

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 4

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 The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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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BEFORE THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF MONTANA

In the matter of the adoption of New)	NOTICE OF PROPOSED
Rules I and II pertaining to fuel tax	)	ADOPTION
refund for agricultural uses)	
	)	NO PUBLIC HEARING
	)	CONTEMPLATED

TO: All Concerned Persons

1. On March 26, 2012, the Department of Transportation proposes to adopt the above-stated rules.

2. The Department of Transportation 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 Transportation no later than 5:00 p.m. on March 15, 2012, to advise us of the nature of the accommodation that you need. Please contact Tracy Halubka, Department of Transportation, P.O. Box 201001, Helena, Montana, 59620; telephone (406) 444-0806; fax (406) 444-5411; TDD/Montana Relay Service (406) 444-800-335-7592 or (406) 444-7696; or e-mail thalubka@mt.gov.

3. The rules as proposed to be adopted provide as follows:

NEW RULE I DEFINITIONS (1) "Gross earned agricultural or farm income" means all taxable income and wages, before expenses, a person or business receives from: cultivating, operating, or managing a farm for gain or profit, either as owner or tenant; operating a livestock, dairy, poultry, fish, fur-bearing animals, or horticultural commodities business; operating a feed yard for the fattening of cattle; operating a fruit or truck farm; operating an agricultural commodities business; operating a plantation, ranch, range, nursery or orchard; and sale of crop shares if the person materially participates in producing the crop.

(2) "Gross earned income" means all taxable income and wages, before expenses, a person or business earns from: services, sale of goods, working for someone, or working in a business the person owns or operates. Examples of gross earned income generally include but are not limited to: wages, salaries, tips, and other taxable employee pay; union strike benefits; long-term disability benefits received prior to minimum retirement age; earnings from self-employment if the person owns or operates their own business; and gross income received as a statutory employee. Examples of gross income that are not considered earned include: passive income, such as interest, dividends, and capital gains; retirement income; social security; unemployment benefits; alimony; and child support.

AUTH: 15-70-104, MCA
IMP: 15-70-223, 15-70-362, MCA

REASON: The proposed new rule is necessary to define terms that are later used in New Rule II on Agricultural Use Fuel Tax Refunds. The terms are not elsewhere defined in MDT fuel tax statute or rule.

NEW RULE II AGRICULTURAL USE FUEL TAX REFUND (1) The use of gasoline or special fuel by a person who earns income while engaged in the business of farming or ranching, which qualifies as agricultural use, may apply for a refund of the applicable tax on the gallons of gasoline or special fuel used in carrying on a trade or business of farming, ranching, or other agricultural purposes. An applicant may claim a fuel tax refund according to the ratio of the applicant's gross earned agricultural or farm income to the total gross earned income, excluding unearned income.

(2) An application for an agricultural use fuel tax refund shall include the applicant's appropriate state or federal tax return (based on type of entity) with supporting federal forms, schedules, and statements for one of the three previous tax years.

(3) To determine an applicant's eligibility for fuel tax refund under 15-70-223 and 15-70-362, MCA, the ratio between the gross earned agricultural or farm income to the total gross earned income must be determined as follows:

(a) Gross earned agricultural or farm income is determined using a combination of the following federal Internal Revenue Service (IRS) or state of Montana tax information, including but not limited to:

- (i) Schedule F – gross income less custom hire;
- (ii) Form 4835 – gross farm rental income and active participation;
- (iii) Form 1065(partnerships) – any third-party payments, gross receipts or sales and other income with corresponding statements showing agriculture;
- (iv) Form 1120 (corporations) – total of third-party payments and gross receipts or sales and other income with corresponding statements;
- (v) Form 1120s (corporations) – total of third-party payments and gross receipts or sales and other income with corresponding statements;
- (vi) Federal farm schedule – gross income less custom hire and miscellaneous income;
- (vii) 1099-MISC – crop insurance proceeds; or
- (viii) Form 4797 – gross sales of agricultural products.

(b) Gross earned income is determined by using the applicant's gross earned agricultural or farm income plus a combination of the following federal IRS or state of Montana tax information, including but not limited to:

- (i) Form 1040 –wages, salaries, tips;
- (ii) MT Form 2 – wages, salaries, tips;
- (iii) Schedule C – total gross receipts;
- (iv) 1099-MISC – other income, fishing boat proceeds and nonemployee compensation;
- (v) K-1 (1120S) – ordinary business income;
- (vi) K-1 (Form 1065) – taxable income from passive activities and taxable income from other activities;
- (vii) Schedule F – custom hire;

(viii) Federal farm schedule – custom hire; or
(vix) Form 1065(partnerships) – any third-party payments, gross receipts or sales and other income not agriculture.

(4) All federal tax forms are available on the IRS web site at www.irs.gov. All state of Montana tax forms are available on the Montana Department of Revenue web site at www.revenue.mt.gov.

AUTH: 15-70-104, MCA

IMP: 15-70-223, 15-70-362, MCA

REASON: The proposed new rule is necessary because the current process to determine standard deduction eligibility is confusing to the public as to how the department determines the ratio between gross earned farm/agricultural income and gross earned income and the sources from which the information is derived. This rule will clarify the process and the income tax forms, schedules, and statements that are used to determine eligibility.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to: Tracy Halubka, Department of Transportation, P.O. Box 201001, Helena, Montana, 59620; telephone (406) 444-0806; fax (406) 444-5411; or e-mail thalubka@mt.gov, and must be received no later than 5:00 p.m., March 22, 2012.

5. 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 Tracy Halubka at the above address and must be received no later than 5:00 p.m., March 22, 2012.

6. 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 478 persons based on an estimated number of 4776 persons eligible for fuel tax refunds for agricultural uses.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list 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 4 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 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.

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

/s/ Carol Grell Morris
Carol Grell Morris
Rule Reviewer

/s/ Timothy W. Reardon
Timothy W. Reardon
Director
Department of Transportation

Certified to the Secretary of State February 13, 2012.

BEFORE THE DEPARTMENT OF CORRECTIONS
OF THE STATE OF MONTANA

In the matter of the adoption of New) NOTICE OF PUBLIC HEARING ON
Rules I through V pertaining to the) PROPOSED ADOPTION
education of exonerated persons)

TO: All Concerned Persons

1. On March 16, 2012, at 10:00 a.m., the Department of Corrections will hold a public hearing in Room 3-65 of 5 South Last Chance Gulch, at Helena, Montana, to consider the proposed adoption of the above-stated rules.

2. The Department of Corrections will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Corrections no later than 10:00 a.m. on March 13, 2012, to advise us of the nature of the accommodation that you need. Please contact Myrna Omholt-Mason, Department of Corrections, 5 South Last Chance Gulch, Helena, Montana, 59620; telephone (406) 444-3911; fax (406) 444-4920; or e-mail momholt-mason@mt.gov.

3. The rules as proposed to be adopted provide as follows:

NEW RULE I DEFINITIONS (1) "Department" means the Department of Corrections as authorized in 2-15-230, MCA.

(2) "Exonerated person" means a person who was convicted of a felony offense in the state of Montana; was incarcerated in a state prison for the felony offense; and whose felony offense was overturned or later dismissed based on the results of postconviction forensic DNA testing that exonerated the person of the crime for which the person was convicted and incarcerated.

AUTH: 53-1-214, MCA

IMP: 53-1-214, MCA

STATEMENT OF REASONABLE NECESSITY: New Rule I is necessary to implement 53-1-214, MCA, that mandates the department pay educational expenses for exonerated persons. It is necessary to define terms used in the subsequent rules in this section.

NEW RULE II PROGRAM AND ELIGIBILITY (1) There is a program that may pay education expenses for exonerated persons. The department may pay educational expenses for an exonerated person as described in these rules. Educational reimbursement is contingent upon legislative appropriation of funds for this purpose.

(2) To be eligible for educational reimbursement the exonerated person must have:

- (a) been convicted of a felony criminal offense in the state of Montana;
 - (b) been imprisoned in a state prison as described in 53-30-101, MCA, or in a prison out-of-state as a result of transfer through the interstate compact as a result of the conviction;
 - (c) had the felony criminal offense for which the exonerated person was imprisoned overturned or dismissed by a court of competent jurisdiction; and
 - (d) had the conviction overturned or dismissed as a result of postconviction forensic DNA testing.
- (3) An exonerated person is eligible to receive benefits under these rules for ten years after the exonerated person's release from incarceration.

AUTH: 53-1-214, MCA

IMP: 53-1-214, MCA

STATEMENT OF REASONABLE NECESSITY: New Rule II is necessary to implement 53-1-214, MCA that mandates the department pay educational expenses to exonerated persons. It is necessary to define who may be designated as an exonerated person within the parameters of the statute. The department decided to take this approach because it is the criteria listed in the statute.

NEW RULE III APPLICATION AND DESIGNATION (1) For an exonerated person to receive educational aid the person must submit an application to the department's main office in Helena, Montana on a form made available at the department's main office or on the department's web site. The main office address is: Department of Corrections, 5 South Last Chance Gulch, Helena, Montana, 59620.

(2) The application must be received by the department 30 days before the person incurs the expense for which the person requests reimbursement.

(3) The exonerated person must submit the following items along with the completed application:

(a) the exonerated person's judgment of imprisonment or commitment to the Department of Corrections;

(b) a certified copy of the document that overturned or dismissed the conviction for which the person was incarcerated; and

(c) documentation that the conviction was overturned as a result of postconviction forensic DNA testing.

(4) If the application meets the criteria listed in New Rule II(2), the department will approve the application. After the application has been approved, the department will send the exonerated person a letter stating the exonerated person is designated as an exonerated person eligible to receive aid at the institutions and for the expenses listed in these rules.

(5) The designation of exonerated person entitles the exonerated person to receive benefits for up to five years from the time the exonerated person begins an educational program that is reimbursed under these rules, but in no instance will the department reimburse the exonerated person beyond the time the exonerated person attains a bachelor's or master's degree or ten years after the exonerated person was released from incarceration.

AUTH: 53-1-214, MCA
IMP: 53-1-214, MCA

STATEMENT OF REASONABLE NECESSITY: New Rule III is necessary to implement 53-1-214, MCA, that mandates the department reimburse persons who spend time in prison and who are later exonerated for the crime for which they were incarcerated. The department fashioned New Rule III to most effectively have the exonerated person prove he or she is eligible to receive educational benefits while making the procedure as simplified as possible to effectuate the bill sponsor's request that the process be speedy and simple to access, while at the same time giving the department the necessary information to appropriately make the designation.

NEW RULE IV APPROVED EDUCATIONAL INSTITUTIONS AND EXPENSES (1) The department will pay an eligible exonerated person's expenses associated with the following educational institutions that are designated as approved educational institutions:

- (a) a Montana community college;
- (b) a unit of the Montana university system, as described in 20-25-201, MCA;

or

- (c) any accredited Montana tribally controlled community college.

(2) The department will pay an eligible exonerated person's expenses associated with:

- (a) efforts to meet admission standards or requirements for admission at one of the above listed educational institutions including:
 - (i) a course of study to satisfy requirements for a certificate of equivalency of completion of secondary education (GED); and
 - (ii) assistance in completing any adult education program or courses.
- (3) Upon proper proof and documentation as outlined in New Rule V, the department will pay the eligible exonerated person's expenses for tuition, fees, books, and room and board.

AUTH: 53-1-214, MCA
IMP: 53-1-214, MCA

STATEMENT OF REASONABLE NECESSITY: New Rule IV is necessary to implement 53-1-214, MCA, that mandates the department reimburse exonerated persons who spend time in prison and who are later exonerated for the crime for which they were incarcerated. The department fashioned New Rule IV to reflect the institutions and expenses listed in the statute.

NEW RULE V PROCEDURE TO RECEIVE BENEFITS (1) To receive benefits the exonerated person, on a form provided by the department, must establish and show proof of admission to an educational institution listed in New Rule IV and current enrollment or enrollment in a program of preparation for admission to an approved educational institution.

(2) Upon establishment of admission or enrollment, the department will establish a reimbursement plan with the exonerated person.

(a) The department will pay the costs for tuition, fees, and room and board directly to the educational institution or program.

(b) Expenses for books will be reimbursed to the exonerated person with presentation of a proper receipt.

(c) If the exonerated person does not live on campus during the period of enrollment in an educational program, the department will pay the exonerated person the average amount of room and board charged at a unit of the Montana university system for the duration of active enrollment.

(3) The exonerated person must furnish proof of enrollment for each new educational period, the beginning of each semester, or the beginning of each educational course in preparation for college admission.

AUTH: 53-1-214, MCA

IMP: 53-1-214, MCA

STATEMENT OF REASONABLE NECESSITY: New Rule V is necessary to implement 53-1-214, MCA, that mandates the department reimburse persons who spend time in prison and who are later exonerated for the crime for which they were incarcerated. The department fashioned New Rule V to most effectively enable the department to reimburse the exonerated person while making the procedure as simplified as possible to effectuate the bill sponsor's request that the process be speedy and simple to access.

4. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Myrna Omholt-Mason, Department of Corrections, 5 South Last Chance Gulch, Helena, Montana, 59620; telephone (406) 444-3911; fax (406) 444-4920; or e-mail momholt-mason@mt.gov, and must be received no later than 5:00 p.m., March 22, 2012.

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

6. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Myrna Omholt-Mason, 5 South Last Chance Gulch, Helena, Montana, 59620 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, apply and have been fulfilled. The primary bill sponsor was contacted by telephone on November 16, 2011.

/s/ Diana Koch
Diana Koch
Rule Reviewer

/s/ Mike Ferriter
Mike Ferriter
Director
Department of Corrections

Certified to the Secretary of State February 13, 2012.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF PUBLIC HEARING ON
ARM 24.33.121 construction	)	PROPOSED AMENDMENT AND
contractor registration fees,	)	ADOPTION
24.33.131 evidence of compliance)	
with laws, and the adoption of NEW)	
RULES I through IV construction)	
contractor registration requirements)	

TO: All Concerned Persons

1. On March 16, 2012, at 9:00 a.m., a public hearing will be held in the Sacajawea Room in the basement of the Walt Sullivan Building, 1315 E. Lockett 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 department no later than 5:00 p.m., on March 9, 2012, to advise us of the nature of the accommodation that you need. Please contact the Employment Relations Division, Construction Contractor Registration, Attention: Dallas Cox, P.O. Box 8011, Helena, Montana 59604-8011; telephone (406) 444-9586; TDD (406) 444-5549; facsimile (406) 444-3465; or e-mail dcox@mt.gov.

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

24.33.121 CONSTRUCTION CONTRACTOR REGISTRATION FEES

(1) The fee for the issuance, renewal, or reinstatement of a construction contractor certificate of registration is \$53-00.

(a) The fee is nonrefundable for applicants.

(b) An applicant will have a maximum of six months to submit the required information for approval. After six months, the applicant must resubmit the \$53 fee and a new application.

(2) If a business structure changes to require an FEIN (or not require an FEIN), a new application and \$53 application fee must be submitted.

AUTH: 39-9-103, MCA

IMP: 39-9-206, MCA

REASON: The department determined it is reasonably necessary to amend this rule to clearly set forth ICCU procedures. Although these fees and processes are not new, they were not previously set forth in rule. The department is standardizing this six-month deadline with that for independent contractor exemptions. The fee is not

refundable because it is necessary to sustain the contractor registration program and consistently administer education purposes as required by statute.

24.33.131 EVIDENCE OF COMPLIANCE WITH LAWS (1) remains the same.

(a) verification by the department by use of the ~~national council on compensation insurance~~ National Council on Compensation Insurance (NCCI) national workers' compensation database that the entity applying for construction contractor registration has current workers' compensation coverage; or

(b) through (d) remain the same.

(i) A current exemption certificate must be valid for at least six months from the date of the construction contractor application.

AUTH: 39-9-103, MCA

IMP: 39-9-201, ~~39-9-202~~, MCA

REASON: The department is adding (1)(d)(i) to clarify that people applying for construction contractor registration (CCR) must have at least six months remaining on their independent contractor exemption certificates (ICEC). Previously, the department required that ICECs met or exceeded the length of time of the CCR, and later changed to a one-year ICEC time frame to match the length of workers' compensation policies. Following negative comments from customers, the department began requiring at least six months remaining on an ICEC. The department is amending this rule now, when it is setting forth CCR processes in rule. Implementation cites are being amended to accurately reflect all statutes implemented through the rule and to delete reference to a repealed statute.

4. The proposed new rules provide as follows:

NEW RULE I CONTRACTOR REGISTRATION APPLICATION

REQUIREMENTS (1) Applicants must identify a business structure in the application. Acceptable business structures include the following:

- (a) sole proprietorship;
- (b) partnership;
- (c) limited liability partnership;
- (d) member-managed limited liability company;
- (e) manager-managed limited liability company; and
- (f) corporation.

(2) Applicants applying as sole proprietorships, partnerships, and member-managed limited liability companies must submit social security numbers (SSN).

(3) Applicants applying as corporations and manager-managed limited liability companies must submit employer identification numbers (FEIN).

(4) Applicants must answer YES or NO to whether they are applying as "Bid Only" status.

(a) "Bid only" status refers only to out-of-state construction contractors who are not yet performing any work in Montana. With this status, a contractor may only bid work in Montana. Once a job is awarded, the status must be updated and if the

contractor has employees, the contractor must obtain and show proof of a Montana workers' compensation policy.

(5) Applicants must answer YES or NO as to whether they:

(a) are doing construction work in Montana;

(b) have employees;

(c) lease employees from a professional employment organization (PEO);

(d) obtain workers from a temporary service contractor (TSC); and

(e) perform work on commercial, industrial, or government jobs.

(6) Applicants must provide the name or names of all applicants and percentage of entity ownership for all owners.

(7) Applicants must provide current e-mail addresses, if applicable.

AUTH: 39-9-103, MCA

IMP: 39-9-102, 39-9-201, MCA

REASON: The department determined it is reasonably necessary to adopt New Rule I to clearly delineate the application requirements for construction contractor registration. These requirements are not new and are established in statute, but were not previously set forth in rule. The department concluded that this new rule will clarify the statutory requirements and address questions posed by applicants.

Because the entities that are eligible for construction contractor registration are enumerated in statute, the department must first determine an applicant's business structure as proposed in (1). The department verifies with the Secretary of State all member-managed or manager-managed limited liability companies and corporation statuses, and whether the corporation or manager-managed limited liability company DBAs are registered as principals.

The department is adopting (2) and (3) to clarify the identification number requirements for the different types of applicants. Because corporations and manager-managed limited liability companies are considered separate entities, they are issued federal employer identification numbers and not social security numbers.

The department is adopting (4) to address confusion about applicants with "bid only" status. Any person, firm, or corporation bidding a construction job in Montana must be registered with the department as a construction contractor. However, a valid Montana workers' compensation insurance policy is not required until work is actually being performed in the state.

The department is proposing (5)(a) to determine if applicants are doing construction work in the state and avoid registering contractors who are not required to be registered in Montana. Because the department verifies applicants' compliance with workers' compensation and other labor laws, it is reasonably necessary to add (5)(b) - (d) to obtain information on the applicants' categories of employees.

The department is proposing (5)(e) to obtain information necessary to calculate standard prevailing rate of wages for building construction services. This information is required by statute at 18-2-413, MCA, and is reasonably obtained from registered construction contractors.

To comply with requirements of the department's xTier computer system, it is necessary to provide 100 percent ownership for sole proprietorships, partnerships,

and member-managed limited liability companies. For corporations and manager-managed limited liability companies, the department must determine if the corporate officers and managers are exempt from the workers' compensation act under 39-71-401(2)(r), MCA, by owning 20 percent or more of the shares. The department may also request articles of organization or operating agreements from corporations and manager-managed limited liability companies before approving an application.

NEW RULE II ADDITIONAL APPLICATION INFORMATION (1) If an application is missing any required information, the applicant will have 30 days to submit the missing information. After 30 days, incomplete applications will be deemed denied.

(2) Applicants will have six months from the date the program receives the application to submit the missing information for approval of their construction contractor registration.

AUTH: 39-9-103, MCA

IMP: 39-9-201, MCA

REASON: The department determined it is reasonably necessary to adopt New Rule II and establish a reasonable, standardized timeline for application processing to ensure the smooth workflow of the contractor registration unit and improve customer satisfaction.

NEW RULE III REPORTING CERTIFICATE CHANGES (1) Certificate holders must report all changes to a certificate in writing to the department within ten days of the change. Such reportable changes include, but are not limited to:

- (a) address;
- (b) name;
- (c) FEIN;
- (d) status;
- (e) phone number;
- (f) addition to ownership; and
- (g) workers' compensation insurance carrier change.

(2) If a change is not reported to the department within ten days, the certificate may be suspended.

AUTH: 39-9-103, MCA

IMP: 39-9-201, 39-9-206, 39-9-301, 39-9-303, MCA

REASON: The department is adopting New Rule III to ensure that current, accurate information is on file with the department. The department is required under 39-9-303(2), MCA, to "inform a person, firm, or corporation whether a construction contractor is registered." Changes must be reported timely so the department is able to provide reliable information regarding accurate, legitimate certificates.

NEW RULE IV CERTIFICATES OF REGISTRATION (1) Issued certificates will display one of the following statuses:

(a) "BID ONLY" means the contractor is registered only to bid construction work in Montana and cannot perform actual work until the contractor upgrades the certificate to one of the following statuses.

(b) "EMPLOYEES ONLY" means the contractor carries workers' compensation coverage on employees and is registered to have employees.

(c) "LEASED EMPLOYEES" means the contractor uses employees from an employee-leasing firm. These employees are presumably covered with workers' compensation and unemployment insurance through the leasing company.

(d) "NO EMPLOYEES, MAY HIRE EXEMPT WORKERS ONLY" means the contractor does not carry workers' compensation coverage on any employees.

(2) Along with a certificate, each certificate holder will receive a construction contractor wallet card and a vehicle decal. The department shall review requests for more than one decal or card on an individual basis.

(3) To increase public visibility of the construction contractor registration program, the department may provide one participant gift per year to each registered contractor (i.e., baseball caps, flashlights, etc., as determined by the department).

AUTH: 39-9-103, MCA

IMP: 39-9-204, MCA

REASON: The department determined it is reasonably necessary to adopt this new rule to set forth and clarify for the public the four statuses of construction contractor registration. Although these statuses are not new and have been used since the inception of contractor registration, they were not previously set forth in rule.

The department is proposing (2) to clarify the procedure for issuing only one wallet card and vehicle decal per registered contractor. Requiring department review to issue duplicate cards and decals will conserve resources and program funds and ensure consistency in the process.

The department is proposing (3) to clarify for applicants and certificate holders that promotional materials may be provided to registered contractors annually, and that the form of the gifts is at the department's sole discretion.

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 Employment Relations Division, Construction Contractor Registration, Attention: Dallas Cox, P.O. Box 8011, Helena, Montana 59604-8011; telephone (406) 444-9586; TDD (406) 444-5549; facsimile (406) 444-3465; or by e-mail to dcox@mt.gov, and must be received no later than 5:00 p.m., March 23, 2012.

6. An electronic copy of this Notice of Public Hearing is available through the department web site at <http://dli.mt.gov/events/calendar.asp>. 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 department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed. 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 department 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 Department of Labor and Industry, Office of Legal Services, Attention: Mark Cadwallader, P. O. Box 1728, Helena, Montana 596240-1728; faxed to the office at (406) 444-1394; e-mailed to mcadwallader@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. The department's hearings bureau has been designated to preside over and conduct this hearing.

