a contested case proceeding setting rates for a public utility. When the commission is in possession of such information, the commission will not issue protective orders to prevent the disclosure of compensation information of the three highest-paid, Montana-based public utility employees. Disclosure of other utility employee personnel compensation information will be determined on a case-by-case basis.

The commission finds that in order to be classified as a public utility in Montana, the entity must have devoted property to a use in which the public has an interest; in effect, the owner of the property grants to the public an interest in the use of the property so devoted. *See* 69-3-1-1, MCA, and *Great N. Util. Co. v. P.S.C.,* 88 M 180, 293 P. 294 (1930). Once deemed a public utility, the very existence of the public utility depends upon monies provided through rates by its ratepayers. It does not strike the commission as being discordant to reason that the ratepayers of a public utility would want to know and ought to know, how their money is spent. There are undoubtedly exceptions to the public's right to know any and all public utility-possessed information, e.g., trade secrets possessed by the public utility, but the commission concludes that the ratepayers have a right to know the compensation paid the highest paid public utility employees. The commission determines in the revised adopted rule that this right to know governs the total compensation of the three highest-paid, Montana-based public utility employees. Should the issue of the public's right to know compensation information of other public utility employees, the commission will consider protection from disclosure versus the publics' right to know on a case-by-case basis. The commission finds that the public does not recognize that any subjective expectation of privacy as regards their compensation held by the highest paid utility employees is a reasonable expectation.

Moreover, the commission finds precedent addressing the private or public nature of government employee salaries to be analogous. The Attorney General of Montana determined that no privacy right is infringed by the disclosure of a state employee's salary. *See Opinion No. 109* (1980), *38 Op. Atty Gen. Mont. 375*. The Attorney General favorably cited a Michigan decision that found that salaries of state university employees were not "intimate details" of a "highly personal" nature and that "disclosure of this information would not thwart the apparent purpose of the exemption to protect against the highly offensive public scrutiny of totally private

personal details." The Michigan decision further found that "The precise expenditure of public funds is simply not a private fact." *Id.* Even if the information being sought did infringe on the privacy of the employees, it would have to be disclosed because "[t]he minor invasion occasioned by disclosure of information which a university employee might hitherto have considered private is outweighed by the public's right to know precisely how its tax dollars are spent." *Id.* Moreover, the Attorney General did not find it necessary to consider the privacy of government employees on a case-by-case basis in order to conclude that:

> "Even if the information you have asked about [a state employee's salary] did infringe on an individual's privacy, Montana's balancing test likewise would require it to be disclosed." *Id.*

The analogy is that disclosure of public utility employee compensation either does not involve a private fact, or that it is at most, a minor invasion. Ratepayers have a right to know how the revenue derived from assessed utility rates is being spent by the business that has devoted property to a public purpose, i.e., a business that is clothed with a public purpose.

The commission finds support for its revised rule in the general rule that government records are open to the public, and the burden placed upon the custodian of the records is to affirmatively show the demands of individual privacy clearly outweigh the merits of public disclosure when balancing the merits of public disclosure and individual privacy before protection is afforded the information. *Opinion No. 107, 37 Op. Atty Gen. Mont. 460 (1978)*.

The adopted rule does not contemplate disclosure of federal or state income tax records; it does not address an individual's expenses or investments that may be reflected on tax records; it does not require disclosure of income from a source unrelated to the public utility. It simply would require disclosure of the total compensation paid the three highest-paid, Montana-based public utility employees if the commission were asked for such information that was in the agency's possession.