/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 February 13, 2012

BEFORE THE ALTERNATIVE HEALTH CARE BOARD
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of) NOTICE OF PUBLIC HEARING ON
ARM 24.111.409 inactive status,) PROPOSED AMENDMENT
24.111.511 naturopathic physician)
national substance formulary list,)
24.111.602 direct-entry midwife)
apprenticeship requirements,)
24.111.2102 naturopathic physician)
continuing education requirements,)
and 24.111.2103 midwives continuing)
education requirements)

TO: All Concerned Persons

1. On March 15, 2012, at 9:30 a.m., a public hearing will be held in room B-07, 301 South Park Avenue, Helena, Montana, to consider the proposed amendment 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 Alternative Health Care Board (board) no later than 5:00 p.m., on March 9, 2012, to advise us of the nature of the accommodation that you need. Please contact Cheryl Brandt, Alternative Health Care Board, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2394; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdahc@mt.gov.

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

24.111.409 INACTIVE STATUS (1) through (3)(c) remain the same.
(i) are not required to maintain CPR or neonatal resuscitation credentials while on inactive status; ~~and~~
(ii) are exempt from CE requirements; and
(iii) are exempt from reporting requirements pursuant to ARM 24.111.613.
(4) through (6) remain the same.

AUTH: 37-1-131, 37-1-319, 37-26-201, 37-27-105, MCA
IMP: 37-1-131, 37-1-319, MCA

REASON: The board determined it is reasonably necessary to amend this rule and no longer require midwives on inactive status to submit semiannual reports on their

clients. By rule, inactive status licensees are prohibited from practicing under that license, and therefore, have no clients and no need to report.

24.111.511 NATUROPATHIC PHYSICIAN NATURAL SUBSTANCE FORMULARY LIST (1) through (7) remain the same.

(8) Naturopathic physicians may prescribe and administer enzyme, digestive, and proteolytic preparations. The following are examples:

(a) through (13) remain the same.

(a) albuterol;

(a) through (e) remain the same, but are renumbered (b) through (f).

(g) lisinopril;

(f) through (j) remain the same, but are renumbered (h) through (l).

(14) through (17) remain the same.

AUTH: 37-1-131, 37-26-201, MCA

IMP: 37-26-301, MCA

REASON: Pursuant to 37-26-301, MCA, the board-appointed formulary committee has recommended that the full board amend the natural substance formulary list to include albuterol, prescribed for asthma, and lisinopril, prescribed for hypertension. The committee found that both drugs have been proven effective in treating these medical conditions. The board concluded that adding these drugs to the formulary will enable naturopaths to provide primary care to their patients and noted that these substances are routinely covered in both the naturopaths' medical education and continuing education programs as agents for use in clinical practice.

24.111.602 DIRECT-ENTRY MIDWIFE APPRENTICESHIP REQUIREMENTS (1) and (2) remain the same.

(3) Applicants for a direct-entry midwife apprenticeship license shall submit a completed application with the proper fee, a current CPR card indicating certification to perform adult and infant cardiopulmonary resuscitation, a supervision agreement, and a curriculum outline or method of academic learning that meets the board's educational rule requirements for licensure. A supervision agreement shall include:

(a) through (4)(c) remain the same.

(d) submit a positive evaluation of skills and educational progress form, ~~with~~ and written verification by supervisor of completion of Level I; ~~and~~

(e) obtain approval from the board to proceed to Level II.

(5) A Level II direct-entry midwife apprenticeship is served under the direct supervision of the licensed supervisor, with a focus on birth, postpartum, and newborn care. To complete Level II, the direct-entry midwife apprentice shall:

(a) attend ten births as primary birth attendant; Five of the ten births, as primary birth attendant in Level II, must be supervised by a licensed direct-entry midwife. The which births are must be verified by signed birth certificates, signed affidavits from the birthing mothers, or affidavit documented records from supervisor; the person who supervised the births to include all of the following:

(i) prenatal records;

(ii) birth records; and

(iii) postpartum records.

(b) through (5)(d) remain the same.

(e) submit a positive evaluation of skills and educational progress form, ~~with~~ and written verification by supervisor of completion of Level II; and

(f) obtain approval from the board to proceed to Level III.

(6) A Level III direct-entry midwife apprenticeship is served as either Level III-A or III-B, as defined below. The focus of Level III shall be continuous prenatal, perinatal, and postnatal care. To complete Level III, the direct-entry midwife apprentice shall:

(a) complete 15 continuous-care births as the primary attendant; Eight of the 15 continuous-care births in Level III must be supervised by a Montana-licensed direct-entry midwife. which are The births must be verified by signed birth certificates, signed affidavits from the birthing mothers, or affidavit documented records from supervisor; the person who supervised the births to include all of the following:

(i) prenatal records;

(ii) birth records; and

(iii) postpartum records.

(~~+~~) (b) provide documentation of each of the 15 continuous-care births as defined in 37-27-103, MCA, which must include at least five prenatal exams, one of which must have been performed before the beginning of the 28th week of gestation, as determined by last menstrual period or sonogram, and include one postpartum exam. Ten of the 15 continuous-care births must have been performed under the personal supervision of a qualified supervisor;:

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

(~~e~~) (d) submit protocols for birth, postpartum, and newborn care;

(~~d~~) (e) complete Level III skills checklist; and

(~~e~~) (f) submit a positive evaluation of skills and educational progress form, ~~with~~ and written verification by supervisor of completion of Level III.

(7) Level III III-A and Level III-B direct-entry midwife apprentices are ~~separated~~ distinguished as follows:

(a) remains the same.

(b) A Level III-B direct-entry midwife apprentice shall require ~~direct~~ indirect supervision by the licensed supervisor ~~unless~~ when, in the professional judgment of the supervisor, with concurrence of the board, the Level III-B apprentice is capable of safely and competently performing midwifery services under indirect supervision after the following requirements have been met:

(i) remains the same.

(ii) verification of completion of at least 75 percent of educational/academic requirements for full licensure; and

(iii) remains the same.

(8) Direct-entry midwife apprenticeship applicants who have, at the time of application, through an apprenticeship or other supervisory setting, participated as the primary birth attendant at 25 births, 15 of which included continuous care, may enter directly into direct-entry midwife apprenticeship license Level III-B. To complete Level III-B, at least eight continuous-care births must be supervised by a Montana-licensed direct-entry midwife.

(a) The 25 births and 15 continuous-care births shall be evidenced by the signed birth certificate as primary birth attendant, an affidavit from the birth mother, or documented records from the applicant, ~~as shown on the birth experience form furnished by the board.~~ person who supervised the births to include all of the following:

(i) prenatal records;

(ii) birth records; and

(iii) postpartum records.

(a) through (9)(c) remain the same, but are renumbered (b) through (9)(d).

~~(d)~~ (e) notify the board in writing of any change in the supervisory relationship, including advancement from direct to indirect supervision, termination of the supervisory relationship, or any other relevant changes, and submit supervision change notification to the board so that it is received on or before the day that supervised tasks are performed in order for them to count toward licensure requirements; and

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

(10) remains the same.

AUTH: 37-1-131, 37-27-105, MCA

IMP: 37-27-105, 37-27-201, 37-27-205, 37-27-321, MCA

REASON: The board is amending this rule to clarify the requirements for completion of the three direct-entry midwifery apprenticeship levels and to specify that board approval is required before an apprentice may proceed to the next apprenticeship level. This rule conforms with the statutory requirements of documentation required to verify completion of the requirements at each level. When the board receives incomplete birth information, additional documentation is requested from the applicant. The board is also amending this rule to specifically set forth the documentation that must be submitted by the person who supervised the births to further clarify and implement 37-27-201, MCA.

The board is amending (5)(a) to clarify that in a Level II apprenticeship, five of the ten births as primary birth attendant, must be supervised by a licensed direct-entry midwife to ensure that the apprentice receives sufficient experience and training in a home birth setting. The board is amending (6) to specify that eight of the 15 continuous-care births in the Level III apprenticeship must be supervised by a Montana-licensed direct-entry midwife. The board concluded this supervision is necessary to ensure that direct-entry midwives are sufficiently and specifically trained to operate within a midwife's scope of practice in Montana.

The board determined it is reasonably necessary to amend (7) to address confusion on the differences between Level III-A and III-B apprentices. Level III-A apprentices require direct supervision by a licensed supervisor and Level III-B allows indirect supervision of apprentices when certain requirements have been met and with the concurrence of the board.

24.111.2102 NATUROPATHIC PHYSICIAN CONTINUING EDUCATION REQUIREMENTS

(1) Naturopaths must obtain 15 continuing education credits each renewal period, except as provided in ~~(9)~~ (8). At least five of the credits must

be in naturopathic pharmacy. If the naturopath holds a naturopathic childbirth specialty certification as provided in ARM 24.111.510, an additional five credits per renewal period must be obtained in obstetrics. One hour of education (excluding breaks) equals one continuing education credit.

(2) through (8) remain the same.

AUTH: 37-1-131, 37-1-319, 37-26-201, MCA

IMP: 37-1-131, 37-1-141, 37-1-306, MCA

REASON: The board is amending this rule and ARM 24.111.2103 to reference the correct rule sections, as the rules were renumbered through amendment in 2009.

24.111.2103 MIDWIVES CONTINUING EDUCATION REQUIREMENTS

(1) Midwives must obtain 14 continuing education credits each renewal period, except as provided in ~~(9)~~ (8). One hour of education (excluding breaks) equals one continuing education credit.

(2) through (8) remain the same.

AUTH: 37-1-131, 37-1-319, 37-27-105, MCA

IMP: 37-1-131, 37-1-141, 37-1-306, MCA

4. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Alternative Health Care Board, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdahc@mt.gov, and must be received no later than 5:00 p.m., March 23, 2012.

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

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

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

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

ALTERNATIVE HEALTH CARE BOARD
MAGGI BEESON, ND, 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 February 13, 2012

BEFORE THE BOARD OF FUNERAL SERVICE
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of) NOTICE OF PUBLIC HEARING ON
ARM 24.147.401 fee schedule) PROPOSED AMENDMENT

TO: All Concerned Persons

1. On March 16, 2012, at 1:00 p.m., a public hearing will be held in room B-07, 301 South Park Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rule.

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 Funeral Service (board) no later than 5:00 p.m., on March 9, 2012, to advise us of the nature of the accommodation that you need. Please contact Jodi Koehnke, Board of Funeral Service, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2037; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdfnr@mt.gov.

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

24.147.401 FEE SCHEDULE

(1) remains the same.	
(a) Mortuary	\$ 250 <u>375</u>
(b) Mortuary branch facility	250 <u>375</u>
(c) Crematory	250 <u>375</u>
(d) through (3) remain the same.	
(a) Mortician	250 <u>375</u>
(b) Crematory operator	200 <u>300</u>
(c) Crematory technician	200 <u>300</u>
(d) Mortician intern	220 <u>330</u>
(4) through (5) remain the same.	
(a) Mortuary	300 <u>450</u>
(b) Mortuary branch facility	50 <u>75</u>
(c) Crematory	300 <u>450</u>
(d) Cemetery (five-year renewal)	4000 <u>1500</u>
(6) remains the same.	
(a) Mortician - active	200 <u>300</u>
(b) Mortician - inactive	400 <u>150</u>
(c) Crematory operator - active	400 <u>150</u>
(d) Crematory operator - inactive	50 <u>75</u>
(e) Crematory technician - active	400 <u>150</u>

(f) Crematory technician - inactive
(7) through (9) remain the same.

50 75

AUTH: 37-1-131, 37-1-134, 37-19-202, 37-19-301, 37-19-303, 37-19-304, 37-19-403, 37-19-702, 37-19-703, 37-19-808, 37-19-814, 37-19-815, 37-19-816, MCA

IMP: 37-1-134, 37-1-141, 37-19-301, 37-19-303, 37-19-304, 37-19-402, 37-19-403, 37-19-702, 37-19-703, 37-19-808, 37-19-814, 37-19-815, 37-19-816, MCA

REASON: The board has determined it is reasonably necessary to increase license application and renewal fees as proposed to comply with the provisions of 37-1-134, MCA, and keep the board's fees commensurate with program costs. Over the last several years, the board has experienced an increase in expenses in excess of revenue generated through board licensure fees. In providing administrative services to the board, the department has determined it is necessary to increase fees as proposed to ensure that the board can cover their operating expenses. The board decided to increase fees by 50 percent at this time to avoid another increase in the near future. The board estimates the proposed fee changes will affect approximately 455 applicants/licenseses and generate \$46,535 in additional annual revenue.

4. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Funeral Service, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdfnr@mt.gov, and must be received no later than 5:00 p.m., March 23, 2012.

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

6. 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 Funeral Service, 301 South Park Avenue, P.O. Box 200513, Helena,

Montana 59620-0513; faxed to the office at (406) 841-2305; e-mailed to dlibsdfnr@mt.gov; or made by completing a request form at any rules hearing held by the agency.

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

8. Colleen White, attorney, has been designated to preside over and conduct this hearing.

BOARD OF FUNERAL SERVICE
R.J. (DICK) BROWN, 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 February 13, 2012

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

In the matter of the amendment of)
ARM 24.189.401 fee schedule,)
24.189.414 nonresident psychological)
services, 24.189.601 application)
procedures, 24.189.607 required)
supervised experience, 24.189.610)
work samples - examination,)
24.189.2309 professional)
responsibility, and the adoption of)
NEW RULE I temporary permit)

NOTICE OF PUBLIC HEARING ON
PROPOSED AMENDMENT AND
ADOPTION

TO: All Concerned Persons

1. On March 16, 2012, at 9:30 a.m., a public hearing will be held in room B-07, 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 Psychologists (board) no later than 5:00 p.m., on March 9, 2012, to advise us of the nature of the accommodation that you need. Please contact Cheryl Brandt, Board of Psychologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2394; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibspsy@mt.gov.

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

24.189.401 FEE SCHEDULE (1) through (1)(e) remain the same.
(f) Temporary permit application fee 100
(2) remains the same.

AUTH: 37-1-134, 37-17-202, MCA
IMP: 37-1-134, 37-1-141, 37-17-302, MCA

REASON: The board determined it is reasonably necessary to implement a temporary permit application fee to comply with the provisions of 37-1-134, MCA, to set and maintain fees commensurate with associated costs. The board is proposing New Rule I in this notice to implement temporary practice permits, and the process requires board review during meetings, as well as board staff time. The board

estimates that the \$100 fee will affect approximately four license applicants each year and result in an estimated \$400 increase in annual revenue.

24.189.414 NONRESIDENT PSYCHOLOGICAL SERVICES

(1) Nonresident consulting psychological services defined in 37-17-104(4), MCA, may be rendered to individuals, groups, corporations, or the public for compensation or fee.

(2) and (3) remain the same.

AUTH: 37-1-131, 37-17-202, MCA

IMP: 37-17-104, MCA

REASON: Section 37-17-104, MCA, the statute implemented through this rule, was renumbered following a 2009 amendment. The board is amending this rule and ARM 24.189.601 to align with the renumbering and to delete internal references to specific MCA sections according to ARM formatting requirements.

24.189.601 APPLICATION PROCEDURES (1) Applications for licensure, when properly filled out by the applicant, must provide the board with that information necessary to ascertain whether or not the applicant meets the requirements of the law as to education and experience. Application forms must reflect satisfactorily the requirements of Montana law.

(a) through (c) remain the same.

(d) An application must be completed for final board review no more than 18 months after the board receives it or it will expire and a new application and fee will be required. If a temporary practice permit is issued, the application will not expire under this provision.

(2) remains the same.

(a) a completed and notarized application form;

(b) and (c) remain the same.

(d) three work samples documents establishing the satisfactory completion of predoctoral and postdoctoral supervision;

(e) and (f) remain the same.

~~(3) Work samples must be written examples of recent work (within two years of application date), at least two of which must be psychological evaluations. The purpose of the evaluations is to demonstrate competence in history taking, administration and interpretation of formal tests of intelligence, and administration and interpretation of objective and projective tests of personality. Tests utilized must be those widely recognized and respected in the practice of psychology. Projective testing will include projective techniques, at least one of which is a Rorschach or an apperception test. Each of the two evaluations must include the integration and interpretation of history taking, intelligence testing, and personality testing leading to an appropriate diagnosis and recommendations. Evaluations must also demonstrate competence in formulating appropriate diagnoses using the five axes specified in the Diagnostic and Statistical Manual of Mental Disorders (DSM) as well as making appropriate recommendations. Work samples do not include newspaper or other similar articles or publications. All identifying information must be removed~~

~~from work samples submitted to the board. Questions regarding the work samples may be included in the oral examination and candidates may be requested to present the raw data upon which their work samples were based.~~

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

~~(5)~~ (4) The board shall examine the transcript of every applicant to determine whether degrees were awarded by an accredited institution of higher learning with an adequate course of study in psychology as defined in 37-17-302, MCA, and ARM 24.189.604.

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

~~(7)~~ (6) ~~When the application file is complete and acceptable, the~~ The applicant will be notified in writing as to the time and place of the oral examination once the completed application is received and the board has approved the work samples. It shall be the duty of the applicant to inform the department when it is not feasible to appear at the time and place stated for the examination.

(a) If a candidate is scheduled for the examination a second time and does not appear, without legitimate excused reasons, ~~he~~ the applicant may lose his eligibility for the examination.

(b) When the application file is complete and acceptable, the board shall notify an applicant who is licensed in another state or province, and who is now a resident of Montana, that the applicant is allowed to practice as a psychologist pursuant to 37-17-104(5), MCA, pending satisfactory completion of the next board oral exam for which the applicant is eligible.

AUTH: 37-1-131, 37-17-202, MCA

IMP: 37-17-302, MCA

REASON: The board is amending (1)(d) to implement an application expiration date and address the ongoing issue of applicants failing to complete the licensure process in a timely fashion. The board concluded this amendment is reasonably necessary to ensure proper records retention and to provide a conclusion to outstanding applications that are not diligently pursued. The board is further amending this rule to align with current application processes and to reference the statute that provides the educational minimum standards.

The board is amending (2) and (6) to establish a process allowing otherwise qualified applicants to obtain necessary work samples as part of the examination process. For simplicity and to facilitate the issuance of temporary permits, the board is relocating the work sample provisions in (3) to ARM 24.189.610, which addresses the examination process.

24.189.607 REQUIRED SUPERVISED EXPERIENCE (1) Acceptable supervised experience must involve the practice of psychology and must have been performed competently at a professional level in order to be considered satisfactory in scope and quality. The supervised practice of psychology that occurs without the board's preapproval and outside of the activities and services exempted under 37-17-104, MCA, is the unlicensed practice of psychology, which is a disciplinary matter.

(a) through (2)(a) remain the same.

(b) One year of experience (a minimum of 1600 hours) must be postdoctoral. Each year of required supervised experience that occurs over more than 12 consecutive months (e.g., due to medical reasons) will be considered for board approval on a case-by-case basis. Postdoctoral supervised experience is calculated from the time of completion of all requirements for the doctoral degree and may not commence until all doctoral degree requirements are completed and the board has approved the proposed supervision. Completion of doctoral degree requirements may be established by a certified transcript or communication from an appropriate institutional official, such as the registrar or the dean of the graduate school.

(3) An applicant for postdoctoral supervised experience shall obtain from and submit to the board, a supervision proposal form. The form must indicate an agreement, acceptable to the board, between the applicant and the supervisor, and certify the existence of a supervisory relationship, as defined in this rule, for a specified period. The board shall notify the applicant in writing of the acceptability of the supervision proposal. Regardless of the terms of any supervision agreement, board-approved supervised experience is subject to the rules and statutes governing the practice of psychology and, except as otherwise permitted under these rules, terminates no later than the date that is two years following the date the supervised experience begins.

(4) and (a) remain the same.

(b) be obtained over a period of no more than five two calendar years. The Postdoctoral supervised experience may not continue beyond two years, except that the board may review and approve written requests for additional time in which to complete the postdoctoral supervision in situations where personal or professional matters may necessitate an extension;

(c) through (13) remain the same.

AUTH: 37-1-131, 37-17-202, MCA

IMP: 37-17-302, MCA

REASON: The board determined it is reasonably necessary to amend this rule to clarify the board's role regarding supervised experience and to put an end to supervision arrangements that are not reported to and approved by the board, and those that continue indefinitely. With the implementation of the temporary permit process proposed in New Rule I, the five-year period for acquiring postdoctoral supervised experience is no longer an appropriate length of time. The board concluded that only two years should be allowed to acquire this experience.

24.189.610 WORK SAMPLES - EXAMINATION (1) Once the licensing application is approved by the board, the applicant must submit three work samples for board approval.

(a) Work samples must be written examples of recent work (within two years of the application date), at least two of which must be psychological evaluations. Each of the two psychological evaluations must include a demonstration of competence in:

(i) the integration and interpretation of:

(A) history-taking utilizing a clinical interview conducted by the applicant;

(B) intelligence testing; and

(C) personality testing utilizing at least one objective personality inventory that is widely recognized and used in the field/practice of psychology, has strong empirical foundations, and assesses global personality and psychological functioning;

(ii) the formulation of appropriate diagnoses using the five axes specified in the Diagnostic and Statistical Manual of Mental Disorders (DSM); and

(iii) making appropriate recommendations.

(b) Work samples do not include newspaper or other similar articles or publications. Tests utilized must be those widely recognized and respected in the practice of psychology. All identifying information must be removed from work samples submitted to the board. Questions regarding the work samples may be included in the oral examination and candidates may be requested to present the raw data upon which their work samples were based.

~~(4)~~ (3) The applicant will be notified of the oral examination time schedule at least two weeks in advance. This examination schedule will establish: time(s), place(s), the amount of the examination fee, and other pertinent information and/or instructions.

~~(2) The board shall determine the subject matter and scope of specialized psychological areas and techniques for the examination.~~ Examinations for licensure will be a computerized national examination and an oral examination. These will be conducted by the board or its ~~duly-constituted~~ duly constituted representative(s). The computerized examination developed by the national licensing program, with the support of the ~~Association of State and Provincial Psychology Boards~~ association of state and provincial psychology boards, may be given.

(a) and (b) remain the same.

~~(3)~~ (4) The board shall determine the subject matter and scope of specialized psychological areas and techniques for the oral examination. Oral examinations shall include such matters as professional ethics for the purpose of determining the applicant's competence to conduct ~~himself~~ the applicant in a professional manner and to probe ~~his~~ the applicant's knowledge and judgement. The examination shall be scored on a ~~5-point~~ five-point scale: 5 (excellent), 4 (good), 3 (fair), 2 (poor), 1 (very poor). A mean score of three derived from the ratings of all examiners is required for passing. Candidates must have a mean of three, based on total points, divided by the number of scales evaluated. Additionally, they cannot have a mean of two or less on any one scale they are evaluated on. Oral examinations for candidates shall include, but not be limited to, questions in the following areas:

(a) through (f) remain the same.

~~(4)~~ (5) Applicants shall be informed of the results of the ~~examination~~ examinations by the department. All applicants who pass both examinations shall be considered licensed if they have met all other requirements. The department shall transmit the board's decision in writing to applicants and, when appropriate, inform them of their right to appeal. Reasons for actions shall be specified. The communication shall be sent to the last known address of the applicant by mail.

~~(5)~~ (6) Applicants who fail the computerized examination will be required to retake both the computerized and oral examinations. Applicants failing the oral examination once will only be required to retake the oral examination. Applicants

who fail the computerized or oral examinations twice shall, in addition to being retested, file in advance a statement regarding arrangements plan that must be preapproved by the board and must include a time period for securing further professional training and experience. The license applicant is then obligated to complete the preapproved plan prior to being authorized to take the examination or to being licensed.

AUTH: 37-1-131, 37-17-202, MCA

IMP: 37-1-131, 37-17-302, 37-17-303, MCA

REASON: In addition to moving the work sample provisions to this rule, the board is amending this rule to delete the requirement for a projective test from the work samples, clarify the work sample requirements, and clarify and tighten portions of the oral examination procedures. The board determined these changes are necessary to address any misunderstanding of what constitutes adequate work samples, and reduce the instances where improper work samples delay the processing of the license application.

The board is removing the requirement for work samples to use projective testing because projective testing is no longer taught in all schools and is used less frequently in the clinical setting. The board is also amending this rule to ensure that an applicant who has repeatedly failed any of the examinations will be properly prepared before having the opportunity to retest. Implementation cites are being amended to provide all statutes implemented through the rule and delete reference to repealed statutes.

24.189.2309 PROFESSIONAL RESPONSIBILITY (1) through (1)(d) remain the same.

(e) shall make reasonable efforts to plan for facilitating care in the event that psychological services are interrupted by factors such as the psychologist's illness, death, unavailability, or relocation, or by the client's relocation or financial limitations;

(f) and (g) remain the same.

(h) shall continue the defined professional relationship with the client until a relationship is established with the professional person to whom the client is referred or until the relationship has been terminated by mutual agreement. In situations where referral, consultation, or other changes in the conditions of the treatment are indicated, and the client refuses referral, the psychologist shall carefully weigh the possible harm to the client, the psychologist, and the psychologist's profession that might ensue from continuing the relationship.

(2) remains the same.

(a) shall not exploit persons over whom they have supervisory, evaluative, or other authority such as students, supervisees, employees, research participants, or clients;

(b) who performs interventions or administers, scores, interprets, or uses assessment techniques shall be familiar with the reliability, validation, and related standardization or outcome studies of, and proper applications and uses of, the techniques they use; and

(i) shall recognize limits to the certainty with which diagnoses, judgments, or predictions can be made about individuals;

(ii) shall attempt to identify situations in which particular interventions or assessment techniques or norms may not be applicable or may require adjustment in administration or interpretation, because of factors such as individuals' gender, age, race, ethnicity, national origin, religion, sexual orientation, disability, language, or socioeconomic status;

(iii) shall, when offering assessment or scoring procedures to other professionals, accurately describe the purpose, norms, validity, reliability, and applications of the procedures and any special qualifications applicable to their use;

(iv) remains the same.

(v) shall, regardless of whether the scoring and interpretation are done by the psychologist, by assistants, or by automated or other outside services, take reasonable steps to ensure that appropriate explanations of results are given and adequate provisions are made for referring and counseling individuals when needed;

(c) through (4) remain the same.

(a) shall provide psychological services for the purpose of diagnosis, assessment, or treatment only in the context of a defined professional relationship. However, nothing in these rules precludes the provision of psychological services for crisis management or intervention, even in the absence of a defined professional relationship;

(b) shall not prepare personnel reports and recommendations based on test data secured solely by mail, unless such appraisals are an integral part of a continuing client relationship with a company;

(i) ~~The~~ the reports shall not be embellished with detailed analyses of the subject's personality traits, as would be appropriate only after intensive interviews with the subject;

(ii) ~~The~~ the reports shall not make specific recommendations as to the employment or placement of the subject, which go beyond the psychologist's knowledge of the job requirements of the company; and

(iii) ~~The~~ the reports shall not purport to eliminate the company's need to carry on other regular employment or personnel practices such as appraisal of the work history, checking of references, or past performance in the company;

(c) shall not undertake or continue a defined professional relationship with a client when the psychologist is, or could reasonably be expected to be impaired due to mental, emotional, physiologic, pharmacologic, or substance abuse conditions. If such a condition develops after a defined professional relationship has been initiated, the psychologist shall terminate the relationship in an appropriate manner, shall notify the client in writing of the termination, and shall assist the client in obtaining services from another professional;

(d) shall give a truthful, understandable, and appropriate account of the client's condition to the client or to those responsible for the care of the client;

(e) shall make assessments, recommendations, reports, and psychological, diagnostic, or evaluative statements based on information and techniques (including personal interviews of the individual when appropriate) sufficient to provide appropriate substantiation for their findings; and

(f) through (5)(a) remain the same.

(b) shall not teach the use of techniques or procedures that require specialized training, licensure, or expertise, including, but not limited to, hypnosis, biofeedback, and projective techniques, to individuals who lack the prerequisite training, legal scope of practice, or expertise;

(c) shall establish an appropriate process for providing feedback to students and supervisees in academic and supervisory relationships; and

(d) through (6)(a) remain the same.

(b) shall delegate to their employees, supervisees, and research assistants only those responsibilities that such persons can reasonably be expected to perform competently, on the basis of their education, training, or experience, either independently or with the level of supervision being provided;

(c) shall not, prior to obtaining the board's approval, commence supervision of a person practicing psychology;

(d) shall, upon board approval of the supervision, reasonably and adequately supervise persons practicing psychology, so as to ensure the client's mental and physical health and safety are not at risk and that each supervisee complies with all applicable standards, rules, and statutes; and

(e) shall strictly comply with the rules governing supervision.

(7) remains the same.

(8) The violation of any statute, rule, or standard applicable to the licensee in relation to the licensee's practice of psychology is unprofessional conduct.

AUTH: 37-1-131, 37-1-319, 37-17-202, MCA

IMP: 37-1-131, 37-1-316, 37-17-101, MCA

REASON: Consistent with other changes being proposed to the board's rules, the board is amending this rule to provide appropriate disciplinary measures to ensure proper supervision of unlicensed practitioners in both postdoctoral and temporary permit settings. The board is adding (8) to clarify the board's disciplinary authority over the conduct of licensees.

4. The proposed new rule provides as follows:

NEW RULE I TEMPORARY PERMIT (1) An applicant requesting a temporary permit must submit to the board:

(a) an application for a temporary permit, which must include a supervision agreement signed by the proposed supervisor;

(b) the fee for the temporary permit application;

(c) a completed license application; and

(d) the fee for the license application.

(2) An applicant for licensure may be issued a temporary permit if the applicant:

(a) lacks only the examination for licensure; and

(b) works under the supervision of a board-approved psychologist.

(3) The supervised practice of psychology that occurs without the board's preapproval and outside of the activities and services exempted under 37-17-104, MCA, is the unlicensed practice of psychology, which is a disciplinary matter.

- (4) Before commencing supervision of a temporary permit holder, a supervisor shall obtain board approval. Supervisors must, at a minimum:
 - (a) be licensed in Montana throughout the period of supervision;
 - (b) have no less than three years experience as a licensed psychologist prior to the date supervision begins; and
 - (c) during the period of supervision, remain free of disciplinary sanctions against each psychology license held by the supervisor.
- (5) The supervisor shall:
 - (a) not be required to work in the same setting as nor be an actual employee of the organization or institution where the temporary permit holder works;
 - (b) be available in a timely manner for supervision in the event of an emergency;
 - (c) be available to the temporary permit holder's clients for emergency consultation and intervention via no less than telephone communication;
 - (d) determine the adequacy of the temporary permit holder's preparation for the tasks to be performed and determine the level of supervision;
 - (e) be ethically and legally responsible for all of the professional activities of the temporary permit holder;
 - (f) terminate the temporary permit holder's activities and inform the board of the reasons for terminating those activities when it is reasonably necessary to ensure the protection of the public; and
 - (g) report to the board any breach in ethical, legal, or professional responsibilities of the temporary permit holder.
- (6) During the supervision period, the temporary permit holder shall:
 - (a) when describing his or her activities and services, use the title "temporary permit practitioner in psychology";
 - (b) when signing psychological reports and other professional opinions, conclusions, and written work rendered by the temporary permit holder, use the title "temporary permit practitioner in psychology", and obtain the countersignature of the supervisor; and
 - (c) inform each client orally and in writing of the supervised nature of the work and provide each client the name of the supervisor.
- (7) A supervisor whose primary responsibilities are in another employment position shall not supervise more than a total of three supervisees, including temporary permit holders, at any one time.
- (8) A supervisor shall not be involved in a dual relationship with a temporary permit holder, which would compromise the supervisory relationship; e.g., related by marriage, immediate family, business partnership, employee of the temporary permit holder, or a former client-professional relationship. If the temporary permit holder pays the supervisor for the supervision, the supervisor shall be especially cautious to avoid negative impacts from the financial arrangements on the supervisory relationship.
- (9) A temporary permit is valid until the person either fails the first oral examination for which the person is eligible, following issuance of the permit, or is granted a license, whichever occurs first.
- (10) The first oral examination for which the person is eligible is the next oral examination occurring at least 90 days following the date the person submits the

required work samples, but not later than the second oral examination test date following the date the temporary permit is issued. Except, however, that on a case-by-case basis, and upon good cause, the first oral examination for which the person is eligible may be set by the board to allow the applicant additional time to obtain the required work samples and to continue the supervised practice of psychology. If the time is extended, it shall be extended to the date of what will then constitute the first oral examination for which the person is eligible.

(11) A person who has held a temporary permit in the past may be granted another temporary permit only upon a justifiable excuse and when good cause appears, and then only if it is shown that the refusal of a temporary permit would preclude the person from licensure, because, without it, the person would be unable to obtain the necessary work samples for the oral examination.

AUTH: 37-1-131, 37-1-319, 37-17-202, MCA

IMP: 37-1-131, 37-1-305, MCA

REASON: The board is proposing this new rule to establish criteria for temporary permits and enable license applicants to practice under supervision while obtaining the required work samples for the oral examination. The board regularly receives applicant requests for permission to complete the examination process, including the work samples, without unnecessarily delaying their ability to practice in the interim. This new rule will allow license applicants to practice while completing the examination process, while ensuring the public's safety through the applicants' supervision.

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 Psychologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdpsy@mt.gov, and must be received no later than 5:00 p.m., March 23, 2012.

6. An electronic copy of this Notice of Public Hearing is available through the department and board's web site on the World Wide Web at www.psy.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 Psychologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; faxed to the office at (406) 841-2305; e-mailed to dlibspsy@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. Tyler Moss, attorney, has been designated to preside over and conduct this hearing.

BOARD OF PSYCHOLOGISTS
GEORGE WATSON, PhD., 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 February 13, 2012

BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION OF THE STATE OF MONTANA

In the matter of the repeal of ARM	)	NOTICE OF PUBLIC HEARING
36.17.601 through 36.17.606 and the	)	ON PROPOSED REPEAL AND
adoption of New Rules I through VII	)	ADOPTION
regarding the application procedures)	
and loan requirements of the)	
Renewable Resources Grant and Loan)	
Program)	

To: All Concerned Persons

1. On March 21, 2012, at 2:00 p.m., the Department of Natural Resources and Conservation will hold a public hearing in the Bannack Conference Room (bottom floor), 1625 Eleventh Avenue, Helena, Montana, to consider the proposed repeal and adoption of the above-stated rules.

2. The department 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 department no later than 5:00 p.m. on March 5, 2012, to advise us of the nature of the accommodation that you need. Please contact Pam Smith, Montana Department of Natural Resources and Conservation, 1625 Eleventh Avenue, Helena, MT 59620, telephone (406) 444-6839, fax (406) 444-2684 e-mail pamsmith@mt.gov.

3. The department proposes to repeal the following rules:

36.17.601 APPLICATION FEES

AUTH: 85-1-612, MCA
IMP: 85-1-612, 85-1-616, MCA

36.17.602 APPLICATION FORM AND CONTENT

AUTH: 85-1-612, MCA
IMP: 85-1-612, 85-1-616, MCA

36.17.603 RANKING CRITERIA TO BE USED TO EVALUATE PUBLIC GRANT APPLICATIONS AND PRIORITIZE PUBLIC GRANTS RECOMMENDED FOR FUNDING

AUTH: 85-1-612, MCA
IMP: 85-1-601, 85-1-605, 85-1-612, 85-1-616, MCA

36.17.604 APPLICATION OF CRITERIA FOR AWARD OF GRANTS AND LOANS TO PRIVATE APPLICANTS

AUTH: 85-1-612, MCA

IMP: 85-1-610, 85-1-612, 85-1-616, MCA

36.17.605 TERMS AND CONDITIONS FOR GRANT AND LOAN AGREEMENTS

AUTH: 85-1-612, MCA

IMP: 85-1-605, 85-1-613, 85-1-616, 85-1-617, MCA

36.17.606 ARRANGEMENTS FOR OBTAINING SECURITY INTERESTS

AUTH: 85-1-612, MCA

IMP: 85-1-613, 85-1-615, 85-1-616, MCA

REASONABLE NECESSITY: ARM 36.17.601 through 36.17.603, 36.17.605, and 36.17.606 are being repealed because their text has been integrated within the text of New Rules I through VII. That integration gives the new rules more clarity and, to help avoid confusion, places the definitions rule as the first active rule in the subchapter. ARM 36.17.604 is being repealed to avoid the potential of conflicts with the statutory content of 85-1-606, 85-1-609, and 85-1-610, MCA.

4. The rules as proposed to be adopted provide as follows:

NEW RULE I DEFINITIONS As used in this subchapter, the following definitions apply unless the context requires otherwise:

(1) "Act" or "RRGL program" means the statutes establishing the Renewable Resource Grant and Loan Program (RRGL) in Title 85, chapter 1, part 6, MCA.

(2) "Applicant" means the following who submit an application under the act, meeting the purposes and policies of the act pursuant to 85-1-601, MCA:

(a) a local governmental or state governmental entity eligible under 85-1-605, MCA;

(b) a tribal government eligible under 85-1-605, MCA; or

(c) a private person that is an individual, association, partnership, corporation, or other governmental entity that is not eligible for loans and grants under 85-1-605, MCA.

(3) "Application" means an application for a renewable resource grant or loan submitted by an applicant in accordance with the act and the rules adopted pursuant to the act.

(4) "Bureau" means the Resource Development Bureau of the Department of Natural Resources and Conservation.

(5) "Conservation" means the promotion of efficient and/or sustainable use of a renewable resource.

(6) "Department" means the Department of Natural Resources and Conservation provided for in Title 2, chapter 15, part 33, MCA.

(7) "Development" means a new beneficial and sustainable use of a renewable resource.

(8) "Director" means the director of the Department of Natural Resources and Conservation as provided for under 2-15-3301, MCA.

(9) "Management" means activities that improve governing entities' ability to control and administer a renewable resource.

(10) "Preservation" means the protection of a renewable resource from pollution, destruction, or neglect.

(11) "Program costs" means nonreimbursable costs not directly related to the project. Program costs include, but are not limited to:

(a) office rent that will be incurred whether or not the project is implemented;

(b) salaries of existing fully funded staff positions unless the work-hours associated with the project are accounted for; or

(c) any other costs that pay for ongoing or general services of the applicant.

(12) "Project costs" means costs that will be incurred only by implementing the project described in the application, and whose funding source is:

(a) RRGL program funds;

(b) matching dollars; or

(c) in-kind contributions.

(13) "Public benefits" means a benefit that accrues to the common well-being, safety, health, or welfare of the citizens of Montana from a renewable resource project including, but not limited to the benefits that accrue to an applicant.

(14) "Public resource" means land, air, water, fish, wildlife, and recreation opportunities.

(15) "Renewable resource" means a sustainable natural resource including water, wind, renewable energy, soil, wetlands, fish and aquatic habitat, wildlife habitat, range land, crop land, and forests.

(16) "Renewable resource grant" means a project grant approved by the Legislature for the enhancement of a renewable resource meeting the objectives of 85-1-602, MCA.

(17) "Renewable resource project" or "project" as used in conjunction with Title 85, chapter 1, part 6, MCA, means any activity or development that conserves, develops, manages, or preserves a renewable resource; and does not result in a long-term adverse impact to land, air, water, fish, wildlife, or recreation opportunities.

(18) "Renewable resource planning grant" means a grant to provided funding for any preliminary or planning activity that would contribute to a renewable resource project as determined by the bureau. Examples include, but are not limited to grants to provide funding for preliminary engineering reports, resource assessments, or technical reports.

AUTH: 85-1-612, MCA

IMP: 85-1-612, MCA

REASONABLE NECESSITY: New Rule I is reasonably necessary to provide definitions for terminology used within the context of this subchapter for the administration of the Renewable Resource Grant and Loan Program as enacted in Title 85, chapter 1, part 6, MCA.

NEW RULE II APPLICATION FEES AND DUE DATE (1) An applicant shall submit an application fee with each application.

(a) A governmental or tribal applicant shall pay a \$250 nonrefundable application fee for each renewable resource grant, small loan, and/or large loan application submitted.

(b) A private applicant shall pay a \$150 nonrefundable application fee for each loan application submitted.

(2) All applications submitted to the bureau must be postmarked on or before May 15 or the next business day if May 15 falls on a Sunday or a federal holiday and post offices are closed. Electronic application submissions will not be accepted.

AUTH: 85-1-612, MCA

IMP: 85-1-612, 85-1-616, MCA

REASONABLE NECESSITY: New Rule II incorporates the text from ARM 36.17.601 and corrects some minor grammatical errors. It also clarifies the date by, and manner in which, all applications must be submitted to the department. New Rule II is reasonably necessary to administer the requirements of the Renewable Resource Grant and Loan Program as enacted in Title 85, chapter 1, part 6, MCA.

NEW RULE III APPLICATION FORM AND CONTENT (1) Governmental, tribal, and private grant and/or loan applicants shall submit applications according to these rules and the guidelines published by the bureau.

(a) Application guidelines may be obtained from, and completed applications must be submitted with supporting documentation to, the Resource Development Bureau, Conservation and Resource Development Division, Department of Natural Resources and Conservation, P.O. Box 201601, 1625 Eleventh Avenue, Helena, MT 59620-1601.

(2) The application requirements for governmental and tribal applicants as described in the guidelines must include at a minimum:

(a) an authorizing statement signed by an authorized representative of the applicant;

(b) a proposal abstract providing a brief project description stating how the project's benefits support the RRGL program purpose;

(c) a renewable resource and public benefits narrative describing how and to what extent a project benefits a renewable resource under the RRGL program pursuant to the purposes of the program stated in 85-1-601, MCA. A project that does not further the state's purposes as stated in 85-1-601(2), MCA, is ineligible for a grant;

(d) a technical narrative documenting the technical feasibility of the project. A project that is not technically feasible is ineligible for a grant or loan;

(e) a project management plan explaining how the project and the grant will be managed. An application that does not demonstrate the applicant's ability to manage the grant project is ineligible for a grant or loan;

(f) a financial feasibility narrative demonstrating that the funding is obtainable to complete the project and that the project can be completed within the proposed budget. A financial feasibility narrative must include:

(i) project costs that will be reimbursed with grant or loan funds; and
(ii) program costs that are not reimbursable costs and may not be included as project costs. An application that does not document financial feasibility is ineligible for a grant or loan;

(g) an environmental narrative and checklist evaluating the potential environmental impact of the project and each project alternative with identification of mitigation measures. An application that does not have a complete environmental narrative and checklist is ineligible for consideration; and

(h) if applicable, a narrative describing how the project will implement the state water plan.

(3) Upon receipt of an application, the bureau will review the application.

(a) An application submitted by a governmental agency must be signed by the agency head. An application is not complete if it is filed without the written authorization of the agency head. If the application is incomplete, it shall be returned to the agency and the fee shall not be returned.

(4) Any application returned under this rule may not be resubmitted in the same cycle in which it was returned.

AUTH: 85-1-612, MCA

IMP: 85-1-612, 85-1-616, MCA

REASONABLE NECESSITY: New Rule III incorporates the text from ARM 36.17.602. It amends that original language to lay out specific details and requirements of applications that are submitted to the department. New Rule III is reasonably necessary to administer the requirements of the Renewable Resource Grant and Loan Program as enacted in Title 85, chapter 1, part 6, MCA.

NEW RULE IV CRITERIA FOR RANKING GOVERNMENTAL AND TRIBAL RENEWABLE RESOURCE GRANT APPLICATIONS (1) For each grant cycle, the bureau shall publish with its guidelines the numerical points to be awarded.

(2) Points are awarded and deducted based on the following criteria.

(a) Points must be awarded for renewable resource benefits related to the project. If a project has no renewable resource benefits, it is ineligible for a grant.

(b) Points must be awarded for public benefits. If a project has no public benefits, it is ineligible for a grant.

(c) Tie breaker preference must be given to projects that have an equal score and that:

(i) implement the state water plan priorities; and/or

(ii) will mitigate human health or safety problems.

(d) No points may be awarded for financial feasibility. Points will be deducted for errors or omissions in this section. If a project is determined to not be financially feasible, it is ineligible for a grant.

(e) If a project is determined to have adverse environmental impacts that cannot be mitigated and do not preserve the state's renewable resources per 85-1-601, MCA, it is ineligible for a grant.

(f) No points may be awarded for technical feasibility. Points will be deducted for errors or omissions in this section. If a project is determined to not be technically feasible, it is ineligible for a grant. Technical feasibility includes, but is not limited to:

(i) adequacy of the alternative analysis;

(ii) adequacy of cost estimates for potential alternatives and the preferred alternative;

(iii) preferred alternative selection;

(iv) thoroughness and feasibility of the project's implementation plan and schedules; and

(v) quality of supporting technical data submitted with the application.

(g) Points may be deducted from applications for which there have been past management problems, prior project completion issues, or such other concerns as identified in the published guidelines for the grant cycle. If a management plan is not adequate to support the project, it is ineligible for a grant.

(3) Applications shall be assigned a net ranking score based on the points gained or lost. Once the applications have been ranked, the bureau shall review all of the rankings and shall recommend to the director a funding priority list of all of the applications.

(a) The priority list will be used to determine department funding recommendations and will be incorporated in a report to the Legislature recommending government and tribal grant applications for funding and the amount of grant award suggested.

(b) Funding recommendations are made to maximize benefit to Montanans and will be based on the total amount of grant funds available, the amount of grant funds requested, and the total project cost.

AUTH: 85-1-612, MCA

IMP: 85-1-601, 85-1-605, 85-1-612, 85-1-616, MCA

REASONABLE NECESSITY: New Rule IV incorporates the text from ARM 36.17.603. It amends that original language to clarify the specific criteria used for ranking government or tribal renewable resource grant applications. New Rule IV is reasonably necessary to administer the requirements of the Renewable Resource Grant and Loan Program as enacted in Title 85, chapter 1, part 6, MCA.

NEW RULE V RENEWABLE RESOURCE GOVERNMENTAL AND TRIBAL PLANNING GRANTS (1) Funds for renewable resource planning grants are limited by legislative appropriation.

(2) Renewable resource planning grants provide funding for preliminary engineering reports, resource assessments, technical reports, or any planning activity that would contribute to a renewable resource project as determined by the bureau. Funding may also be awarded in the form of administrative grants.

(3) No application fee is required for the submission of a public planning grant.

(4) Public planning grant applicants shall submit applications in the form prescribed, and according to the guidelines published by the bureau.

(5) The bureau shall evaluate an application for a public planning grant on the basis of how well the application content explains and meets the objectives of the RRLG program.

AUTH: 85-1-612, MCA

IMP: 85-1-612, 85-1-616, MCA

REASONABLE NECESSITY: ARM 36.17.601 through 36.17.606, which the department is proposing to repeal, while incorporating the text into these new rules, did not contain submission requirements for renewable resource planning grants. New Rule V is reasonably necessary to clarify what those requirements are, and to administer the requirements of the Renewable Resource Grant and Loan Program as enacted in Title 85, chapter 1, part 6, MCA.