Comment 4:

The Montana Telecommunications Association (MTA) provided oral and written comments on the proposed rule. The MTA states that the proposed rule violates clear Montana Supreme Court case law that requires, in every instance, a case-by-case determination of the public's right to know as measured against an individual's expectation of privacy. *Havre Daily News, LLC v. City of Havre,* 2006 MT 215, 333 Mont. 331, 142 P.3d 864. The balancing of the inherent tension between the constitutionally protected right of privacy and the constitutionally guaranteed public right to know requires a factual determination of whether the individual whose privacy interest is at stake has an actual expectation of privacy. *Id.,* ¶ 23, citing *Bozeman Daily Chronicle v. Police Department,* 260 Mont. 218, 224, 859 P.2d 435,

439 (1993). Following that determination, a factual inquiry must be made into whether or not society is prepared to recognize that expectation of privacy as reasonable. MTA states that the Supreme Court went on to note that the following inquiries may be relevant to that factual analysis: (1) the attributes of the individual; (2) the particular characteristics of the discrete piece of information; and (3) the relationship of that information to the public duties of the individual. *Id.* The MTA also cites *Disability Rights Montana v. State,* 2009 MT 100, 350 Mont. 101, 207 P.3d 1092 for the proposition that an agency could not categorize information that would always be released. The court rejected that approach and found that the determination of the right to know vis-à-vis the right to privacy is always a fact-specific inquiry that can never be short-circuited by rule or policy. *Id.,* ¶ 23. The MTA also cites *Associated Press, Inc. v. Department of Revenue,* 2000 MT 160, 300 Mont. 233, 4 P.3d 5 in which the Department of Revenue (DOR) attempted to implement a rule that declared tax returns and other documents it received relating to the coal severance tax to be confidential. The court rejected the DOR's categorization of tax documents as private on a "wholesale basis" without engaging in the balancing test required by Article II, sec. 9. The court found the regulation to be unconstitutional on its face because there was no mechanism that would allow for disclosure if a proper showing was made under the right-to-know provision of the constitution. *Id.,* 300 Mont. at ¶ 26. The MTA states that the commission's proposed rule presents the precise scenario as that rejected in *Associated Press*, except in the other extreme. Here the commission is attempting to wholesale categorize documents as public, without any mechanism by which they may be kept confidential. The commission cannot avoid the balancing test by implementing a rule that predetermines information as public.

The MTA further comments that an individual's personal income has long been recognized as a matter of personal privacy. *Citing* 26 U.S.C. § 6103 (income tax returns are confidential); 15-30-303, MCA, (state income tax information is confidential), and Montana Attorney General Opinion, 43 Op. Atty Gen. No. 25 (1989).

The MTA also questions the commission's reliance of cited statutes as authority for adoption of the proposed rule. The commission cited 69-3-102, MCA, which sets forth the general power and ratemaking authority of the commission. MTA contends that the commission already has the information addressed by the rulemaking in its possession. The commission has the ability to use the information to exercise its powers under Title 69, but it does not have the authority to disseminate this information to the public at large. Moreover, the MTA argues that the other statutory cites relied upon by the commission for this rulemaking, *viz.,* sections 102, 106, 201, 203 and 330 of Part 3, Title 69 do not confer upon the commission a statutory basis for requiring the production of the information and the public disclosure of such information. Section 102 affords the commission the authority to regulate, supervise, and control public utilities. Section 106 gives the commission the authority to inquire into the management of the business of public utilities. Section 201 requires utilities to provide adequate service at reasonable

charges. Section 203 requires utilities to provide an annual report to the commission. Section 330 authorizes the commission to fix the rates of public utilities at just and reasonable rates. The MTA maintains that adoption of this administrative rule would be an arbitrary or capricious disregard for the purpose of the authorizing statute and under such circumstances, a court may declare the rule invalid. *See Pennaco Energy, Inc. v. Montana Board of Environmental Review,* 2008 MT 425 ¶ 20, 347 Mont. 415 ¶20, 199 P.3d 191 ¶ 20. A rule comports with the Montana Administrative Procedure Act only if it is (a) consistent and not in conflict with the applicable statute; and (b) reasonably necessary to effectuate the purpose of the statute. The MTA contends that the commission has met neither of these requirements. None of the statutes cited by the commission gives it the authority to *carte blanche* make certain information available to the public at large.

The MTA further comments that adoption of the proposed rule will harm the individuals whose information is made public, will harm the companies who are required to disclose the information, and it will harm the state of Montana. Executives living elsewhere would be reluctant to secure employment in Montana if their compensation was public information. Losing these executives would harm Montana businesses. Moreover, revealing such compensation packages may allow competing companies to recruit personnel.