NEW RULE VI TERMS AND CONDITIONS FOR GRANT AND LOAN AGREEMENTS WITH GOVERNMENTAL, TRIBAL, AND PRIVATE RECIPIENTS

(1) Successful governmental, tribal, and private grantees must enter into a written agreement with the bureau if the grantee wishes to continue the grant process. The written agreement must contain clear specifications for the work to be completed and a budget and other appropriate terms and conditions governing the performance of the grantee.

(2) The grantee shall document all project costs to be paid or reimbursed, and those to be credited as matching contributions.

(3) Grant funds that are not spent for the approved project must be returned to the renewable resource state special revenue account for use as directed by appropriation.

(4) Grant agreements with tribal governments in Montana must contain, in addition to other appropriate terms and conditions:

(a) a requirement that in the event a dispute or claim arises under the agreement, state law will govern as to the interpretation and performance of the agreement and that any judicial proceeding concerning the terms of the agreement will be brought in the district court of the first judicial district of the state of Montana;

(b) an express waiver of the tribal government's immunity from suit on any issue specifically arising from the transaction of a grant; and

(c) an express waiver of any right to exhaust tribal remedies signed by the tribal government.

(5) For successful governmental loans the borrower shall:

(a) furnish a bond resolution which contains the specific requirements and covenants with respect to the project financed from the loan proceeds; and

(b) enter into an agreement which:

(i) allows the department to purchase the applicant's bond or bond anticipation note, with the amount specified;

(ii) stipulates the terms of repayment and interest rates and fees to be paid by the borrower;

(iii) specifies the work to be completed;

- (iv) specifies insurance requirements and inspection requirements; and
- (v) specifies the conditions for the disbursement of funds.
- (6) Loan agreements with tribal governments in Montana must contain, in addition to other appropriate terms and conditions:
 - (a) a requirement that in the event a dispute or claim arises under the agreement, state law will govern as to the interpretation and performance of the agreement and that any judicial proceeding concerning the terms of the agreement will be brought in the district court of the first judicial district of the state of Montana;
 - (b) an express waiver of the tribal government's immunity from suit on any issue specifically arising from the transaction of a loan; and
 - (c) an express waiver of any right to exhaust tribal remedies signed by the tribal government.
- (7) For successful private loans, the borrower shall furnish title insurance showing ownership of land, mortgages, encumbrances, or other lien defects; and shall enter into a loan agreement with the department prior to project construction or equipment purchase. The loan agreement will:
 - (a) specify the loan administration fee;
 - (b) contain clear specifications for the work to be completed;
 - (c) stipulate a budget to be consistent with the application;
 - (d) specify provisions for the disbursement and repayment, including principal and interest of loan funds;
 - (e) describe the collateral provided to secure the loan;
 - (f) prescribe remedies for borrower delinquency or default in repayment; and
 - (g) specify that the recipient agrees to comply with Montana contracting and procurement laws applicable to state and federal agencies, counties, and municipalities. The agreement may provide specific guidance on compliance but may not waive compliance with the contracting or procurement laws.

AUTH: 85-1-612, MCA

IMP: 85-1-605, 85-1-613, 85-1-616, 85-1-617, MCA

REASONABLE NECESSITY: New Rule VI incorporates the text from ARM 36.17.605 with minor formatting and grammatical changes, and specifies grant and loans requirements that apply specifically to governmental, tribal, and private recipients. The rule also clarifies that loan recipients must comply with applicable Montana contracting and procurement laws. New Rule VI is reasonably necessary to administer the requirements of the Renewable Resource Grant and Loan Program as enacted in Title 85, chapter 1, part 6, MCA.

NEW RULE VII ARRANGEMENTS FOR OBTAINING SECURITY INTERESTS (1) For loans to private applicants the borrower shall provide security which is at least equal to 125% of the principal value of the loan.

- (2) Private borrowers shall provide security with:
 - (a) a first or second real estate mortgage;
 - (b) an assignment of accounts receivable;
 - (c) certificates of deposit or similar securities;
 - (d) a turn off authority; or

- (e) other security as accepted by the department.
- (3) Private water users association or ditch company borrowers may provide security in the following manner, which may be in addition to any security items listed in (2):
 - (a) a lien on the shares of stock in the association;
 - (b) a lien on the revenues of the association;
 - (c) a lien on the accounts receivable of the association; and/or
 - (d) a lien on any water purchase agreements of the association.
- (4) At the department's request, the private borrower shall also provide an appraisal of the real property used as security for the loan.
- (5) A partial release of lien may be granted by the department upon written request of the private borrower if the remaining security is at least equal to 125% of the outstanding principal value of the loan and the department establishes that the loan will remain adequately secured.
- (6) The private borrower shall be apprised of state law governing foreclosure on delinquent loans at the time of loan closure.

AUTH: 85-1-612, MCA

IMP: 85-1-613, 85-1-615, 85-1-616, MCA

REASONABLE NECESSITY: New Rule VII incorporates the text from ARM 36.17.606 with minor formatting and grammatical changes. New Rule VII is reasonably necessary to administer the requirements of the Renewable Resource Grant and Loan Program as enacted in Title 85, chapter 1, part 6, MCA.

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 in writing to Pam Smith, Montana Department of Natural Resources and Conservation; 1625 Eleventh Avenue, Helena, MT 59620; telephone (406) 444-6839; fax (406) 444-2684; e-mail pamsmith@mt.gov, and must be received no later than 5:00 p.m. March 22, 2012.

6. Pam Smith, Department of Natural Resources and Conservation, has been designated to preside over and conduct the public hearing.

7. An electronic copy of this Notice of Public Hearing on Proposed Repeal and Adoption is available through the department's web site at <http://www.dnrc.mt.gov>. The department strives to make the electronic copy of this Notice of Public Hearing on Proposed Repeal and Adoption conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered.

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

person wishes to receive notices regarding conservation districts and resource development, forestry, oil and gas conservation, trust land management, water resources, or a combination thereof. 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 Lucy Richards, 1625 Eleventh Avenue, Helena, MT 59620; fax (406) 444-2684; e-mail lrichards@mt.gov; or may be made by completing a request form at any rules hearing held by the department.

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

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

/s/ Mary Sexton

MARY SEXTON

Director

Natural Resources and Conservation

/s/ Kevin Peterson

KEVIN PETERSON

Rule Reviewer

Certified to the Secretary of State on February 13, 2012.

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

In the matter of the adoption of New	)	NOTICE OF PUBLIC HEARING ON
Rules I through VII, amendment of	)	PROPOSED ADOPTION,
37.111.101, 37.111.106, 37.111.107,	)	AMENDMENT, AND
37.111.116, 37.111.117, 37.111.121,	)	REPEAL
37.111.122, 37.111.124, 37.111.130,)	
and repeal of 37.111.104,)	
37.111.105, 37.111.115, 37.111.123,)	
and 37.111.135 pertaining to public)	
sleeping accommodations)	

TO: All Concerned Persons

1. On March 21, 2012, at 1:30 p.m., the Department of Public Health and Human Services will hold a public hearing in Room 207 of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed adoption, amendment, and repeal of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on March 14, 2012, to advise us of the nature of the accommodation that you need. Please contact Kenneth Mordan, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

3. The rules as proposed to be adopted provide as follows:

NEW RULE I REVIEW OF PLANS AND SPECIFICATIONS (1) Whenever an initial license is applied for, the applicant must submit plans and specifications to the local health authority for review and approval before construction, remodeling, or conversion begins.

(2) If the local health authority is unable to perform the review, plans and specifications must be submitted to the department for review and approval.

(3) Plans and specifications must include the following:

(a) location and detail of storage rooms used for bedding and furnishings;

(b) location and detail of janitorial facilities;

(c) location and detail of laundry facilities, including a description of equipment, floor and wall finish material;

(d) a flow chart indicating the route of laundry through sorting, washing, drying, ironing, folding, and storage;

- (e) location and description of all food preparation, storage, and service areas, unless already required to license as a retail food service establishment under 50-50-102, MCA;
 - (f) description of dishes, cookware, utensils, and cooking equipment available in guest rooms, including details of cleaning and storage;
 - (g) location and detail of ice production, storage, and dispensing equipment;
 - (h) location of swimming pools, spas, and other recreational water features;
 - (i) name of sanitary landfill licensed by the Department of Environmental Quality (DEQ) which will receive solid waste from the establishment;
 - (j) documentation of approval from DEQ and any applicable local health authority permit and inspection report, if the establishment will be served by a public wastewater system;
 - (k) documentation of approval from the local health authority, if the establishment will be served by a nonpublic wastewater system;
 - (l) documentation of approval from DEQ, if the establishment will be served by a public water supply;
 - (m) demonstration of compliance with this subchapter, if the establishment will be served by a nonpublic water supply; and
 - (n) any other pertinent information requested by the local health authority.
- (4) Construction must be in accordance with the plans and specifications as approved. Any changes from the approved plans must be reviewed and approved, in writing, by the local health authority.
- (5) Approval is valid for two years. If construction, remodeling, or conversion is not completed within two years, the local health authority may require plans and specifications to be resubmitted for review.
- (6) If the establishment was previously licensed by the department and no structural modification will be involved, the local health authority may waive the requirement for the submission of plans and specifications.

AUTH: 50-51-103, MCA

IMP: 50-51-103, MCA

NEW RULE II WATER SUPPLY SYSTEM GENERAL REQUIREMENTS

- (1) An establishment must provide an adequate and potable supply of water.
- (2) A public water supply system must be approved by the Department of Environmental Quality and meet the requirements of ARM Title 17, Chapter 38, subchapters 1, 2, 3, and 5.
- (3) A nonpublic water supply system must meet the requirements of Food and Consumer Safety (FCS) Circular 1-2012 when:
 - (a) the water supply is constructed after the effective date of this rule;
 - (b) modifications are made to the water system; or
 - (c) the local health authority determines compliance with FCS Circular 1-2012 is necessary to meet the requirements of this subchapter.
- (4) A nonpotable water source may be used only if:
 - (a) access points are marked "not for human consumption";
 - (b) installation and maintenance prevent any connection to a potable water supply system; and

(c) the source is used in a manner that does not expose the public to any health risk.

(5) The department adopts and incorporates by reference FCS Circular 1-2012 in effect April 27, 2012, which contains potable water construction and maintenance standards for nonpublic water supplies serving licensed establishments. A copy of FCS Circular 1-2012 may be obtained from the Department of Public Health & Human Services, Food & Consumer Safety Section, P.O. Box 202951, Helena, Montana 59620-2951. The FCS Circular 1-2012 is also available on the department's web site at www.fcscs.mt.gov.

AUTH: 50-51-103, MCA

IMP: 50-51-103, MCA

NEW RULE III NONPUBLIC WATER SUPPLY SAMPLING AND TEST REPORTS (1) An establishment using a nonpublic water supply system must have water samples analyzed for coliform bacteria as follows:

(a) Coliform sampling must be done before licensing and at least in two separate months of each calendar year that the establishment operates.

(b) The sampling schedule must include collection when the water source is most likely to be contaminated, such as during April through June and September through October, in the high ground water season, or as directed by the local health authority.

(c) The local health authority may require the establishment to sample monthly, in the months the establishment operates, if an inspection, sampling results, or an event indicates the water source is vulnerable to contamination.

(d) The local health authority may return the sampling frequency to two in a calendar year if an on-site sanitary inspection of the water source and other pertinent information shows the water source is no longer vulnerable to contamination.

(2) Following shock disinfection, a coliform sample must be collected at least three to five days after disinfectant is no longer detected in the system.

(3) An establishment using a nonpublic water supply system must have a water sample analyzed for total nitrate before initial licensing and at least once each year that the establishment is licensed.

(4) Water samples must be analyzed by a laboratory licensed and certified by the state of Montana for drinking water analysis.

(5) The establishment must ensure water test results are transmitted to the local health authority from the laboratory in a format acceptable to the local health authority.

(6) The establishment must keep test results available for inspection by the local health authority for at least five years.

AUTH: 50-51-103, MCA

IMP: 50-51-103, MCA

NEW RULE IV NONPUBLIC WATER SUPPLY CONTAMINATED SAMPLES

(1) If coliform bacteria is detected in a nonpublic water supply routine sample, the establishment must:

- (a) collect at least four more repeat samples at the following system points:
 - (i) the location of the original contaminated routine sample;
 - (ii) up-gradient to the contaminated routine sample;
 - (iii) down-gradient to the contaminated routine sample; and
 - (iv) at the source; or
 - (v) as directed by the local health authority.
- (b) collect at least five routine samples in the month following a detection of coliform in any routine sample; and
- (c) notify the local health authority within 48 hours of receiving test results.

(2) If coliform is detected in a repeat sample, the establishment must:

- (a) take appropriate corrective action; and
- (b) notify customers and staff by placing an advisory sign approved by the local health authority at each point of use, or as directed by the local health authority.

(3) If fecal coliform or E. coli is detected in a routine sample or repeat sample, the establishment must:

- (a) stop using the water source immediately;
- (b) provide a temporary source of safe water in accordance with [New Rule VI];
- (c) take appropriate corrective action; and
- (d) notify the local health authority within 24 hours of receiving test results.

(4) If an establishment fails to take the four repeat or five routine samples following the detection of coliform, or fails to test for fecal coliform or E. coli in coliform positive samples, the establishment must follow corrective actions as specified in (3).

AUTH: 50-51-103, MCA

IMP: 50-51-103, MCA

NEW RULE V WATER SUPPLY CORRECTIVE ACTIONS (1) An establishment must take appropriate corrective action, which may include shock disinfection, replacement, or repair of the water supply system within a period specified by the local health authority when:

(a) a water sample exceeds the maximum contaminant levels as specified in ARM Title 17, chapter 38, subchapter 2;

(b) the supply does not have the capacity to provide enough water for drinking, cooking, personal hygiene, laundry, cleaning, and wastewater disposal;

(c) the local health authority reports to an establishment that the establishment's water supply system is vulnerable to contamination based on a site visit;

(d) a pathogenic microorganism is detected; or

(e) a confirmed disease outbreak is associated with the water supply through investigation.

(2) When a water supply is replaced or repaired, the water supply system must be shock disinfected.

AUTH: 50-51-103, MCA

IMP: 50-51-103, MCA

NEW RULE VI WATER SUPPLY RESTRICTED-USE ORDER (1) The local health authority shall issue a restricted-use order to an establishment when:

(a) the Department of Environmental Quality (DEQ) has issued a boil water order;

(b) fecal coliform or E. coli is detected in a nonpublic water supply sample;

(c) the total nitrate level is over 10 mg/L in a nonpublic water supply sample;

(d) a nonpublic water supply sample exceeds the maximum contaminant levels as specified in ARM Title 17, chapter 38, subchapter 2;

(e) a pathogenic microorganism is detected; or

(f) a confirmed disease outbreak is associated to the water source by investigation.

(2) An establishment that is subject to a restricted-use order must provide and use a temporary source of potable water as described in (3) for customer and staff drinking, food and drink preparation and service, ice, dishwashing, food contact surface cleaning, and hand washing, or discontinue operations.

(3) With approval from the local health authority, an establishment may provide potable water on a temporary basis using one or more of the following:

(a) bottled or packaged potable water from a department-licensed water bottler, or other approved water bottler, if the water is dispensed directly from the original container;

(b) water from a DEQ-approved public water supply that meets the requirements of ARM Title 17, chapter 38, subchapters 1, 2, 3, and 5, stored in a clean potable water container or holding tank;

(c) water delivered by a department-licensed potable water hauler;

(d) if the water is fecal or E. coli contaminated, water that has been boiled for at least one minute, and stored and served from a clean, sanitized covered container; or

(e) other source approved by the local health authority.

(4) If the local health authority determines that boiling water will not provide adequate potable water, it may require an establishment to use another approved method for supplying water.

(5) An establishment subject to a restricted-use order must notify customers and staff of the restricted-use order by placing a sign at each point of use, or as otherwise directed by the local health authority.

(6) A water supply under a restricted-use order may not be used to make ice.

(7) An establishment subject to a restricted-use order may wash, rinse, and sanitize dishes, utensils, and equipment using the affected water system if using an approved chemical disinfectant or a commercial dish machine that reaches 180°F (82°C) in the final rinse.

(8) A restricted-use order may be removed by the local health authority after:

(a) laboratory sampling demonstrates that the water supply is safe;

(b) the establishment flushes all pipes, faucets, and drinking fountains by running cold water for at least five minutes; and

(c) the establishment flushes, cleans, and sanitizes food and beverage equipment connected to the water supply, such as, but not limited to, post-mix beverage machines, spray misters, coffee makers, tea urns, ice machines, glass washers, and dishwashers in accordance with manufacturer's instructions.

AUTH: 50-51-103, MCA

IMP: 50-51-103, MCA

NEW RULE VII ICE (1) Ice must be made from the establishment's approved water supply meeting the requirements of this subchapter or obtained from a licensed or approved supplier.

(2) Ice must be manufactured, stored, handled, transported, and served in a manner that prevents contamination.

(3) Ice must be stored in an automatic dispenser if the ice is not dispensed directly by the establishment staff.

(4) Where open-bin ice is provided, an ice scoop must be readily available for use by the staff and protected from contamination.

AUTH: 50-51-103, MCA

IMP: 50-51-103, MCA

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

37.111.101 DEFINITIONS In addition to those definitions contained in 50-51-102, MCA, the following definitions apply to this subchapter:

(1) "Bedding" means a ~~mattresses~~, box springs, mattress covers, mattress pads, sheets, pillow slips, pillows, pillow covers, blankets, comforters, quilts, duvet, and bedspreads.

(2) and (3) remain the same.

(4) "Establishment" means a facility providing sleeping accommodations to the public, such as a hotel, motel, tourist home, or rooming house, including boarding house, hostel, or vacation home or retirement home. For the purpose of this subchapter, establishment does not include a "bed and breakfast," "guest ranch," or "outfitting and guide facility."

(5) "Fire authority" means the state fire marshal or ~~his~~ the state fire marshal's authorized agent.

(6) "Fixtures" means a shower, bathtub, toilet, toilet seat, urinal, lavatory handwashing sink, kitchen sink, janitor ~~and custodial~~ sink, ~~utensil~~ dishwashing sink, and all exposed plumbing integral to them.

(7) ~~"Floors" means sub-flooring and floor coverings of all rooms including stairways, hallways, and lobbies.~~

(8) (7) "Furnishings" means ~~cups, glasses, pitchers, utensils, draperies, curtains, blinds, light fixtures, lamps and lamp shades, chairs, tables, desks, shelves, books, magazines, bookcases, dressers, bedsteads, mattress springs other than box springs, towels, wash cloths, soap, toilet tissue, radios, television sets, coffee makers, water heaters, pictures, mirrors, cabinets, closets and refrigerators~~

an item provided within a guest unit including, but not limited to, a cup, glass, pitcher, ice bucket, utensil, drapery, curtain, blind, light fixture, lamp and lamp shade, chair, table, desk, shelf, book, magazine, bookcase, dresser, bedstead, mattress, box springs, towel, wash cloth, soap, toilet tissue, radio, television, coffee maker, microwave oven, heating and cooling unit, picture, mirror, cabinet, closet, and refrigerator.

~~(9)~~ (8) "Guest" means each occupant of person using any provided services such as a bed or bathing facility within any unit of an establishment.

~~(10)~~ (9) "License" means a written instrument document issued by the department authorizing the operation of an establishment.

~~(11)~~ (10) "Local health authority" means a local health officer, local sanitarian, sanitarian-in-training, or any other person authorized by the local board of health or department.

~~(12)~~ (11) "Sanitarian" means the person who is qualified under Title 37, chapter 40, part 3, MCA, and represents the health officer.

(12) "Shock disinfection" means an application of a chemical disinfectant to a water supply in order to kill all microorganisms. The chemical disinfectant is usually chlorine at a concentration much stronger than allowed in potable water.

(13) "Sleeping accommodation" means the provision of sleeping quarters ~~and linen service or housekeeping service~~ where the linen service ~~and~~ or housekeeping service are provided by management or by the residents guests under the direct supervision of management. Sleeping accommodation does not include a place of residency subject to the Residential Landlord and Tenant Act of 1977, Title 70, chapter 24, MCA.

(14) "Wastewater system" means a sewage treatment and disposal system.

AUTH: 50-51-103, MCA

IMP: 50-51-103, MCA

37.111.106 LICENSURE, RENEWAL, AND INSPECTION (1) ~~Upon notification by the department that an application and fee have been received for a license for a previously unlicensed establishment, the local health officer, local health department sanitarian or sanitarian-in-training shall make a precicensing inspection to determine compliance with the requirements of this subchapter. No person shall operate an establishment without a license issued by the department and validated by the local health officer.~~

(2) An issued license is not transferable to any other premises or licensee.

(3) A license may be issued or renewed by the department and validated by the local health officer if the establishment demonstrates compliance with this subchapter.

~~(2)~~ (4) The local health officer, ~~or a sanitarian or sanitarian-in-training employed by or contracted with the local board of health~~ authority must inspect each licensed establishment within the jurisdiction of the local board of health to determine compliance with this subchapter at least once ~~in every 12 months~~ each calendar year, unless that schedule is modified by signed agreement with the department.

~~(3) If the establishment is in compliance with this subchapter and the department does not receive notification of noncompliance from the building authority or fire authority, a license will be issued or renewed.~~

(5) The local health authority, after proper identification, must be provided access to the establishment at all reasonable hours for the purpose of conducting inspections and investigations as required under this subchapter.

(6) Inspection findings must be written to reference any rule violated, state the correction to be made, and specify a reasonable period of time for the correction.

(7) The written inspection report must be made on a form authorized by the department.

(8) A copy of the completed inspection report form must be given to the person in charge of the establishment at the conclusion of the inspection.

(9) The local health authority must retain all documentation of enforcement of this subchapter including, but not limited to, inspection reports, consumer complaints, illness investigations, plans of correction, and enforcement actions for at least five years.

(10) The completed inspection report is a public document that must be made available for public review upon request, distribution to any person upon payment of copying costs, or to the department upon request.

(11) Obtaining a license under this subchapter does not relieve the applicant from satisfying other applicable plan review, licensing, and inspection requirements. Other requirements may include, but are not limited to the following:

(a) building code permit and inspection;

(b) fire and life safety inspection;

(c) retail food licensing;

(d) public swimming pool, spa, and other water feature licensing; and

(e) business licensing.

(12) Notification of noncompliance from the building or fire authority may prevent a license from being issued by the department or validated by the local health officer.

AUTH: 50-51-103, 50-51-303, MCA

IMP: 50-51-103, 50-51-301, 50-51-303, MCA

37.111.107 PHYSICAL REQUIREMENTS (1) ~~An establishment must comply with the following physical requirements:~~

~~(a) In addition to the requirements of this subchapter, compliance with the state building code and fire code is required.~~

~~(b) At least one storage room sufficient in size for the storage of extra bedding and furnishings must be provided.~~

~~(c) (2) Adequate and convenient janitorial facilities including a janitor sink and storage area for equipment and chemicals must be provided.~~

~~(d) (3) All rooms, hallways, stairways, and public access areas must be provided with at least ten foot-candles of light.~~

~~(e) (4) Floors and walls in toilet and bathing rooms, laundries, janitorial closets, and similar rooms subject to large amounts of moisture must be smooth, and nonabsorbent, and easily cleanable.~~

(f) remains the same, but is renumbered (5)

~~(g) (6) Bathing facilities must be provided with anti-slip surfaces or mats.~~

(7) Handwashing sinks and bathing facilities must be provided with water at a temperature of at least 100° F (38° C) and not more than 120° F (49° C).

(8) Establishment property must be maintained to minimize the presence of insects, rodents, and other vermin which affect public health.