The MTA asserts that the threshold $100,000 per year compensation level incorporated into the proposed rule is arbitrary and the commission has no basis supporting keeping confidential compensation information below that level, or basis to publicly disclose compensation information above that level.

The MTA contends that the privacy interest at stake is a fundamental right under the Montana Constitution. As such, the commission's proposed rule abrogating an individual's right to privacy in compensation information is subject to strict scrutiny analysis. *Montana Environmental Information Center v. Montana DEQ,* 1999 MT 248, 296 Mont. 207, 988 P.2d 1236. The arbitrary selection of compensation levels subject to disclosure together with application of an undefined "public interest" standard cannot successfully withstand strict scrutiny for the commission must show a compelling state interest for its action. *Id*., at ¶ 61. The compelling state interest must be closely tailored to effectuate only that compelling state interest. *Shapiro v. Thompson,* (1999), 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600. Moreover, the commission must show that its choice of action is the least onerous path that can be taken to achieve its objective. *State v. Pastos* (1994), 269 Mont. 43, 887 P.2d 199. The MTA contends that the commission is not able to make any of these requisite showings. The commission has not identified what its objective is, or its need for this rulemaking proceeding let alone attempted to explain what compelling state interest justifies its action.

The MTA asserts that the proposed rule is void for vagueness citing *Monroe v. State,* (Mont. 1984), 265 Mont. 1, 8, 873 P.2d 230, 234. In *Monroe,* the Montana Supreme Court noted that the issue of vagueness with regard to a statute or

ordinance "can be raised in two different connotations: (1) whether it is so vague the law is rendered void on its face; or (2) if it is vague as applied in a particular circumstance." The MTA contends that it is impossible for employees to know whether or not their salaries will be subject to public disclosure in any given year; therefore, the proposed rule is void on its face and will be void as applied to any particular situation.

Response 4:

The commission's Response No. 3 above responds to many of the MTA assertions. The commission finds that a public utility employee's subjective expectation of a right of privacy to his/her utility compensation is more akin to a governmental employee's subjective expectation that his/her governmental compensation would not be publicly disclosed, than a private business' employee's privacy expectations. Disclosure is a minor invasion outweighed by the rate-paying public's right to know. Public utility compensation information does not constitute intimate details of a highly personal nature of a public utility employee. As described in Response 3 above, a public utility is a business clothed with a public purpose and the utility has dedicated property to a public use. The rate-paying public has a right to know how a public utility is expending the revenues it receives from its customers. If the utility is a publicly-traded corporation, the Securities and Exchange Commission requires the filing and public availability of the top five highest-paid executive compensation. *See Tr.,* pp. 48-50. Moreover, there are times when Montana utility cooperatives, under Internal Revenue Service regulations, are required to file executive compensation information in their annual 990 form. *See Tr.,* pp 59-60. The commission finds that a subjective expectation of privacy, at least with regard to the highest-paid public utility employees, is not an expectation that is accepted by the public as reasonable.

The MTA also questions the commission's statutory citations that it relies upon as the source of authority for adoption of this rule. The commission cites, among other provisions, 69-3-102, MCA, which sets forth the general power and ratemaking authority of the commission. Clearly, public utility employee compensation is a factor in the setting of rates by the commission and the commission routinely reviews such information, most often in a contested case that sets utility rates. The revised rule simply informs the public that when such information is in the commission's possession, the agency will not issue a protective order to govern disclosure of the three highest-paid, Montana-based employees. Requests for protective orders for employees other than the three highest-paid, Montana-based employees will be considered on a case-by-case basis. Moreover, if the public utility or its employees believe that there are unique circumstances that would warrant issuance of a protective order for all or one of the three highest-paid, Montana-based employees, it may seek the issuance of such a protective order. The commission maintains that the cited statute authorizes the commission to indicate to the public how it will treat information in its possession (protected or disclosed) upon which utility rates are, in part, based.