(9) The local health authority may require licensed pesticide services for persistent pest infestations.

(10) Adequate ventilation must be provided to prevent excess moisture and odors.

AUTH: 50-51-103, MCA

IMP: 50-51-103, MCA

37.111.116 SEWAGE WASTEWATER SYSTEM ~~(1) The department hereby adopts and incorporates by reference the following Department of Environmental Quality publications setting construction and operation standards for sewage systems:~~

~~(a) Circular #84-10, "Sewers and Sewage Treatment for Multi-Family and Non-Residential Buildings"~~

~~(b) Circular #13, "The Sanitary Pit Privy." Copies of the above circulars may be obtained from the Department of Public Health and Human Services, Public Health and Safety Division, Food and Consumer Safety Section, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.~~

~~(2) In order to ensure sewage is completely and safely disposed of, an establishment must:~~

~~(a) connect to a public sewage system meeting the requirements of ARM Title 17, chapter 38, subchapter 1; or~~

~~(b) if the establishment is not utilized by more than 25 persons daily at least 60 days out of the calendar year, including guests, staff, and residents; and an adequate public sewage system is not available; utilize a nonpublic system whose construction and use meet the construction and operation standards contained in Department of Environmental Quality Circular #84-10, incorporated by reference in (1) of this rule.~~

~~(3) A sewage system design, other than the type described in this rule, may be utilized only if it is designed by an engineer registered in Montana and offers equivalent sanitary protection as determined by the department or local health authority.~~

~~(4) An establishment must replace or repair its sewage system whenever:~~

~~(i) it fails to accept sewage effluent at the rate of application;~~

~~(ii) seepage of effluent from, or ponding of effluent on or around, the system occurs;~~

~~(iii) contamination of a potable water supply or state waters is traced to effluent from the sewage system; or~~

~~(iv) a mechanical failure occurs, including electrical outage, or collapse or breakage of septic tank, inlet lines, or drainfield lines.~~

(1) An adequate and safe wastewater system must be provided for conveying, treating, and disposing of all sewage from permanent public sleeping accommodations and food service.

(2) Immediate measures must be taken to alleviate health and sanitation hazards caused by wastewater at the establishment when they occur.

(3) All wastewater must be disposed of by a public wastewater system approved by the Montana Department of Environmental Quality or by a private wastewater system constructed and operated in accordance to applicable state and local regulations.

(4) A wastewater system has failed and requires replacement or repair if any of the following conditions occur:

(a) the system fails to accept, treat, or dispose of wastewater as designed;

(b) the system displays surfacing effluent;

(c) effluent from the wastewater system contaminates a potable water supply or state waters; or

(d) the wastewater system experiences mechanical failure, including electrical outage, or collapse or breakage of a septic tank, lead line, or drainfield line.

(5) Extension, alteration, replacement, or repair of any wastewater system must be done in accordance with all applicable state and local regulation.

AUTH: 50-51-103, MCA

IMP: 50-51-103, MCA

~~37.111.117 SOLID WASTE In order to ensure that solid waste is safely stored and disposed of an establishment must:~~

~~(1) store all solid waste between collections in containers which have lids and are corrosion-resistant, flytight, watertight, and rodent-proof;~~

~~(2) clean all solid waste containers frequently;~~

~~(3) utilize exterior collection stands for the containers referred to in (1) of this rule which prevent the containers from being tipped, protect them from deterioration, and allow easy cleaning below and around them; and~~

~~(4) transport or utilize a private or municipal hauler to transport the solid waste at least weekly to a landfill site approved by the department in a covered vehicle or covered containers.~~

(1) Solid waste must be collected, stored, and disposed of in a manner that does not create a sanitary nuisance.

(2) Solid waste must be removed from the premises at least weekly to a licensed solid waste disposal facility.

(3) Solid waste may not be burned on the premises.

AUTH: 50-51-103, MCA

IMP: 50-51-103, MCA

~~37.111.121 LAUNDRY FACILITIES (1) Laundries operated in conjunction with, or utilized by, an establishment must be provided with:~~

~~(a) mechanical washer and hot air tumble dryer. Manual washing and line drying of bed linen, towels and washcloths is prohibited. Dryers must be properly vented to prevent maintenance problems.~~

~~(b) A hot water supply system capable of supplying water at a temperature of 54°C (130°F) to the washer during all periods of use.~~

~~(c) Separate area for sorting and storing soiled laundry and folding and storing clean laundry.~~

~~(d) Separate carts for transporting soiled and cleaned laundry.~~

~~(e) Handwashing facilities including sink, soap, and disposable towels. A soak sink may double as a handwashing sink.~~

~~(2) Sheets, pillow covers, towels and washcloths must be machine washed at a minimum temperature of 54°C (130°F) for a minimum time of eight minutes and dried in a hot air tumble dryer or ironed at a minimum temperature of 150°C (300°F).~~

(1) All bedding, towels, and other laundered items must be mechanically washed and hot air dried in laundry facilities which meet the following requirements:

(a) The wash cycle must run with sufficient detergent and for a time demonstrated to thoroughly remove all visible soil.

(b) Laundered items must be thoroughly hot air tumble dried to at least 130°C (54°C) for ten minutes.

(2) Clean laundry must be kept protected from contamination from soiled laundry and other sources by the following:

(a) using separate labeled carts or containers for transportation;

(b) providing sufficient space for sorting, folding, and storage; and

(c) washing hands between touching soiled and clean laundry.

(3) Laundry facilities must have a convenient handwashing sink, hand soap, disposable towels, and trash can.

(4) A handsink may be used for soaking laundry if the handsink remains accessible for handwashing when needed.

AUTH: 50-51-103, MCA

IMP: 50-51-103, MCA

37.111.122 HOUSEKEEPING GUEST ROOM CLEANING AND MAINTENANCE (1) An establishment must comply with the following housekeeping and maintenance requirements:

(a) In each establishment daily housekeeping and maintenance services must be provided. Housekeeping must be provided between the occupancy of different guests and at least daily or as requested by each guest.

(a) Clean bed sheets and pillow cases must be provided to each guest daily or as requested by a guest.

(b) Each janitor room must be kept clean, ventilated and free from odors. Clean towels and washcloths must be provided to each guest daily or as requested by a guest.

(c) Shared bathrooms must be cleaned daily.

(d) All bedding, towels, and washcloths provided by management must be clean and in good repair.

~~(c) (2) Mop heads, when used, must be changed frequently using laundered replacements. Mops must be air dried between uses.~~

~~(d) (3) Toilets, bathtubs, lavatories, and showers may not A designated janitor sink must be used for washing and rinsing of mops, brooms, brushes, or any other cleaning devices.~~

~~(e) The transporting, handling and storage of clean bedding must be done in such a manner as to preclude contamination by soiled bedding or from other sources.~~

~~(f) Cleaners used in cleaning bathtubs, showers, lavatories, urinals, toilet bowls, toilet seats, and floors must contain fungicides or germicides.~~

~~(g) Deodorizers and odor-masking agents may not be used unless the room in which used is clean to sight and touch.~~

~~(h) (4) Cleaning devices must be kept separate and used only as follows: Toilet bowl brushes, mops, sponges, must be only for cleaning toilet bowl and urinals. Cleaning devices used for lavatories, showers and bathtubs may not be used for any other purpose. Bathtub, shower, toilet, and urinal cleaning devices must be kept separate and may not be used for any other purpose.~~

~~(i) Dry dust mops and dry dust cloths for cleaning purposes are prohibited. Dusting and cleaning shall be accomplished using treated mops, wet mops, treated cloths, and moist cloths or other means approved by the department or health authority which will not serve to spread soil from one place to another.~~

~~(j) Establishments must be kept free of harborage for insects, rodents and other vermin.~~

~~(k) All bedding, towels, and wash cloths provided by management must be clean and in good repair. At least weekly, clean bed linens must be made available to each guest. At least daily, clean wash cloths and towels must be made available to each guest. Soiled linens, soiled wash cloths, or soiled towels are not to be left in units for subsequent guests.~~

~~(l) remains the same, but is renumbered (5)~~

~~(6) Management must provide written instructions to guests when guests are responsible for cleaning, dishwashing, or laundry tasks.~~

~~(7) Management must provide for maintenance as needed.~~

~~(m) (8) Cleaning compounds and pesticides must be stored, used, and disposed of in accordance with the label requirements and manufacturer's instructions.~~

~~(9) Ozone air purifiers may not be used within the establishment.~~

~~(n) (10) Glasses, pitchers, ice buckets, and other utensils used for food or drink provided in units for use by guests may not be washed or sanitized in any lavatory or janitor sink. Approved facilities for washing, rinsing, and sanitizing glasses, pitchers, ice buckets, and other utensils must be provided. In absence of approved washing facilities, single service utensils must be used. Glasses, pitchers, ice buckets, and other utensils used for food or drink provided for guests must be washed, rinsed, and sanitized in approved facilities as specified in ARM 37.110.215(14) or single-service items must be used.~~

~~(o) (11) All utensils used for food or drink provided in units for use by guests must be stored, handled, and dispensed in a manner which precludes prevents contamination of the utensil prior to use by a guest.~~

AUTH: 50-51-103, MCA
IMP: 50-51-103, MCA

37.111.124 FOOD SERVICE REQUIREMENTS (1) remains the same.

(a) If the food service is available only to ~~residents~~ overnight registered guests of the establishment, licensure as a food service establishment is not required.

AUTH: 50-51-103, MCA
IMP: 50-51-103, MCA

37.111.130 GUEST REGISTRATION (1) ~~In e~~Each establishment, must maintain a register of all guests, including name and home address of the guest and unit to which the guest was assigned, ~~must be maintained~~.

(2) Guest registration must be kept available for at least 90 days for communicable disease investigations or other public health reasons.

AUTH: 50-1-202, 50-51-103, MCA
IMP: 50-1-202, 50-2-118, 50-51-103, MCA

5. The department proposes to repeal the following rules:

37.111.104 PRECONSTRUCTION REVIEW, is found on page 37-27637 of the Administrative Rules of Montana.

AUTH: 50-51-103, MCA
IMP: 50-51-103, MCA

37.111.105 EXISTING BUILDING: CHANGE OF USE, is found on page 37-27638 of the Administrative Rules of Montana.

AUTH: 50-51-103, MCA
IMP: 50-51-103, MCA

37.111.115 WATER SUPPLY SYSTEM, is found on page 37-27653 of the Administrative Rules of Montana.

AUTH: 50-51-103, MCA
IMP: 50-51-103, MCA

37.111.123 POOLS, SPAS, AND OTHER FEATURES, is found on page 37-27663 of the Administrative Rules of Montana.

AUTH: 50-51-103, MCA
IMP: 50-51-103, MCA

37.111.135 MINIMUM PERFORMANCE REQUIREMENTS FOR LOCAL HEALTH AUTHORITIES, is found on page 37-27679 of the Administrative Rules of Montana.

AUTH: 50-51-103, MCA

IMP: 50-51-103, MCA

6. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services, Communicable Disease Control & Prevention Bureau, Food and Consumer Safety Section (FCS) is proposing rule changes to ARM Title 37, chapter 111, subchapter 1 related to public sleeping accommodations, specifically hotels, motels, tourist homes, retirement homes, rooming houses, and boarding houses. These rules govern the plan review, licensing, physical requirements, water supply, sewage system, solid waste, laundry facilities, housekeeping and maintenance, pools, food service, guest registration, and minimum performance requirements for local health authorities.

Major changes are proposed to ARM 37.111.115, the water supply rule, to allow for nonpublic water supply system requirements that are consistent with current federal and state public water supply standards, while taking into consideration residential style construction and maintenance for smaller systems. The existing outdated rule is confusing to businesses and regulatory authorities, leading to inconsistent licensing and application of the rule throughout Montana.

The existing wastewater standards are in conflict with current local and state regulation. If wastewater standards are not updated, health authorities will continue to ignore existing standards as they are written, and to follow current local and state regulation. Proposed wastewater system requirements are updated to reflect current state and local regulations, rather than citing public sewer requirements for all, regardless of size or type. Language in all rules is updated to provide modern terminology of the industry, and clarification for both business operators and inspecting health authorities.

A water work group formed in 2006 representing the Department of Public Health and Human Services, Department of Environmental Quality, and local health authorities (registered sanitarians) to develop potable water standards for nonpublic small establishments. The water supply standards and other rules for public accommodations were reviewed by the FCS Study Group in 2010, other subject matter experts and local health jurisdictions at various times from 2006 to 2011. Feedback from these groups was incorporated into these proposed rule amendments.

New Rule I

Information previously found in ARM 37.111.104 and 37.111.105 has been moved to New Rule I. The department is proposing to change the title from "Preconstruction Review" to "Review of Plans and Specifications" to include all situations requiring plan review, such as change of use, ownership change, and remodeling. This rule is necessary to clarify and update rules pertaining to the review of plans by the local health authority and the department.

New Rule II

The health standards previously found in ARM 37.111.115 have been moved to New Rule II, III, IV, V, and VI. The department is proposing to adopt New Rule II and to rename the "Water Supply Requirements" to "Water Supply System General Requirements" and add other rule titles so that businesses and regulators can quickly find applicable rules. This rule is necessary to clarify and update rules pertaining to the public and nonpublic water supply system requirements for establishments.

New Rule III

The department is proposing to adopt New Rule III which is necessary to describe the sampling requirements for small water systems so that the business operator knows what is required.

New Rule IV

The department is proposing to adopt New Rule IV regarding contaminated water samples for nonpublic water systems so the establishments can quickly find the information needed. This rule is necessary to state the requirements for nonpublic water system providers dealing with the detection of contaminated water samples.

New Rule V

The department is proposing to adopt New Rule V which describes water supply corrective actions so that both public and nonpublic systems will have specific guidance and know what is expected of them if a problem occurs.

New Rule VI

The department is proposing to adopt New Rule VI which allows operations to remain open during a boil order or other event with appropriate restrictions and safety measures in place. This rule applies to public and nonpublic water supplies since DEQ boil orders do not provide specific protocol for licensed establishment operations. Food and water safety processes are addressed in this rule, based on current policy and protocol.

New Rule VII

The department is proposing to move ice standards to New Rule VII, rather than leaving it with other water supply system requirements because ice is a food product made from the water supply.

ARM 37.111.101

The department is proposing to amend the definitions as follows:

- (1) add "duvets" to the definition of "bedding", since they have become more prevalent in sleeping accommodations;
- (4) change a phrase in the definition of "establishment" from "hotel, motel, tourist home, rooming house, or retirement home" to "public sleeping accommodation." Accommodation advertising and the types of public accommodations change over time, so, "establishment" is better defined as a "public sleeping accommodation," rather than a list of present types. Today, "tourist homes" are commonly called "vacation homes" and "rooming houses" are commonly called "hostels." Statute and administrative rule differentiates requirements for "bed and breakfasts," "guest ranch," and "outfitting and guide facilities," so these terms needed exclusion from the "establishment" definition.
- (5) remove gender from the definition of "fire authority;"
- (6) change "lavatory" to "handwashing sink" to update language;
- (8) change the term "furnishings" to be more inclusive of the items provided to guests in guest rooms and to correct a typographical error;
- (9) change the "guest" definition to take into consideration use of a room that is not just sleeping on the bed, such as shower use;
- (10) replace the term "instrument" with "document" when describing a license to use common vernacular;
- (11) update the "local health authority" definition to match appropriate responsibilities of sanitarian-in-training and authorization from local health officer. Existing language only allows sanitarians to act as the local health authority and the state department to authorize a person to act on behalf of the local health authority.
- (13) add the new definition of "shock disinfection" because the term is used in water supply corrective actions;
- (14) clarify the definition of "sleeping accommodation" to help distinguish an establishment requiring licensing from a rented residential property; and
- (15) add the definition of "wastewater system" to clarify when this term is used in the proposed rules. The term refers to both treatment and disposal components.

ARM 37.111.106

The department is proposing to state that a license is required in order for a business to be open. As the rule is currently written, this licensing requirement is implied but not directly stated. The department is proposing to move the prelicensing inspection requirement to ARM 37.111.106(3). This rule is necessary to update and clarify requirements related to the licensure, licensure renewal, and inspections of establishments.

ARM 37.111.107

The department is proposing to eliminate unnecessary language and to clarify the physical requirements for establishments.

ARM 37.111.116

The department is proposing to change the title of this rule to reflect current terminology. The department is proposing to update wastewater system requirements with current state and local standards, inclusive of laws, rules, and local ordinances.

ARM 37.111.117

The department is proposing to update solid waste requirements to allow large container storage on the ground surface as long as it is sanitary, and to prohibit unnecessary air pollution created by the burning of garbage.

ARM 37.111.121

The department is proposing to reword this entire rule which is necessary to clarify and update the requirements for laundry facilities.

ARM 37.111.122

The department is proposing to update the rule title of "Housekeeping and Maintenance" to "Guest Room Cleaning and Maintenance" to be more specific about the rule content. The department is proposing to simplify the language of this rule for clarity.

ARM 37.111.124

The department is proposing to change "residents" to "overnight registered guests" to be consistent with the definitions in this rule and to be congruent with new legislation passed in 2011 in house bill (HB) 258, which changed the definition of a guest ranch.

ARM 37.111.130

The department is proposing to add a minimum for guest registration record retention of 90 days so that state and local health authorities are better able to complete Hepatitis A investigations. The statutes granting authority and implementing this change have been added to the rule's history section.

ARM 37.111.104

The department is proposing to repeal ARM 37.111.104 "Preconstruction Review" so that the content may be covered in the New Rule I "Review of Plans and Specifications" and ARM 37.111.106 "Licensure, Renewal, and Inspection."

ARM 37.111.105

The department is proposing to repeal this rule and move the content to New Rule I: "Review of Plans and Specifications" and ARM 37.111.106 "Licensure, Renewal, and Inspection."

ARM 37.111.115

The department is proposing to repeal outdated public water supply standards. General requirements, corrective actions, nonpublic water supply sampling and test reports, nonpublic water supply contaminated samples, and restricted-use order are proposed in separate rules for easy identification and acknowledgement of different appropriate standards for public and nonpublic water supplies.

ARM 37.111.123

The department is proposing to repeal the swimming and bathing area rule because the licensing of pools, spas, and other water features is covered in separate rule, ARM 37.115.102 through 2211.

ARM 37.111.135

The department is proposing to repeal "Minimum Performance Requirements for Local Health Authorities" because the standards in (1)(a) and (b) are covered in ARM 37.111.106 Licensure, Renewal and Inspection, (2) is redundant of (1), and conditions for payment to counties are already covered in 51-51-303, MCA.

7. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Kenneth Mordan, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail dphhslegal@mt.gov, and must be received no later than 5:00 p.m., March 22, 2012.

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

9. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 7 above or may be made by completing a request form at any rules hearing held by the department.

10. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

/s/ Shannon L. McDonald
Rule Reviewer

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

Certified to the Secretary of State February 13, 2012.

BEFORE THE STATE COMPENSATION INSURANCE FUND
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 2.55.320 and 2.55.327A,)
pertaining to classifications of)
employments and the construction)
industry premium credit program)

TO: All Concerned Persons

1. On December 8, 2011, the Montana State Fund published MAR Notice No. 2-55-41 pertaining to the proposed amendment of the above-stated rules at page 2580 of the 2011 Montana Administrative Register, Issue Number 23.

2. The Montana State Fund has amended the above-stated rules as proposed.

3. No comments or testimony were received.

/s/ Nancy Butler
Nancy Butler, General Counsel
Rule Reviewer

/s/ Elizabeth Best
Elizabeth Best
Chair of the Board

/s/ Michael P. Manion
Michael P. Manion, Chief Legal Counsel
and Rule Reviewer

Certified to the Secretary of State February 13, 2012

BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 8.2.503 pertaining to the)
administration of the Quality Schools)
Grant Program – Project Grants)

TO: All Concerned Persons

1. On December 22, 2011, the Department of Commerce published MAR Notice No. 8-2-98 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 2721 of the 2011 Montana Administrative Register, Issue Number 24.

2. The department has amended the above-stated rule as proposed.

3. No comments or testimony were received.

/s/ KELLY A. CASILLAS
KELLY A. CASILLAS
Rule Reviewer

/s/ DORE SCHWINDEN
DORE SCHWINDEN
Director
Department of Commerce

Certified to the Secretary of State February 10, 2012.

BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF AMENDMENT AND
ARM 8.94.3815, and the repeal of	)	REPEAL
ARM 8.94.3806, 8.94.3808,)	
8.94.3810, 8.94.3811, and 8.94.3813)	
pertaining to governing the)	
submission and review of applications)	
for funding under the Treasure State)	
Endowment Program (TSEP))	

TO: All Concerned Persons

1. On December 22, 2011, the Department of Commerce published MAR Notice No. 8-94-99 pertaining to the public hearing on the proposed amendment and repeal of the above-stated rules at page 2723 of the 2011 Montana Administrative Register, Issue Number 24.

2. The department has amended the above-stated rules as proposed.

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

COMMENT #1: One comment was received related to the reorganization of Statutory Priority #1 scoring level definitions and examples. The commenter was concerned that the reorganization will result in more projects achieving the same scores and reduce the clear distinction between scores and project differences for this ranking priority. An additional concern related to the reorganization is the unintended consequence will be reducing project scores and deemphasizing the importance of TSEP program in communities.

RESPONSE #1: The scoring level definitions and examples for Statutory Priority #1 are guidance for grantees and *examples* of how a project may rank. Each project will be scored dependent on its own merit as described by the applicant. MDOC engineers and ranking staff will use current available scoring levels and comparative judgment, past experience, and professional knowledge to determine the score based on the health and safety problems associated with the project. It is not the intent of the MDOC to score all projects similarly, but to assess each project on its health and safety consequences.

COMMENT #2: One commenter expressed concerns about the amended environmental requirements, consistency with other funding agencies, and consistency with state and federal environmental review requirements. The commenter was also concerned that the new environmental requirements add work load and cost to local communities.

RESPONSE #2: The purpose of Appendix C is to provide applicants with a template for conducting environmental review of a proposed project prior to the submission of a TSEP application, in accordance with the requirements of the Montana Environmental Policy Act (MEPA) and as described in detail in Chapter 1 of the Application Guidelines. There is no requirement that an applicant utilize Appendix C to complete environmental review of a proposed TSEP project, or that environmental review be conducted by an engineer. The new guidelines require only that the applicant complete environmental review for a proposed project in accordance with MEPA prior to submission of an application for TSEP funding.

COMMENT #3: One commenter noted that the total points for ranking did not add correctly.

RESPONSE #3: The addition on the Total Maximum Points Possible for application scoring was reconciled to reflect the accurate total amount of 5000.

COMMENT #4: One commenter requested clarification regarding narrative related to the bridge specific information as opposed to all projects.

RESPONSE #4: The examples for scoring of Bridge Projects continues to the heading of Statutory Priority #2. A clearer distinction between the sections has been made.

COMMENT #5: One commenter requested a table of contents be added to the guidelines.

RESPONSE #5: A Table of Contents was added to the guidelines.

4. The Department of Commerce has repealed ARM 8.94.3806, 8.94.3808, 8.94.3810, 8.94.3811, and 8.94.3813.

/s/ KELLY A. CASILLAS
KELLY A. CASILLAS
Rule Reviewer

/s/ DORE SCHWINDEN
DORE SCHWINDEN
Director
Department of Commerce

Certified to the Secretary of State February 10, 2012.

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the adoption of a	)	NOTICE OF ADOPTION OF
Temporary Emergency Rule	)	TEMPORARY EMERGENCY RULE
Amendment of ARM 23.4.217,	)	AMENDMENT
pertaining to recertification of breath-)	
test personnel)	

TO: All Concerned Persons

1. The Department of Justice is adopting the following emergency rule amendment because in the 2007 amendment of ARM 23.4.217, under that new definition of "annual" as "365 days", the Division intended to keep "annual" certification of the breath-test instruments and remove all references to any "annual" examination or recertification for any breath-test specialists. Inadvertently, the word "annual" was not removed in ARM 23.4.217(8) in reference to breath-test specialist-senior operators (senior operators) and an "annual" examination. The division's intent was to have senior operators recertify on a "regular basis", as required of breath-test specialist operators in ARM 23.4.217(5) by taking the same examination as an operator. Under the division's procedure for recertification, all breath-test specialists take the same exam and exams are completed between October and December 31 of each year. The breath-test specialists are then recertified prior to their permit expiring at the end January of the following year, i.e., every 365 days. This procedure fully complies with ARM 23.4.218 and 23.4.217(5)'s recertification on a "regular basis". These exams were no longer dated as recertification occurred on a regular basis.

In January 2012, in a case involving a driving under the influence, fourth or subsequent offense, a felony, in violation of 61-8-601, MCA, a Montana district court interpreted ARM 23.4.217(8) to require that all senior operators take the recertification examination once within every 365 days. The prosecutor protested this interpretation but because the recertification examinations for the senior operators for the previous year no longer showed the actual date of examination, the prosecutor could not show proof of exact exam dates. Consequently, the district court ruled the results of the breath test in that case inadmissible at trial. The Attorney General's Office disagrees with the interpretation and has appealed the issue to the Montana Supreme Court.

Meanwhile, as ARM 23.4.217 stands, this type of interpretation potentially exposes any and all breath tests conducted by the approximately 1,900 breath-test specialists in the State of Montana to this type of ruling. Successful prosecution and removing drunk drivers from endangering the public depends on officers being on the roads as much as possible, and using the results of these breath tests as proof beyond a reasonable doubt of driving under the influence under 61-8-401, MCA, or a BAC greater than .08 under 61-8-406, MCA. Additionally, the district court in the case mentioned above, criticized the language in ARM 23.4.217 overall, especially ARM 23.4.217(7), claiming that it could include "Beatles songs." It is clear that the overall wording and context of language in ARM 23.4.217 is extremely

confusing, thereby exposing ARM 23.4.217 to further illogical legal arguments and rulings that breath-test results are inadmissible at trial. Successfully investigating and prosecuting drunk drivers from Montana's public roadways protects the public's safety and welfare. The current language of ARM 23.4.217 has the potential of rendering completely useless Montana's entire statewide system of successfully investigating and prosecuting cases of driving under the influence of alcohol. It is therefore imperative that the rule be amended immediately to clarify its intent and prevent a future court from excluding breath-test results.

2. The department 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 no later than 5:00 p.m. on March 15, 2012, to advise us of the nature of the accommodation that you need. Please contact Kathy Stelling, Department of Justice, 215 North Sanders, P.O. Box 201401, Helena, MT 59620-1401; telephone (406) 444-2026; Montana Relay Service 711; fax (406) 444-3549; or e-mail kstelling@mt.gov.

3. The temporary emergency rule was effective February 15, 2012.

4. The text of the temporary emergency rule provides as follows:

23.4.217 RECERTIFICATION OF BREATH-TEST PERSONNEL SPECIALISTS (1) The division must approve any breath-test specialist recertification course materials necessary for the recertification of the breath-test specialists/operator. The division shall ~~place~~ provide a copy of the ~~recertification exam~~ approved breath-test specialist recertification materials to a ~~in the custody of the breath-test specialist/senior operator for each department. A senior operator from another department may provide the breath-test specialist recertification materials to departments with no senior operator.~~

(2) ~~The breath-test specialist/ senior operator shall have the responsibility of presenting~~ provide the approved breath-test specialist recertification course and monitoring the examination of materials to all any personnel breath-test specialists seeking recertification. ~~The division may, if it determines that the circumstances warrant, give recertification training to any individual(s) seeking recertification directly from the division.~~

(3) All ~~examinations~~ completed breath-test specialist recertification materials shall be sent to the division for grading verification of completion.

(4) Permits shall be ~~issued to~~ renewed for all individuals breath-test specialists ~~successfully~~ completing the breath-test specialist recertification training materials. ~~The permit expires the last day of the month, in the following year in which the specialist was certified prior to expiration of her/his current permit.~~

(5) ~~All breath test specialist/operators shall be recertified on a regular basis by attending a recertification course approved by the division.~~

(6) ~~In addition to the regular recertification, all breath test specialist/senior operators may be recertified by a representative of the division once every two years on a schedule to be determined by the division.~~

~~(7) (5) Training may include, The breath-test specialist recertification materials are related to the field of breath alcohol testing, which may include, but is are not limited to, the following subjects:~~

- ~~(a) toxicology and pharmacology of alcohol in the human system;~~
- ~~(b) breath analysis instrument theory;~~
- ~~(c) breath analysis instrument operation;~~
- ~~(d) current legal decisions; and~~
- ~~(e) training techniques; and~~
- ~~(f) any area deemed appropriate by the division.~~

~~(8) The breath test specialist/senior operator is still required to submit an annual examination based on the material he/she is presenting to the breath test specialist/operators, in addition to the biannual recertification which may be conducted by the division.~~

~~(9) A permit will be issued to all individuals successfully completing the senior operator's recertification training. Certification expires the last day of the month, in the following year in which the specialist was certified.~~

~~(10) The breath test specialist/technician is only required to fulfill the recertification requirements of a breath test specialist/senior operator. The technician's proficiency will be assessed through monitoring of his/her performance.~~

~~(11) All breath test specialists must successfully pass a recertification course within 90 days after his/her expiration date.~~

~~(12) (6) If a Any breath-test specialist fails to recertify within the specified time frame, he/she not completing the recertification materials prior to expiration of her/his current permit, may complete the recertification materials within 90 days of the expiration date of her/his current permit. A breath-test specialist shall not perform any analysis of a person's breath for alcohol until the breath-test specialist's permit is renewed. All breath-test specialists who fail to complete the recertification materials within 90 days of the expiration date of her/his current permit must either attend complete an initial certification course or file a written request, in writing, with the division for an exemption. Exemption requests will be reviewed and approved or denied by the division. If approved, the breath-test specialist must then complete that year's recertification materials within 30 days of the division's approval date.~~

~~(13) If a breath test specialist fails the recertification examination, he/she may retake the examination within 30 days of notification of failure. After a second test failure, all candidates for recertification must retake the appropriate breath test specialist course.~~

~~(7) If the division determines that the circumstances warrant, the division may give recertification materials to any breath-test specialists seeking recertification directly from the division.~~

AUTH: 61-8-405, MCA
IMP: 61-8-405, MCA

5. The rationale for the temporary emergency rule amendment is as set forth in paragraph 1.

6. A standard rulemaking procedure will be undertaken prior to the expiration of this temporary emergency rule amendment.

7. Concerned persons are encouraged to submit their comments during the upcoming standard rulemaking process. If concerned persons wish to be personally notified of that rulemaking process, they should submit their names and addresses to Kathy Stelling at the address above.

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

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

By: /s/ Steve Bullock
STEVE BULLOCK
Attorney General
Department of Justice

/s/ J. Stuart Segrest
J. STUART SEGREST
Rule Reviewer

Certified to the Secretary of State on February 14, 2012.

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM) NOTICE OF AMENDMENT
23.16.1702, 23.16.1705, 23.16.1712)
and 23.16.1714, concerning sports pool)
card interval payouts, authorized sports)
pools, design and conduct of sports tab)
game payouts, and sports tab game)
prizes)

TO: All Concerned Persons

1. On January 12, 2012, the Department of Justice published MAR Notice No. 23-16-226, regarding the public hearing on the proposed amendment of the above-stated rules at page 7, 2012 Montana Administrative Register, Issue Number 1.

2. The Department of Justice has amended ARM 23.16.1702, 23.16.1705, 23.16.1712, and 23.16.1714 exactly as proposed.

3. A public hearing was held on February 1, 2012. No comments or testimony were received. The Gaming Advisory Council members were given an opportunity to review, question, and make suggestions to the proposed rule amendments. No objections, questions, or suggestions were received and a majority of the council members advised the division to proceed with publication of the rule amendments.

By: /s/ Steve Bullock
STEVE BULLOCK
Attorney General
Department of Justice

/s/ J. Stuart Segrest
J. STUART SEGREST
Rule Reviewer

Certified to the Secretary of State February 13, 2012.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF DECISION ON
ARM 24.29.601, 24.29.604,	)	PROPOSED RULE ACTION
24.29.607, 24.29.608, 24.29.610,)	
24.29.611, 24.29.616, 24.29.617,)	
24.29.618, and 24.29.623, and the)	
adoption of NEW RULES I and II,)	
related to workers' compensation)	
insurance coverage under)	
compensation plan No. 1 and plan)	
No. 2)	

TO: All Concerned Persons

1. On February 9, 2012, the Department of Labor and Industry published MAR Notice No. 24-29-261 pertaining to a public hearing on the proposed amendment and adoption of the above-stated rules at page 283 of the 2012 Montana Administrative Register, Issue Number 3.

2. The department has decided to cancel the public hearing on the proposed amendment and adoption of the above-stated rules that was scheduled for March 2, 2012, at 10:00 a.m., in the first floor conference room, room 104, Walt Sullivan Building, 1315 E. Lockey Avenue, Helena, Montana.

3. The department is withdrawing the proposed rule amendments and new rules at this time, pending further review. The department anticipates that a revised notice of public hearing with a modified version of the proposed rule amendments and new rules will be published in the near future, and a public hearing scheduled. Notice of the public hearing and the proposed modified rule amendments and new rules will be published in a future issue of the Montana Administrative Register.

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

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

Certified to the Secretary of State February 13, 2012

BEFORE THE BOARD OF MEDICAL EXAMINERS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF AMENDMENT,
ARM 24.156.1401, 24.156.1403,	)	ADOPTION, AND REPEAL
24.156.1404, 24.156.1406, and)	
24.156.1412 acupuncturist licensure)	
and unprofessional conduct,)	
24.156.1622 and 24.156.1623)	
physician assistant supervision and)	
chart review, the adoption of New)	
Rules I through V acupuncturist)	
discipline reporting and continuing)	
education, and New Rule VI)	
physician assistant performing)	
radiologic procedures, and the repeal)	
of 24.156.1405 acupuncture school)	
approval)	

TO: All Concerned Persons

1. On August 25, 2011, the Board of Medical Examiners (board) published MAR notice no. 24-156-75 regarding the public hearing on the proposed amendment, adoption, and repeal of the above-stated rules, at page 1591 of the 2011 Montana Administrative Register, issue no. 16.

2. On September 27, 2011, a public hearing was held on the proposed amendment, adoption, and repeal of the above-stated rules in Helena. Several comments were received by the October 5, 2011, 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: Numerous commenters generally supported the proposed amendments to ARM 24.156.1622. One commenter stated that the requirement in (5) that even experienced physician assistants (PAs) from out-of-state have an interview when entering into their first supervision and duties and delegation agreements in Montana is burdensome. The commenter suggested that experienced PAs should be treated differently from PAs new to practice and further objected to the requirement for board approval of PA agreements.

Board staff discovered an inadvertent typographical error within this rule in that the term "delegation and duties agreement" should read "duties and delegation agreement" to align with the term as used in statute at 37-20-301(2), MCA.

One commenter requested clarification in (5)(d) as to the appropriate percentage of PA charts to be reviewed by a physician.

RESPONSE 1: The board agrees and is amending (5) and (6) to utilize the correct term, "duties and delegation agreement," as set forth in statute.

The board is further amending (5)(d) to reference ARM 24.156.1623, the rule governing chart review, and address any confusion about the required appropriate levels of chart review.

COMMENT 2: Numerous commenters opposed the proposed amendments to ARM 24.156.1622(7) and (8) and requested that the board strike the sections from the rule. The commenters stated that board approval of agreements would set Montana back, pose a barrier to physicians hiring PAs, and cause delays in hiring PAs. Generally, commenters characterized the requirement of board approval as a form of micromanagement that would undermine local decision-making of physicians and facilities, and requested the board delete the approval requirement. One commenter suggested that the board's review of duties and delegation agreements, which are in the form of a contract, might be beyond the statutory authority of the board.

RESPONSE 2: The board appreciates all comments made in the rulemaking process. After a thorough review and discussion, the board is amending (7) to delete the requirement for board approval of supervision agreements and duties and delegation agreements. The board is deleting (8) to align with the changes to (7).

COMMENT 3: Numerous comments were received regarding proposed New Rule VI(1) and (2), to include the following:

Two commenters thanked the board for addressing training for PAs performing radiologic procedures and expressed approval for this new rule.

Thirteen commenters supported the education and/or licensing requirement for routine radiologic procedures.

Two commenters supported the idea of appropriate training for PAs performing routine radiologic procedures, but stated that requiring a second license to perform routine x-rays that are already being done by PAs would be burdensome.

Three commenters asked the board to consider "grandfathering" PAs who have been performing routine radiologic procedures under the supervision of a physician.

Two commenters asked that the board allow education and/or direct supervision, until competency could be demonstrated for taking plain films.

One commenter suggested that a certificate of education could be granted in place of requiring a second license.

Three commenters noted that requiring two licenses would be confusing.

Two commenters suggested that the board set up alternative training for PAs performing routine radiologic procedures such as one- or two-day preceptorship, in a radiology department.

One commenter noted that to meet the critical needs of rural and frontier settings, it is appropriate for PAs to perform procedures as delegated.

One commenter suggested amending New Rule VI(1) to provide for course and/or completion of training.

RESPONSE 3: The board appreciates all comments made in the rulemaking process. After careful consideration and discussion, the board is amending New Rule VI(1) in response to the comments received by the board. The board is amending (2) to be consistent with the further amendments to (1).

COMMENT 4: Numerous commenters requested that the board amend New Rule VI(3) to refer to the Fluoroscopy Education Framework for the Physician Assistant created through the collaboration of the American Academy of Physician Assistants and the American Society of Radiologic Technologists, as the educational standard for PAs performing fluoroscopy or advanced radiologic procedures.

Two commenters indicated that PAs are currently utilizing fluoroscopy when the PA assists the operating physician by providing fluoroscopic guidance during procedures in hospitals' and clinics' operating rooms and radiology departments. During these procedures, the physician is directing the PA in how and when to "shoot" the fluoroscopic images.

RESPONSE 4: The board appreciates all comments made during the rulemaking process. The board reviewed the suggested fluoroscopy education framework and recognizes that this framework has been found to be thorough and complete by the Society for Interventional Radiology, and that it is adopted or being adopted by California, Connecticut, and Massachusetts. Board members also discussed the comments regarding physician-physician assistant teams operating together. The board is amending New Rule VI(3) to address the concerns of the commenters.

COMMENT 5: One commenter suggested the board offer a jurisprudence examination to PAs. The commenting entity requested the board provide them with lists of all PAs seeking licensure or new supervision agreements, so that the entity could review the supervision and duties and delegation agreements. The entity requested that links to the board web site and information about board PA rules and keeping board agreements up-to-date, be placed on its web site. This commenter suggested that it collaborate with the board to offer instruction and education to PA students prior to graduation.

RESPONSE 5: The board appreciates all comments received in the rulemaking process and notes that the board has previously offered pregraduation training to PA students with great success. The board discussed the commenter's proposal for a jurisprudence examination, but determined the request is beyond the scope of this rule notice. The board would welcome having its web site and information about the board's PA rules linked on the commenter's web site.

4. The board has amended ARM 24.156.1401, 24.156.1403, 24.156.1404, 24.156.1406, 24.156.1412, and 24.156.1623 exactly as proposed.

5. The board has adopted NEW RULE I (24.156.1407), II (24.156.1408), III (24.156.1409), IV (24.156.1410), and V (24.156.1411) exactly as proposed.

6. The board has repealed ARM 24.156.1405 exactly as proposed.

7. The board has amended ARM 24.156.1622 with the following changes, stricken matter interlined, new matter underlined:

24.156.1622 SUPERVISION OF PHYSICIAN ASSISTANT (1) through (4) remain as proposed.

(5) The supervision agreement and ~~delegation and duties~~ and delegation agreement for nonroutine applicants must assure the safety and quality of physician assistant services, considering the location, nature, and setting of the practice and the experience of the physician assistant, and shall provide for:

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

(d) an appropriate percentage of physician assistant charts that must be reviewed by the supervising physician in accordance with ARM 24.156.1623.

(6) The supervision agreement and ~~delegation and duties~~ and delegation agreement for nonroutine applicants may provide for periodic changes in the type of supervision, scope of delegation, practice limitations, frequency, and duration of face-to-face meetings, and percentage of charts reviewed, based upon the duration and nature of experience gained by the physician assistant, the supervising physician's written assessment and evaluation of the physician assistant's experience and judgment, and other factors relevant to the nature and degree of supervision appropriate to assure the safety and quality of physician assistant services.

(7) ~~A supervising physician and physician assistant must submit the proposed supervision agreement and delegation and duties agreement to the board for approval, and as a condition of approval, must demonstrate to the board:~~ The duties and delegation agreement must be submitted, if requested, to the board or its designee during the interview required pursuant to ARM 24.156.1601(3).

~~(a) that the supervision agreement and delegation and duties agreement comply with this rule and all other applicable requirements; and~~

~~(b) that the supervising physician and physician assistant have a complete and functional understanding of their respective responsibilities under the agreements and applicable laws and rules.~~

~~(8) A physician assistant may not practice as a physician assistant in this state prior to board approval of the supervision agreement and delegation and duties agreement.~~

8. The board has adopted NEW RULE VI (24.156.1701) with the following changes, stricken matter interlined, new matter underlined:

NEW RULE VI PHYSICIAN ASSISTANT PERFORMING RADIOLOGIC PROCEDURES – ROUTINE AND ADVANCED PROCEDURES (1) A physician assistant performing routine radiologic procedures must maintain an active limited technologist permit issued by the Montana Board of Radiologic Technologists or provide proof of completion of the coursework required for a limited technologist permit, or provide proof of completion of a course equivalent to that required for a limited technologist permit, or be able to provide proof of adequate training or experience in the clinical setting to assure safe use of ionizing radiation in

~~performance of delegated routine procedures. Such proof must be presented to the board that he or she has completed the United States Army MOS-68P radiologic training course, or a course equivalent to that required for a limited technologist permit. The board shall verify completion of a course different from but equivalent to that required for a limited technologist permit and document, in board minutes, acceptance of such course completion before a physician assistant may perform routine radiological procedures.~~

(2) A physician assistant performing routine radiologic procedures who holds a limited technologist permit or whose education or training meets the requirements of (1) ~~has been accepted by the board as equivalent to that of a limited technologist permit holder~~ may not perform procedures that exceed the scope of practice of a limited technologist permit holder. Routine radiologic procedures, within the scope of practice of a limited technologist permit holder, are set forth in rule and adopted by the Montana Board of Radiologic Technologists.

(3) A physician assistant performing fluoroscopy or advanced radiologic procedures, without the direct supervision and guidance of a physician, must meet the education requirements established by the Board of Radiologic Technologists for a Radiology Practitioner Assistant license or have completed the Fluoroscopy Education Framework for the Physician Assistant created through the collaboration of the American Academy of Physician Assistants and the American Society of Radiologic Technologists. ~~The board shall verify completion of such educational requirements and document acceptance of such educational requirements in board minutes.~~

(4) remains as proposed.

BOARD OF MEDICAL EXAMINERS
ANNA EARL, MD, 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 February 13, 2012

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
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, and 42.22.1311)
relating to property taxes and the)
trend tables for valuing property)

TO: All Concerned Persons

1. On January 12, 2012, the department published MAR Notice No. 42-2-864 regarding the proposed amendment of the above-stated rules at page 12 of the 2012 Montana Administrative Register, Issue Number 1.

2. A public hearing was held on February 6, 2012, to consider the proposed amendments. No one appeared at the hearing and no written comments were received.

3. The department amends the rules as proposed.

4. An electronic copy of this notice is available on the department's web site at www.revenue.mt.gov. Select the "Legal Resources" link in the left hand column, and click on the "Rules" link within to view the options under the "Notice of Proposed Rulemaking" heading. 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. While the department also strives to keep its web site accessible at all times, in some instances it may be temporarily unavailable due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

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

Certified to Secretary of State February 13, 2012

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 42.21.158 relating to personal)
property reporting requirements)

TO: All Concerned Persons

1. On January 12, 2012, the department published MAR Notice No. 42-2-874 regarding the proposed amendment of the above-stated rule at page 49 of the 2012 Montana Administrative Register, Issue Number 1.

2. No comments were received. Therefore, the department amends the rule as proposed.

3. An electronic copy of this notice is available on the department's web site at www.revenue.mt.gov. Select the "Legal Resources" link in the left hand column, and click on the "Rules" link within to view the options under the "Notice of Proposed Rulemaking" heading. 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. While the department also strives to keep its web site accessible at all times, in some instances it may be temporarily unavailable due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

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

Certified to Secretary of State February 13, 2012

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the petition by Unified Disposal Board for a declaratory ruling on the applicability of § 75-10-115, MCA, and associated administrative rules to fees for its landfill)	Docket No. 2012-1-SW
)	DECLARATORY RULING

The Montana Department of Environmental Quality (Department) hereby issues its ruling on the Petition for a Declaratory Ruling filed by the Unified Disposal Board on October 5, 2011. The ruling and the reasons for it follow.

DECLARATORY RULING PROCEEDING

On October 5, 2011, the Unified Disposal Board (UDB) filed a Petition with the Department for a Declaratory Ruling under § 2-4-501, MCA, and rules adopted pursuant to that statute at ARM 17.4.101(1), which adopts, among other rules, the Montana Attorney General's Organizational and Procedural Model Rules concerning declaratory rulings at ARM 1.3.226 through 229.

Questions Presented

In the Petition, UDB presented certain questions and requested the Department to rule on them. The Department has rephrased the questions presented to reflect the legal, regulatory, and factual situation concerning the Unified Disposal District (UDD) landfill, as follows:

I. Does the Department have discretion to issue a preliminary, initial, or conditional license to a person operating a solid waste landfill so that no annual renewal fee will be due until the landfill starts receiving waste?

II. Is a landfill licensee excused from paying the annual fee provided for in ARM 17.50.410, Table 1, during the period starting when the Department issues a license and ending when the landfill first receives waste because the fee constitutes a prohibited confiscatory tax, or because the fee violates the intent of the Legislature in § 75-10-115(1)(b), MCA, that the fee "reflect[] a minimal base fee related to the fixed costs of an annual inspection and license renewal"?

Factual and Regulatory Background

UDB¹ is a multi-county and city solid waste district organized in 1983 under

¹ The Petition refers to Petitioner as Unified Disposal Board (UDB). UDB was created by Interlocal Agreement in 1983. Under that Agreement, all property owned by UDB must be owned in the name of UDB. According to the Cadastral Database administered by the Montana Department of Administration, the landfill property is owned by the "Unified Disposal District" (UDD). The application to the Department for the landfill license addressed in the Petition was filed by UDD, and the

the following sections of the Montana Code Annotated: §§ 7-13-201 (authorizing solid waste districts, since repealed), 7-11-104 (authorizing interlocal agreements), and 75-10-112 (authorizing local governments to operate solid waste management systems and enter into interlocal agreements to do so). UDB operates an existing landfill in Hill County, Montana (the Old Landfill). UDB, using the name Unified Disposal District (UDD), has recently applied to the Department for, and received, a license, No. 490, for a new landfill in Hill County (the New Landfill).