The commission also cites as authority for adoption of the rule, 69-3-102, MCA, which confers upon the commission the authority to regulate, supervise, and control public utilities, and 69-3-106, MCA, which authorizes the commission to inquire into the management of the business of public utilities. The commission maintains that these statutes certainly authorize it to seek and secure public utility compensation information. The revised rule adopted herein simply informs the public how the commission will handle such information when it is in the commission's possession. A similar analysis is appropriate for 69-3-201, MCA, which requires utilities to provide adequate service at reasonable charges; 69-3-203, MCA, which requires utilities to provide an annual report to the commission; and, 69-3-330, MCA, which authorizes the commission to fix the rates of public utilities at just and reasonable rates. These sections authorize the commission to seek and secure compensation information (utility rates are set, in part, on compensation information). The rule simply informs the public how the commission intends to handle such information in its possession.

The commission finds no objective basis for MTA's assertion that adoption of the rule will harm the individuals whose information is made public. The commission has described above that disclosure of such information is a minor invasion of privacy and the public does not find subjective expectations of privacy applicable to utility compensation information to be reasonable. The commission sees no concern about utility executives living in other states displaying a reluctance to secure employment in Montana if their compensation was public information. As noted above, executive compensation is disclosed if the utility is a publicly-traded corporation under SEC rules and, under certain circumstances, Montana utility cooperative compensation frequently appears in their Form 990.

The commission also contends that any assertions that the proposed rule is void for vagueness cannot stand against the revised rule adopted herein. The MTA's basis for the "void-for-vagueness" assertion was that an employee would not know whether his/her salaries would be subject to disclosure under the proposed rule. The revised rule makes it clear that the three highest-paid, Montana-based public utility employees would be subject to the rule.

Comment 5:

John Barrows, Executive Director of the Montana Newspaper Association provided comments in support of the commission's efforts. Mr. Barrows emphasized the Article II, Section 9 public's right to know overrides every other argument except when a case for personal privacy is specifically stated and claimed. It is up to the agency, not the courts to initially make the balancing act. Only where the individual privacy clearly exceeds the public's right to know is nondisclosure permitted.

Response 5:

The commission contends that the revised rule comports with the stated position of the Montana Newspaper Association.

Comment 6:

Oral comments were supplied by counsel for Hot Springs Telephone Company. Hot Springs points out the numerous orders issued over decades by the current and former commissions ruling that there is a right to privacy associated with employees compensation and that this information should be protected by law. Only if there is some new or compelling reason should that precedent be overturned. Counsel also contends that the proposed rule is not necessary because, the commission can perform its duties and regulate public utilities without the proposed rule and can perform its statutory functions through issuance of protective orders. Hot Springs maintains that the proposed rule is not relevant to the commission's duties. Moreover, disclosing of executive compensation of regulated utilities provides an advantage to the utility competitors that are not regulated. Hot Springs also contends that the proposed rule does not address the trade secret nature of executive compensation which is a legal theory independent of the right to privacy issues associated with utility compensation. Hot Springs fails to see any identified benefit of public disclosure of the executive compensation packages, at least in the context of what the commission is doing under its statutory charge. The commission can fully meet its duties without public disclosure of the salary information. Hot Springs also notes that experts and technical witnesses testify at rate hearings under oath. Members of the public that wish to testify do so without being sworn and their testimony is technically not on the record. Disclosure of compensation information to the public would therefore not impact commission rate cases.

Response 6:

The commission maintains that in recent years, the public's acceptance of subjective expectations of privacy held by public utility executives, as regards compensation information, has changed. Perceived abuses of compensation packages, golden parachutes, post-merger key employee packages, and insider-trader convictions of utility executives have eroded the public's acceptance of any such expectations.

As with the MTA's assertions, the commission finds no objective basis to assume that disclosure of compensation information provides an advantage to unregulated competitors. The commission also finds no basis that public utility compensation information is a trade secret under Montana law, as there is no evidence of record to show that the information (compensation) derives independent economic value from its secrecy, or that competitive advantage is derived from its secrecy, a prerequisite to classifying the information as a trade secret. *See* ARM 38.2.5007(4)(b).