Because the license application for the New Landfill stated that it was projected to receive 25,000 tons/year of Group II solid waste, it is a major Class II landfill and its application fee was \$12,000 under ARM 17.50.410, Table 3.

Once the Department receives an application for a landfill license, it reviews the application to determine if it is complete. ARM 17.50.513(1). If complete, the Department analyzes it to determine if it satisfies the requirements of the landfill laws and rules and whether an environmental impact statement is required. ARM 17.50.513(3). The Department notifies the appropriate local health officer of the receipt of the application, as required in § 75-10-222(1), MCA, and conducts an environmental review under the Montana Environmental Policy Act, Title 75, chapter 1, part 2, MCA.

Within 30 days after it completes the environmental review, the Department is required to make a final decision to deny or issue the license and then notify the applicant, appropriate local health officer, and other interested persons. ARM 17.50.513(7) and § 75-10-222(2), MCA. The license is not valid unless the county health officer signs it. § 75-10-222(3), MCA.

Once the Department has issued a license to a landfill, the Department is required by ARM 17.50.410(1)(c) to assess an annual license renewal fee according to ARM 17.50.410, Table 1 (\$4,200 for a major Class II landfill such as the UDD's), and mail an invoice by June 15 of each year. The licensee is required to pay that fee to the Department by July 31 of each year, but may submit it quarterly, with the first payment due on July 31 and subsequent payments due on October 31, January 31, and April 30. ARM 17.50.410(1)(c).

Failure to pay the fee when due subjects a licensee to a criminal penalty of \$2,000, imprisonment not to exceed six months, or both, and to payment of principal and interest. § 75-10-116, MCA.

When the current fees in Table 1 were proposed in 2003, the fees had not been changed since they were established in 1991. The 2003 proposed rulemaking notice by the Montana Board of Environmental Review (BER) predicted that the proposed fee increases would raise an additional \$165,046 for the Department to use to fund its solid waste activities, including "issuing of licenses, monitoring, inspections, and compliance assistance and enforcement at licensed and unlicensed solid waste management systems." That notice further stated that the "fees fund 11 full time employees (FTEs) in the solid Waste Licensing and Regulatory programs, the Pollution Prevention Program and the Department's Legal Unit," and that they were "based on the type of waste collected, the waste handling process and

Department issued the license to UDD. The Department has been unable to find any evidence of the existence of an entity named UDD. In this Ruling, the Department uses the name appearing in the particular document being discussed.

volume/tonnage of waste treated, stored, or disposed of, as required by 75-10-115, MCA." Notice of Public Hearing on Proposed Amendment to Rules Pertaining to Solid Waste Fees, 2003 Mont.Admin.Reg. 1720, 1729 (August 14, 2003), adopted as proposed as to ARM 17.50.410, Table 1 at 2003 Mont.Admin.Reg. 2857 (December 24, 2003).

For the year in which a license is originally issued, the annual landfill license fee is prorated by calendar quarter. ARM 17.50.410(1)(d). In addition to the annual fee, each landfill is required to pay the Department a fee of \$0.40/ton disposed of in the previous year. ARM 17.50.410(1)(c) and Table 1. This is referred to as the tonnage fee. Because § 75-10-221(4), MCA, states that a landfill license lasts "for a period not to exceed 12 months unless renewed by the department," an annual renewal application and approval is required to keep a license in effect.

A landfill license expires on June 30 of a year if not renewed. ARM 17.50.410(1). The Department is required to mail renewal application forms to licensees by February 1 of each year. A licensee must submit a renewal application to the Department by April 1 of each year. ARM 17.50.410(2).

UDD applied to the Department for a license for the New Landfill on July 16, 2008. The Department issued the license for the New Landfill to UDD on October 27, 2009.

The license was issued with 10 conditions, which were attached to the Petition as Attachment B. The Legislature has implicitly provided for the issuance of a solid waste license with conditions in § 75-10-227(1), MCA, which authorizes the Department to issue an administrative order requiring corrective action or assessing penalties for a violation of a solid waste "permit provision," and § 75-10-228(1), MCA, which authorizes the Department to file a lawsuit seeking penalties for a violation of "a license provision."

Three conditions (Nos. 1, 5, and 9) attached to the license and contained in Attachment B required UDD to comply with engineering and storm water requirements when constructing the landfill.

The remaining seven conditions in Attachment B regulate the operation of the landfill concerning litter control (Nos. 2 & 3), acceptance of petroleum-contaminated soils (No. 4), documentation of removal of ozone-depleting refrigerants (No. 6), storm water and leachate releases (Nos. 7-8), and open burning (No. 10). There are other requirements that a landfill must meet before and after the initial receipt of waste. They are contained in the statutes, rules, operations and maintenance (O&M) plan, and other submittals by the licensee that are subject to approval by the Department. See, e.g., ARM 17.50.509, which sets forth the requirements for a landfill's O&M plan; ARM 17.50.540, which requires a Class II landfill to have cost estimates and funded financial assurance for closure and post-closure care before the initial receipt of waste; ARM 17, chapter 50, subchapter 11, which contains operating criteria; and ARM 17.50.1403 and 1404, which require closure and post-closure care plans to be submitted and approved before a landfill may receive waste.

The solid waste regulatory structure provides for a license application and approval, and then for the satisfaction of engineering requirements and operating conditions before waste may be accepted. License conditions must continue to be met while the landfill is operating. In summary, the process established by § 75-10-

221, MCA, and ARM 17.50.410 is that an applicant applies for a license and pays an application fee, and the Department reviews the license application. If it is adequate, the Department issues the license with conditions that must be met either before waste may be received or as ongoing operational requirements. Once a license is issued, an annual renewal application and fee must be submitted.

According to the Petition, UDB expected the New Landfill to be ready to start receiving waste in October 2011. The Department's records indicate that it did begin to receive waste during the last week of October 2011. However, UDD had not satisfied all operating requirements by that date; for example, UDD failed to make the first payment of money into its closure and post-closure financial assurance trust fund before the initial receipt of waste, as required by ARM 17.50.540(5)(a)(v). The Department mailed UDD a violation letter on December 15, 2011, for failing to comply with that requirement. UDD has not yet paid the required funds into the trust fund.

Based on the above authorities, once UDD had a license from the Department, it was required to pay an annual license renewal fee of \$4,200 to the Department each year. Because the New Landfill did not receive waste from October 2009 through most of October 2011, no tonnage fee was due for that period.

The amount of the prorated fee invoiced for FY 2010 (October 27, 2009 – June 30, 2010) was \$2,800. The amounts invoiced for FY 2011 (July 1, 2010 – June 30, 2011) and FY 2012 (July 1, 2011 – June 30, 2012) were \$4,200 each. The Department mailed invoices for the annual fee to UDD in February of 2010 and February 2011, and mailed past-due notices on May 9 and September 6, 2011.

UDD submitted timely annual license renewal applications to the Department in 2010 and 2011, but did not pay the annual license renewal fees when due. After obtaining assurances from the Department that the fees would be refunded if this Petition was decided in its favor, Hill County paid the Department \$7,000 in past-due fees for Fiscal Years 2010 and 2011 on September 26, 2011.

For Fiscal Year 2012 so far, UDD is responsible for a total of \$2,100 in fees: \$1,050 fees for the 1st quarter (July 1 – September 30, 2011), which were due on July 31, 2011; and \$1,050 for the 2nd quarter (October 1- December 31, 2011), which were due on October 31, 2011. UDD paid \$1,050 on October 31, 2011. Therefore, if this Ruling declares that a fee is required, UDD is currently \$1,050 in arrears.

After the Department issued the license for the New Landfill on October 27, 2009, the Department expended about 61 hours of staff time for a total cost of about \$3,700 from November 2009 through October 2011. Work performed by Department staff included, among other things, reviewing portions of the construction manual, working with a UDB representative concerning financial assurance required before the New Landfill could accept waste, addressing license renewal and required fees, and addressing a storm water discharge violation. See Exhibit 1. The Department also expended some additional staff time in December 2011, including the performance of a site inspection on December 5, 2011.

Analysis

I. Does the Department have discretion to issue a preliminary, initial, or conditional license to a person operating a solid waste landfill so that no annual renewal fee will be due until the landfill starts receiving waste?

As described above, the solid waste laws and rules provide for an application for a license, and for issuance of a license if requirements are satisfied. An annual fee is required for each year after a license is issued. Once a license is issued, construction may proceed when rules and conditions of applicable plans are satisfied. Waste may be received if regulatory requirements are satisfied. There is no provision in the solid waste laws or rules for a preliminary, initial, or conditional license.

UDD states that the "license was conditioned on construction of the engineered plans including 10 listed items noted on Attachment B." It is true that the Department did include conditions when it issued the license. However, these conditions did not make the license preliminary, initial, or conditional. Rather, a full license was issued, with requirements that had to be met when the landfill was constructed and before it first received waste and continuously afterwards.

The conditions in Attachment B were those requirements that the Department believed were especially relevant to the New Landfill and that it wished to emphasize to the licensee: that construction had to comply with submitted and approved plans, and that the landfill, once receiving waste, had to be operated properly concerning litter control (in a very windy area), contaminated soils, ozone-depleting compounds, water protection, and air quality.

The issuance of the license was not delayed pending satisfaction of the conditions listed in Attachment B. Once UDD satisfies the regulatory requirements and license conditions, and obtains any necessary approvals, it is entitled to receive waste at the New Landfill.

In summary, the license conditions in Attachment B did not make the issuance of the license for the New Landfill dependent on satisfaction of the conditions. Rather, the conditions were requirements of construction or operation, and failure to comply with them could subject the UDD to enforcement.

Therefore, the ruling on the first question is that the Department does not have discretion to issue a preliminary, initial, or conditional license to a person operating a solid waste landfill, and that an annual license renewal application fee will be due during each year after the license was issued, regardless of whether the landfill is receiving waste.

II. Is a landfill licensee excused from paying the annual fee provided for in ARM 17.50.410, Table 1, during the period starting when the Department issues a license and ending when the landfill first receives waste because the fee constitutes a prohibited confiscatory tax, or because the fee violates the intent of the Legislature in § 75-10-115(1)(b), MCA, that the fee "reflect[] a minimal base fee related to the fixed costs of an annual inspection and license renewal"?

UDB argues, in the Petition at p. 5, that because the landfill was not open and

receiving waste from the date it was licensed, October 27, 2009, until October 2011, and the Department was therefore not inspecting or incurring any expense for a renewal, the fee is not related to services, and is therefore a confiscatory tax. UDD further argues that the fee violates legislative intent, because the fact that the Department did not conduct an inspection means that the fee was not related, as § 75-10-115(1)(b), MCA, requires, to the "costs of an annual inspection and license renewal."

These arguments are not persuasive, for two reasons. First, the Department did incur significant costs for regulation of the New Landfill during that period. Second, the fee was set based on a reasonable estimate of the costs of regulation. Because the annual fee is reasonably related to the estimated costs of the Department's regulation of the landfill, it is a fee and not an unreasonable tax. The fee is related to the estimated costs of an annual inspection and license renewal, and so does not violate the intent of § 75-10-115(1)(b), MCA.

The Montana Supreme Court has established a three-part test for determining if a particular assessment is a tax. In *Montana –Dakota Utilities Co. v. City of Billings*, 2003 MT 332, ¶ 25, 318 Mont. 862, 80 P.3d 1247 (*MDU*), the Court stated that it has held that "a governmental demand for money made for the purposes of raising revenue is a tax. ... If the charges are primarily tools of regulation, they are not taxes." *Id.* The Court referred to the following three-part test from a Washington case, *City of Lakewood v. Pierce County* (2001), 106 Wn. App. 63, 23 P.3d 1, to determine if a purported fee constituted a tax:

1. Whether the primary purpose is to raise revenue or regulate;
2. Whether the money collected is allocated only to the authorized regulatory purpose; and
3. Whether there is a direct relationship between the fee charged and the service received by those who pay the fee or between the fee charged and the burden produced by the fee payer.

MDU, ¶ 23. See also *MDU*, ¶ 25, citing *Lechner v. City of Billings* (1990), 244 Mont. 195, 797 P. 2d 191; *Montana Innkeepers Assoc. v. City of Billings* (1983) 206 Mont. 425, 671 P.2d 21; and *Brueggemann v. City of Billings* (1986), 221 Mont. 375, 719 P.2d 768; and 16 E. McQuillin, *Municipal Corporations*, § 44.02 at 2 (3rd ed. Supp. 2003).

When applying the first part of the *MDU* test, whether the primary purpose is to raise revenue or regulate, the language of §§ 75-10-115(1) and 75-10-106, MCA, is instructive. Those sections authorize the solid waste fees that are at issue in this matter. Section 75-10-115(1), MCA, provides that "(1) The department may prepare rules for adoption by the [Montana Board of Environmental Review, or BER] ... that set fees for the management and regulation of solid waste at facilities subject to regulation pursuant to [Title 75, chapter 10, part 2, MCA]. Upon adoption by the [BER], the department may collect the fees. These fees may include: ... (b) a flat annual license renewal fee that reflects a minimal base fee related to the fixed costs of an annual inspection and license renewal"

Then § 75-10-106, MCA, requires the BER to "adopt rules necessary for the implementation of this part, including but not limited to rules governing ... (2) the

application fee, flat annual license renewal fee, and tonnage or volume-based renewal fee for solid waste management systems prepared by the department pursuant to 75-10-104 and 75-10-115."

Therefore, the statutory language at issue affirmatively states that the fees assessed are to be assessed "for the management and regulation" of regulated solid waste management facilities. The fees are not assessed for raising revenue generally. So, application of the solid waste law to the first prong of the *MDU* test lends support to a conclusion that the flat annual renewal fee is regulatory, and therefore a fee, and not a tax.

The second prong of the *MDU* test, whether the money collected is allocated only to the authorized regulatory purpose, is also addressed in statute. Section 75-10-115(2), MCA, provides: "All fees collected must be deposited in the solid waste management account provided for in 75-10-117." Section 75-10-117(1), MCA, provides for a solid waste management account that, under § 75-10-117(3) MCA, "may be used only for...administration of 75-2-215, part 2 of this chapter, and this part. § 75-2-215, MCA, concerns air quality aspects of waste incineration. Title 75, chapter 10, parts 1 and 2 concern solid waste regulation. When § 75-10-117(1), MCA, is read together with § 75-10-117(3), MCA, it is clear that the solid waste fees received from UDD for the New Landfill are to be deposited in a solid waste management account and can be used only for administration and regulation of solid waste. Therefore, the flat annual renewal fee at issue here is allocated only to administration of the regulatory purpose of the license. So, the second prong of the *MDU* test also militates toward the conclusion that the flat annual renewal fee is a regulatory fee and not a tax.

The third prong of the *MDU* test involves the relationship between the fee charged and the services received. Under ordinary circumstances, a license is obtained and construction of the facility commences soon afterward. In this case, after the Department issued the license for the New Landfill on October 27, 2009, the Department expended about 61 hours of staff time for a total cost of about \$3,700 from November 2009 through October 2011. The work performed by Department staff was related to the regulation of the New Landfill before it was authorized to receive waste.

The Department also performed a site inspection on December 5, 2011.

The expenditure of about 61 hours of staff time, with a total cost of \$3,700, demonstrates that the Department has used some funds from the account into which the UDB annual renewal fees were deposited to conduct solid waste regulatory activities for the New Landfill. The fact that the facility had not, by October 2011, satisfied all of the operating criteria necessary for it to begin to receive waste did not eliminate the Department's duties or costs to regulate the facility. If the facility had been accepting waste during that period, an additional fee of \$0.40 per ton of waste disposed of would have been assessed, and the Department may have had to provide additional services. Therefore, services were provided to Petitioner by the Department to regulate the New Landfill.

The Department recognizes that the amount of fees invoiced, \$9,200, is greater than the costs incurred by the Department, \$3,700. This does not make the fees a prohibited tax. The assessment, collection, and expenditure of solid waste license fees are not exact endeavors. As noted above, the BER established solid

waste fees based on estimates of the Department's costs for analyzing all license applications, regulating all solid waste regulatory programs, funding pollution prevention programs, and solid waste legal work. Some of the fee money collected is used to fund the Department's work in providing technical assistance for planning, integrated waste management, and waste reduction. See § 75-10-104(3), MCA. Some of the fees are used to fund enforcement and legal work. The Department does not conduct cost-accounting on a project-specific basis for each license application and renewal. Project-specific accounting is not required by statutes or by case law. It is unnecessary for the Department to match closely the fees and the costs associated with a particular license. Rather, because the "costs must be prescribed in advance, they must of necessity be based upon estimates which it is the right and duty of the ... authorities [here, the BER] to make." *State v. Pepper* (1924), 70 Mont. 596, 605, 226 P. 1108, 1110.

The annual license renewal fees in ARM 17.50.410, Table 1, were based on a reasonable estimate of costs of regulation, and are appropriate. On balance, the annual license fee adopted by the BER and assessed by the Department satisfies the requirement of § 75-10-115(1)(b), MCA. Therefore, application of the facts and law here to the third prong of the *MDU* test, the relationship between the fee charged and the services received, shows that the annual renewal fee is a fee and not a tax.

Thus, application of the facts here to the three prongs of the *MDU* test lead the Department to conclude that the annual solid waste license fee is a permissible fee and not a prohibited confiscatory tax. Because the fee was adopted as part of a reasonable estimate of the Department's costs of regulating solid waste facilities, it is related to the cost of an annual inspection and license renewal, and so does not violate legislative intent.

Therefore, the ruling on the second question is that the annual solid waste license fees assessed on UDD during the period from October 2009 through October 2011 were permissible and did not violate legislative intent.

Given this regulatory structure, a landfill owner may avoid paying additional annual fees for a solid waste license only by applying for a license so that it obtains it close to the date the landfill is needed.

The Department is constrained by current statutes and rules to assess an annual fee for each year that a landfill has a license. Changes to the statutes and rules would be necessary to allow a landfill not to pay an annual fee for each year it is licensed.

RULING

NOW, THEREFORE, for the foregoing reasons, the Department, pursuant to § 2-4-501, MCA, rules and declares that:

1. The Department does not have discretion to issue a preliminary, initial, or conditional license to a person operating a solid waste landfill, and an annual license renewal application fee will be due during each year after the license was issued, regardless of whether the landfill is receiving waste; and

2. The annual solid waste license fees assessed on UDD during the period from October 2009 through October 2011 were permissible and did not constitute

confiscatory taxes. Further, they did not violate the legislative intent of § 75-10-115(1)(b), MCA.

Dated this 2nd day of February, 2012

STATE OF MONTANA
DEPARTMENT OF ENVIRONMENTAL QUALITY

/s/ Richard H. Opper

RICHARD H. OPPER, Director

NOTICE: Petitioner has the right to appeal the decision of this agency by filing a petition for judicial review in district court within 30 days after service of this decision. Judicial review is conducted pursuant to 2-4-702, MCA.

CERTIFICATE OF SERVICE

I hereby certify that on February 2nd, 2012, I mailed a true and correct copy of the foregoing Ruling, postage prepaid, by U.S. Mail, to the following:

Gina Dahl, Hill County Attorney
Hill County Courthouse
Havre MT 59501

/s/ Misty Gable

MISTY GABLE

Department of Environmental Quality
 Permitting and Compliance Division
 Waste and Underground Tank Management Bureau
 Solid Waste Management Program

Services Provided to the New UDD Class II Facility
 between 10/27/2009 through 10/31/2011

Summary Total Expenses	2009	2010	2011	Totals
Personal Services (Salary + Benefits)	182.07	879.56	1,080.33	2,141.96
Travel/Indirects	<u>38.24</u>	<u>435.66</u>	<u>467.71</u>	<u>941.61</u>
	220.31	1,315.21	1,548.04	\$3,083.56
Overhead 20%	<u>44.06</u>	<u>263.04</u>	<u>309.61</u>	<u>616.71</u>
Totals	264.37	1,578.26	1,857.65	\$3,700.28

SERVICES	STAFF HOURS	STAFF NAME
<u>Fall 2009 Services</u>		
Phase-IA Construction manual requirements (2 Contacts)	3.0	Tim Stepp
Facility FA mechanism requirements (2 contacts)	2.0	Tim Stepp
<u>2010 Services</u>		
Phase-IA Construction manual review (3 contacts)	14.0	Tim Stepp
Facility FA mechanism requirements (2 contacts)	2.0	Tim Stepp
License renewal and fees activities (5 contacts)	7.5	Mary Hendrickson
Site inspection (1 contact)	2.0	Joe Blaine
<u>2011 Services</u>		
Facility FA mechanism requirements (8 contacts)	9.0	Tim Stepp
Storm water discharge violations (6 contacts)	3.0	Tim Stepp
License renewal and fees activities (8 contacts)	11.5	Mary Hendrickson
Site inspection (1 contact)	2.0	Kathy O'Hern
<u>MDEQ Letter Reviews</u>		
	3.0	Rick Thompson
	2.0	Mary Hendrickson
<u>Overhead</u>		
Support staff, copying, filing, etc.	20%	

EXHIBIT 1

SCHOOL DISTRICTS - Authority of school district to construct a new school using multiple funding sources;

TAXATION AND REVENUE - Use of property taxes levied to support adult education and transportation funds;

MONTANA CODE ANNOTATED - Title 20, chapters 7, 9; chapter 10, part 1; sections 20-7-701, (2), -702, -704, -705, (2), (3), 20-9-201(1), -203, -208, (1), (2), (a)(i), (B), (ii), -212(1), -311, -502, -508, -516, -533, -541, -542, (1), -543, (1), (a), (ii), -544(1), (2), 20-10-101, -107, -121, -124, -125, -142, -143(1), (a), (b), (c), (d), (e), -144, -145;

MONTANA CODE ANNOTATED (2011) - Section 20-9-208(2)(a)(i)(B);

MONTANA CODE ANNOTATED (2009) - Section 20-9-208(2)(a), (i);

OPINIONS OF THE ATTORNEY GENERAL - 44 Op. Att'y Gen. No. 41 (1992).

HELD: Property taxes levied to support the adult education and transportation funds may be transferred to the school flexibility fund, but the transfer must be within or directly related to the purposes for which the property taxes were raised, i.e., adult education programming and transportation services. A transfer of property taxes for any other purpose is invalid. Once transferred, property taxes levied to support the adult education and transportation funds may not be converted for other purposes or comingled with flex fund revenues or cash balances to cover expenditures authorized for flex funds. The school board and/or the county may demand an accounting to ensure that a valid transfer occurred and the funding sources have been properly spent.

February 3, 2012

Mr. Chris Christensen
Madison County Attorney
P.O. Box 73
Virginia City, MT 59755-0073

Dear Mr. Christensen:

You have requested an Attorney General opinion concerning the authority of the Ennis School District (District) to construct a new elementary and junior high school using multiple funding sources, including adult education, transportation, and school flexibility funding sources that have been transferred from the adult education and transportation funds to the flex fund account.

Background

According to your letter, the District has generated substantial revenue for adult education through nonvoted mill levies. Presently, the District's mill levy for adult

education is the highest in the State and actually exceeds the District's general fund mill levy. Over the years, the amount of revenue in the adult education fund has grown from \$236,000 in fiscal year 2005 to over \$4 million in fiscal year 2010. At the same time, the actual expenditures for adult education have declined from \$30,528 in fiscal year 2005 to \$24,697 in fiscal year 2009. A portion of the excess balance has been transferred to the school flexibility fund by resolution of the trustees. The resolutions authorizing the transfers indicate that the funding sources will be used to provide adult education as authorized in Mont. Code Ann. § 20-7-702 and to cover flex fund expenses as authorized in Mont. Code Ann. § 20-9-543(1)(a).