Comment 7:

Jay Preston, Chairman of Ronan Telephone Company (Ronan Tel.), Ronan, Montana provided oral comments at the May 18, 2010 hearing. Ronan Tel questions the policy goals underlying the proposed rule. The telecommunications industry is competitive and consumers can vote with the pocketbook as to what services they choose to purchase and from what service provider. Under these circumstances Ronan Tel. fails to see why a rule stripping certain people in regulated companies of their right of privacy should be done when nonregulated companies are not subject to the same disclosures. Moreover, Ronan Tel. maintains that utility-initiated rate cases before the commission are rare because of competition.

Response 7:

The revised rule adopted herein simply informs the public of how the commission intends to handle compensation information that is in its possession. There is no doubt that the commission will possess such information at certain times. The distinction between regulated companies and unregulated competitors is characterized by the public utility's dedication of assets to a public purpose and to subject such entities in Montana to regulation by this commission. The competitors that Ronan Telephone Company refers to are not regulated by this commission; therefore, the compensation information of such competitors will not be in the possession of this commission. The rule simply addresses how the commission intends to handle compensation information when it is in the commission's possession.

Comment 8:

Qwest Corporation (Qwest) filed written comments contending that the proposed rule prescribes an outcome of public disclosure when Montana Supreme Court cases require a case-by-case balancing. Qwest also maintains that the proposed rule is vague in three particular areas: (1) the lack of specificity regarding the term "total company compensation"; (2) the lack of specificity in the term "executive management personnel"; and (3) the proposed rule description of executive functions.

The $100,000 threshold is an arbitrary figure and that no public interest attaches at any particular compensation threshold. Qwest contends that it is unclear whether health insurance benefits is to be one of the elements of compensation under the proposed rule. Qwest maintains that Proposed Rule (2)(a) through (c) [description of executive functions] would include most employees of Qwest working in Montana. Qwest contends that there are no monopolies left in the telecommunications industry and that the public interest is being well-served by the significant levels of competition affording an unprecedented level of customer choice. The proposed disclosure of executive compensation will not advance the public interest.

The right of privacy received extensive attention at the 1972 Constitutional Convention that adopted Article II, sec. 10 of the Montana Constitution. The end result is that the right of privacy cannot be infringed without a compelling state interest and no compelling state interest has been indentified that calls for commission securing the executive compensation information.

Response 8:

The commission's Response Nos. 3 and 4 above address many of the Qwest comments. The revised rule addresses Qwest's stated concerns about lack of specificity and the assertion that a $100,000 threshold is arbitrary.

DEPARTMENT OF PUBLIC SERVICE REGULATION

/s/ Al Brogan
Al Brogan
Rule Reviewer

/s/ Greg Jergeson
Greg Jergeson
Chairman
Public Service Commission

Certified to the Secretary of State September 30, 2010.

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 1.2.419 regarding the scheduled dates for the 2011 Montana Administrative Register	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On August 26, 2010, the Secretary of State published MAR Notice No. 44-2-166 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 1878 of the 2010 Montana Administrative Register, Issue Number 16.

2. The Secretary of State has amended the above-stated rule as proposed.

3. No comments or testimony were received.

/s/ Jorge Quintana
JORGE QUINTANA
Rule Reviewer

/s/ Linda McCulloch
LINDA MCCULLOCH
Secretary of State

Dated this 4th day of October, 2010.

BEFORE THE COMMISSIONER OF POLITICAL PRACTICES
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 44.12.204 pertaining to the payment threshold--inflation adjustment for lobbyists	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On September 9, 2010 the Commissioner of Political Practices published MAR Notice No. 44-2-167 pertaining to the proposed amendment of the above-stated rule at page 1983 of the 2010 Montana Administrative Register, Issue Number 17.

2. The department has amended the above-stated rule as proposed.

3. No comments or testimony were received.

/s/ Jim Scheier
Jim Scheier
Rule Reviewer

/s/ Dennis Unsworth
Dennis Unsworth
Commissioner

Certified to the Secretary of State October 4, 2010.

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 June 30, 2010. This table includes those rules adopted during the period July 1, 2010, through September 30, 2010, 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 June 30, 2010, 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 2010 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.

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