A similar circumstance exists with respect to transportation funding sources. Since fiscal year 2004, the District's transportation fund has realized revenue increases greater than actual expenditures. Consequently, each fiscal year between 2004 and 2008, the trustees approved a transfer of \$120,000 to the school flexibility fund. The resolutions authorizing these transfers are similar to the resolutions authorizing the transfer of adult education funding sources. They state that the funding sources will be used to provide adult education as authorized in Mont. Code Ann. § 20-7-702 and to cover flex fund expenses as authorized in Mont. Code Ann. § 20-9-543(1)(a). There is no mention of the funding sources being used to provide transportation services.

At some point, it became apparent that the District intended to use the transferred funding sources to construct a new elementary and junior high school. The estimated cost of the new school is \$10 million. In response to inquiries from the Office of Public Instruction (OPI), the District Superintendent represented that the new school would be used for multiple purposes including adult education and transportation services, and that only a portion of the school would be used for K-8 instruction. Information provided by the District's auditor indicates the following uses of the new building based on a percentage of overall square footage: adult education (49%), K-8 education (36%) and transportation (15%).

You question whether this is a valid use of adult education and transportation funding sources and, if so, what percentage of the building must be used for those purposes. If it is not a valid use of funding sources, you question what remedies are available to the school board or the county now that a substantial portion of the construction project is complete. Your questions require consideration of several factors: (1) under what circumstances may adult education and transportation funding sources be transferred to the flex fund account? (2) for what purposes may transferred funding sources be spent? and (3) may they be comingled with the flex fund revenue and cash balances to cover school district expenditures under Mont. Code Ann. § 20-9-543(1)(a)?

Analysis

The statutes governing education funds and the transfer of money between funds are found in Title 20, Montana Code Annotated. As used in Title 20, the term "fund" means "a separate detailed account of receipts and expenditures for a specific

purpose as authorized by law or by the superintendent of public instruction." Mont. Code Ann. § 20-9-201(1). The separate and distinct nature of education funds is confirmed in 44 Op. Atty. Gen. No. 41 (1992): "The school finance statutes are very detailed and specify the manner in which each budgeted fund is to be financed." Id. at 168. These fundamental principles are important, as they counsel against the conversion or comingling of funding sources absent specific legislative authorization.

The Legislature's intent to maintain separate and detailed accounting methods for school finance is evidenced in Mont. Code Ann. § 20-9-208, which authorizes transfers between budgeted funds. While the Legislature freely authorizes the transfer of any excess appropriation amount to any other appropriation item of the same budgeted fund, Mont. Code Ann. § 20-9-208(1), the transfer from fund to fund is far more restrictive, particularly if the funding source is a property tax levy, whether approved by the voters or raised by a nonvoted levy. Subsection (2) of the statute allows fund to fund transfers only under the following circumstances:

(2) Unless otherwise restricted by a specific provision of this title, transfers may be made between different funds of the same district or between the final budget and a budget amendment under one of the following circumstances:

(a)(i) Except as provided in subsection (2)(a)(ii), transfers may be made from one budgeted fund to another budgeted fund or between the final budget and a budget amendment for a budgeted fund whenever the trustees determine, in their discretion, that the transfer of funds is necessary to improve the efficiency of spending within the district or when an action of the trustees results in savings in one budgeted fund that can be put to more efficient use in another budgeted fund. Transfers may not be made with funds approved by the voters or with funds raised by a nonvoted levy unless the transfer is within or directly related to the purposes for which the funds were raised. Before a transfer can occur, the trustees shall hold a properly noticed hearing to accept public comment on the transfer.

(ii) Unless otherwise authorized by a specific provision in this title, transfers from the general fund to any other fund and transfers to the general fund from any other fund are prohibited.

Mont. Code Ann. § 20-9-208(2)(a) (2009). (This statute was amended in 2011 to allow a transfer in an additional circumstance, where the transfer "is approved by the qualified electors of the district in an election called for the purpose of approving the transfer, in which case the funds may be spent for the purpose approved on the ballot." Mont. Code Ann. § 20-9-208(2)(a)(i)(B) (2011). Since the transfers in question occurred prior to the passage of this new provision, and no voter approval was sought, I will limit my analysis to the statute as it existed prior.)

This statute clearly restricts transfers of nonvoted levies, which would include adult education, transportation and flex funds. See Mont. Code Ann. § 20-9-208(2)(a)(i) (using the term "nonvoted levy" to describe funding sources raised without voter

approval). Any transfer of property taxes levied to support the adult education and transportation funds to the flex fund prior to 2011 is permissible only if "the transfer is within or directly related to the purposes for which the funds were raised." Mont. Code Ann. § 20-9-208(2)(a)(i) (2009). I will analyze the transfers from each fund separately.

A. Transfer and Use of Adult Education Funding Sources

According to information provided, the trustees' resolutions transferring adult education funding sources to the flex fund account provided two reasons for the transfer:

1. . . . to provide both basic education and secondary general education, K-12 career and vocational/technical education, vocational-technical education, including courses in the English language and American history and government, or any other areas of instruction approved by the trustees for persons 16 [years] of age or older who are not regularly enrolled, full-time pupils for the purposes of ANB computation
2. . . . for the purchase of technological equipment enhancements and expansions considered by the trustees to support enhanced educational programs; facility expansion and remodeling considered by the trustees to support the delivery of educational programs or the removal and replacement of obsolete facilities; to provide supplies and materials considered by the trustees to support the delivery of enhanced education programs; the development of curriculum materials; the purchase, lease, or rental of real property that must be used to provide enhanced programs.

The first stated reason for the transfer of adult education funding sources mirrors the statutory language describing an adult education program in Mont. Code Ann. § 20-7-702. The second stated reason mirrors the statutory language describing school district expenditures from the school flexibility fund in Mont. Code Ann. § 20-9-543.

As explained below, I conclude that the first stated reason effectuated a valid transfer of funding sources from the adult education fund to the flex fund under Mont. Code Ann. § 20-9-208(2)(a) (2009) for the purposes described in Mont. Code Ann. § 20-7-702. However, because those purposes do not include capital outlay for facility acquisition and construction services, transferred property taxes may only be used for adult education programming and not for new school construction. Similarly, property taxes transferred from the adult education funds may not be used for the purposes set forth in Mont. Code Ann. § 20-9-543.

Montana Code Annotated section 20-7-702 authorizes the trustees of a school district to establish and operate an adult education program, to be financed through a "separate adult education fund" as described in Mont. Code Ann. § 20-7-705. The adult education fund is the depository "for all district money received by the district in support of the adult education program." Mont. Code Ann. § 20-7-705(2). The trustees may authorize the levy of a tax on the taxable value of all taxable property within the district for the operation of an adult education program. Mont. Code Ann. § 20-7-705(3). The trustees may also generate revenue for the adult education fund by charging tuition for instruction and fees for the use of equipment and materials. Mont. Code Ann. § 20-7-704.

"Adult education" is defined as "the instruction of persons 16 years of age or older who are not regularly enrolled, full-time pupils for purposes of ANB computation." Mont. Code Ann. § 20-7-701(2). "ANB" is "average number belonging" and its computation is based on average enrollment of regularly enrolled, full-time students as set forth in Mont. Code Ann. § 20-9-311. An adult education program may provide "both basic and secondary general education, career and vocational/technical education, vocational-technical education, American citizenship education, including the English language and American History and government, or any other areas of instruction approved by the trustees." Mont. Code Ann. § 20-7-702.

Because the first stated reason of the resolution transferring the adult education funding sources to the flex fund recites exactly the purposes for which adult education funding sources were raised, it constitutes a valid transfer of property taxes for those purposes. The more difficult question is whether those purposes include construction of a new school that will serve (at least in part) regularly enrolled K-8 students.

While the description of adult education in Mont. Code Ann. § 20-7-702 is seemingly broad in scope, the program itself is narrowly tailored. Adult education serves a distinct population of students which, by definition, does not include regularly enrolled K-8 students. Mont. Code Ann. § 20-7-701, -702. Adult education is to be provided "at any time of the day when facilities and personnel are available," Mont. Code Ann. § 20-7-702, implying that adult education will be provided in an existing facility. Adult education appears in Mont. Code Ann. tit. 20, ch. 7, which addresses "school instruction and special programs," suggesting that adult education is concerned with "programming" and not capital investments. This is in contrast to other funds described in Title 20, chapter 9, where capital outlay for facility acquisition or construction services is specifically authorized. See Mont. Code Ann. § 20-9-502 (authorizing a building reserve fund for new school construction or land acquisition); Mont. Code Ann. § 20-9-508 (authorizing a building fund for building, enlarging, or remodeling a school or other building in the district); Mont. Code Ann. § 20-9-516 (authorizing a school facility and technology account); Mont. Code Ann. § 20-9-533 (authorizing a technology acquisition and depreciation fund).

Based on these statutory provisions, I conclude that adult education funding sources were not intended to finance capital investments such as school buildings. As discussed in Part C, the transfer of property taxes levied to support the adult education fund to the flex fund does not change the nature of the funding sources or allow them to be used for a different purpose. Therefore, the trustees were only authorized to transfer property taxes levied to support the adult education fund to the flex fund for purposes set forth in Mont. Code Ann. § 20-7-702, as stated in the trustees' resolution. Whether or not a certain square footage of building space is used for adult education is not determinative, since no amount of adult education funding sources can be used as capital outlay for facility acquisition or construction services. If any portion of the new school building will be used for adult education, the trustees may spend 100% of the transferred property taxes levied to support the adult education fund for related instruction and programming, but only for that purpose.

B. Transfer and Use of Transportation Funding Sources

As with the adult education funding sources, the propriety of the transfer of property taxes from the transportation fund to the flex fund depends on the purposes for which the taxes were raised as described in Title 20, chapter 10, part 1. These provisions authorize the District to provide transportation services to public school pupils between the ages of 5 and 20 years of age who reside a certain distance from the nearest operating public elementary or high school. Mont. Code Ann. §§ 20-10-101, -121.

To provide transportation services, the trustees are authorized to purchase or rent school buses (Mont. Code Ann. § 20-10-107), contract with a private party for individual transportation (Mont. Code Ann. § 20-10-124) or contract with a private party for bus services (Mont. Code Ann. § 20-10-125). The trustees of a district furnishing transportation to pupils who are residents of the district "shall provide a transportation fund budget that is adequate to finance the district's contractual obligations and any other transportation expenditures necessary for the conduct of its transportation program." Mont. Code Ann. § 20-10-143(1). The transportation fund budget must include:

- (a) an adequate amount to finance the maintenance and operation of school buses owned and operated by the district;
- (b) the annual contracted amount for the maintenance and operation of school buses by a private party;
- (c) the annual contracted amount for individual transportation, including any increased amount because of isolation, which may not exceed the scheduled amounts prescribed in 20-10-142;
- (d) any amount necessary for the purchase, rental, or insurance of school buses; and

(e) any other amount necessary to finance the administration, operation, or maintenance of the transportation program of the district, as determined by the trustees.

Mont. Code Ann. § 20-10-143(1).

Unlike the adult education statutes, the transportation statutes specifically authorize funding sources to be used for capital investments and expenditures related to transportation services or part of the transportation program. I conclude that the transfer of property taxes levied to support the transportation fund to the flex fund is permissible under Mont. Code Ann. § 20-9-208(2)(a)(i), if the transfer is within or directly related to the funding purposes identified in Mont. Code Ann. § 20-10-143(1). Here, there is a question about whether the trustees effectuated a proper transfer of transportation funding sources, since the resolution authorizing the transfer recited the same reasons as the transfer of adult education funding sources, i.e., to provide adult education and to cover flex fund expenditures, with no provision for transportation expenses.

Even if there was a valid transfer of property taxes from the transportation fund, those taxes were generated for specific purposes which do not include classroom construction. While it would be permissible for the trustees to budget for transportation program needs in the flex fund to purchase buses or for construction services associated with transportation under the catch-all provision of Mont. Code Ann. § 20-10-143(1)(e) (allowing "any other amount necessary to finance the administration, operation, or maintenance of the transportation program"), the trustees may not budget for or expend property taxes levied to support the transportation fund for new school construction because that is not a purpose for which transportation funding sources were raised. Any other result would thwart the Legislature's directive that school funds are "separate detailed account of receipts and expenditures for a specific purpose." Mont. Code Ann. § 20-9-201(1).

Whether or not a certain amount of square footage will be used to provide transportation services does not alter the fact that property taxes levied to support the transportation fund cannot be used for classroom construction. If a portion of the new school building will provide transportation services, it is permissible to spend 100% of the property taxes levied to support the transportation fund for those services, but for no other purpose.

It has been suggested that the transfer of transportation money to the flex fund, insofar as it involves state reimbursement money and not property taxes, is a valid transfer as long as the trustees determine, in their discretion, that "the transfer of funds is necessary to improve the efficiency of spending within the district or when an action of the trustees results in savings in one budgeted fund that can be put to more efficient use in another budgeted fund." Mont. Code Ann. § 20-9-208(2)(a) (2009). This proposition assumes that it is permissible to generate surplus revenue from the state transportation reimbursement described in Mont. Code Ann. § 20-10-145, and transfer that surplus to the flex fund to be spent for flex fund purposes. I

am informed that that assumption is inconsistent with OPI's principles of accounting for transportation reimbursements. OPI assumes that state monies deposited in the transportation fund are "first in" when deposited and "first out" when spent. This principle is based on the language of Mont. Code Ann. § 20-10-144, which requires the district to anticipate the amount of transportation reimbursements it will receive from the state, and determine its property tax requirements based on any additional revenue requirements. I am not inclined to second-guess OPI's accounting methods, since they are consistent with the relevant statutes and also with the overall legislative intent for separate and detailed accounting of school finances.

C. Comingling of Funding Sources in the School Flexibility Fund

Assuming there was a valid transfer of adult education and transportation funding sources based on the limited purposes for which the funding sources were raised, the question becomes whether the funding sources may be converted to or comingled with school flexibility funding sources to cover expenditures authorized in Mont. Code Ann. § 20-9-543.

While the trustees have discretion to establish adult education and transportation funds, the creation of a school flexibility fund is mandatory. Montana Code Annotated section 20-9-543 directs the trustees of a district to establish a school flexibility fund (flex fund) to receive funding allocated by the superintendent of public instruction to each school district pursuant to Mont. Code Ann. § 20-9-542. Each school's total allocation is determined in accordance with the formula in Mont. Code Ann. § 20-9-542(1) and the definitions in Mont. Code Ann. § 20-9-541. The trustees may also submit a proposition to the qualified electors of the district to approve a levy to finance the school flex fund. Mont. Code Ann. § 20-9-544(1). The amount of the levy may not exceed 25% of the district's allocation in Mont. Code Ann. § 20-9-542. Id. Money collected from the levy must be deposited in the district's school flexibility fund and spent in accordance with Mont. Code Ann. § 20-9-543. Mont. Code Ann. § 20-9-544(2).

The trustees may use the flex fund, in their discretion, for school district expenditures listed in Mont. Code Ann. § 20-9-543. There are nine specific expenditures listed, one of which is for "facility expansion and remodeling considered by the trustees to support the delivery of educational programs or the removal and replacement of obsolete facilities[.]" Mont. Code Ann. § 20-9-543(1)(a)(ii) (emphasis added). This subsection allows the trustees to use flex fund money to remove or replace obsolete buildings, but it does not allow the trustees to spend property taxes transferred from other funds for those purposes. Transferred funding sources such as adult education and transportation property taxes are in the flex fund solely by virtue of the fact that the transfer was within or directly related to the purpose for which the property taxes were raised. The transferred property taxes are not converted to flex fund revenues, nor may they be comingled with and spent for flex fund purposes. To conclude otherwise is inconsistent with the restrictions on the transfer statute and the purposes of the original fund as designated by the Legislature.

D. Conclusion

1. The resolution authorizing the transfer of property taxes levied to support the adult education fund to the flex fund was effective only for the purposes set forth in Mont. Code Ann. § 20-7-702. The transfer of property taxes levied to support the adult education fund cannot be for the purposes set forth in Mont. Code Ann. § 20-9-543 (authorizing expenditures from the flex fund). Once transferred, the property taxes levied to support the adult education fund cannot be converted to or comingled with flex fund revenues and cash balances. They remain property taxes and must be spent for the purposes for which they were raised. Since adult education funding sources are not raised for capital outlay for facility acquisition or construction services, the trustees cannot budget to expend property taxes levied to support the adult education fund from the flex fund to construct a new school.
2. The resolution authorizing the transfer of property taxes levied to support the transportation fund to the flex fund did not result in a valid transfer under Mont. Code Ann. § 20-9-208(2)(a) because the stated purposes of the transfer are not within or directly related to the purposes for which the property taxes were raised. Even if the trustees effect a valid transfer in the future or retroactively, the transferred property taxes may only be used for transportation services, which may include capital outlay relating to transportation but no others. Once transferred, the property taxes from the transportation fund cannot be converted to or comingled with flex fund revenues or cash balances. They remain transportation revenue and must be spent for the purposes authorized in Title 20, chapter 10, part 1.
3. Flex fund revenues and cash balances may be used for the purposes set forth in Mont. Code Ann. § 20-9-543(1)(a), including facility expansion and remodeling or the removal and replacement of obsolete buildings; however, they may not be comingled with property taxes transferred from other budgeted funds.
4. The school board and/or the county may demand an accounting of funding sources to ensure that they were transferred, budgeted, and expended in accordance with this opinion. See Mont. Code Ann. § 20-9-203 (describing audit procedures for first, second, and third-class school districts); Mont. Code Ann. § 20-9-212(1) (assigning accounting duties to county treasurer). Depending on the results of that accounting, it may be appropriate to reimburse the transportation and adult education funds with available cash balances, pursuant to Mont. Code Ann. § 20-9-208(2)(i)(B). Ultimately, however, the trustees (as the term implies) must answer to the taxpayers of the District, particularly where property taxes are in question. If there is a basis for liability, those remedies may be pursued by the school board, the county, or any other citizen with standing as provided by law.

THEREFORE, IT IS MY OPINION:

Property taxes levied to support the adult education and transportation funds may be transferred to the school flexibility fund, but the transfer must be

within or directly related to the purposes for which the property taxes were raised, i.e., adult education programming and transportation services. A transfer of property taxes for any other purpose is invalid. Once transferred, property taxes levied to support the adult education and transportation funds may not be converted for other purposes or comingled with flex fund revenues or cash balances to cover expenditures authorized for flex funds. The school board and/or the county may demand an accounting to ensure that a valid transfer occurred and the funding sources have been properly spent.

Sincerely,

/s/ Steve Bullock
STEVE BULLOCK
Attorney General

sb/jma/jym

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE

Interim Committees and the Environmental Quality Council

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

Economic Affairs Interim Committee:

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

Education and Local Government Interim Committee:

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

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

- Department of Public Health and Human Services.

Law and Justice Interim Committee:

- Department of Corrections; and
- Department of Justice.

Energy and Telecommunications Interim Committee:

- Department of Public Service Regulation.

Revenue and Transportation Interim Committee:

- Department of Revenue; and
- Department of Transportation.

State Administration and Veterans' Affairs Interim Committee:

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

Environmental Quality Council:

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

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

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

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

Definitions:

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

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

Use of the Administrative Rules of Montana (ARM):

Known
Subject

1. Consult ARM Topical Index.
Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.

Statute

2. Go to cross reference table at end of each number and title which lists MCA section numbers and department corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through September 30, 2011. This table includes those rules adopted during the period October 1, 2011, through December 31, 2011, and any proposed rule action that was pending during the past 6-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 September 30, 2011, 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 2011/2012 Montana Administrative Register.

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BOARD APPOINTEES AND VACANCIES

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

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

In this issue, appointments effective in January 2012 appear. Vacancies scheduled to appear from March 1, 2012, through May 31, 2012, are listed, as are current vacancies due to resignations or other reasons. Individuals interested in serving on a board should refer to the bill that created the board for details about the number of members to be appointed and necessary qualifications.

Each month, the previous month's appointees are printed, and current and upcoming vacancies for the next three months are published.

IMPORTANT

Membership on boards and commissions changes constantly. The following lists are current as of February 1, 2012.

For the most up-to-date information of the status of membership, or for more detailed information on the qualifications and requirements to serve on a board, contact the appointing authority.

BOARD AND COUNCIL APPOINTEES FROM JANUARY, 2012

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Board of Hearing Aid Dispensers (Secretary of State)			
Mr. Wyman McDonald Ronan	Governor	Lieberg	1/9/2012 7/1/2014
Qualifications (if required): public representative with a hearing aid			
Judicial Nomination Commission (Justice)			
Mr. Hubert Abrams Wibaux	Governor	reappointed	1/4/2012 1/1/2016
Qualifications (if required): public representative			
Ms. Mona Charles Kalispell	Governor	reappointed	1/4/2012 1/1/2016
Qualifications (if required): public representative			
Montana Alfalfa Seed Committee (Agriculture)			
Mr. Marvin Frank Joliet	Governor	reappointed	1/4/2012 12/21/2014
Qualifications (if required): alfalfa seed grower			
Mr. Ernest Johnson Chinook	Governor	reappointed	1/4/2012 12/21/2014
Qualifications (if required): alfalfa seed grower			
Mr. John Mehling Hardin	Governor	reappointed	1/4/2012 12/21/2014
Qualifications (if required): alfalfa seed grower			

BOARD AND COUNCIL APPOINTEES FROM JANUARY, 2012

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Montana Election and Technology Advisory Council (Secretary of State)			
Ms. Sandra Boardman Chinook	Secretary of State	reappointed	1/9/2012 1/2/2014
Qualifications (if required):	Blaine County Clerk & Recorder		
Ms. Jeri Custer Forsyth	Secretary of State	reappointed	1/9/2012 1/2/2014
Qualifications (if required):	Rosebud County Clerk & Recorder		
Ms. Janice Hoppes Conrad	Secretary of State	reappointed	1/9/2012 1/2/2014
Qualifications (if required):	Pondera County Clerk & Recorder		
Ms. Charlotte Mills Bozeman	Secretary of State	reappointed	1/9/2012 1/2/2014
Qualifications (if required):	Gallatin County Clerk & Recorder		
Ms. Kathie Newgard Polson	Secretary of State	reappointed	1/9/2012 1/2/2014
Qualifications (if required):	Lake County Election Administrator		
Ms. Bonnie Ramey Boulder	Secretary of State	reappointed	1/9/2012 1/2/2014
Qualifications (if required):	Jefferson County Clerk & Recorder		
Mr. Bret Rutherford Billings	Secretary of State	reappointed	1/9/2012 1/2/2014
Qualifications (if required):	Yellowstone County Election Administrator		

BOARD AND COUNCIL APPOINTEES FROM JANUARY, 2012

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Montana Election and Technology Advisory Council (Secretary of State) cont.			
Ms. Vickie Zeier	Secretary of State	reappointed	1/9/2012
Missoula			1/2/2014
Qualifications (if required): Missoula County Clerk & Recorder			
Trauma Care Committee (Governor)			
Ms. Leah Emerson	Governor	reappointed	1/11/2012
Ronan			11/2/2015
Qualifications (if required): representative of the Western Region Trauma Care			
Ms. Kristen Lowery	Governor	reappointed	1/11/2012
Deer Lodge			11/2/2015
Qualifications (if required): representative of the Montana Trauma Coordinators			
Dr. Dennis Maier	Governor	reappointed	1/11/2012
Billings			11/2/2015
Qualifications (if required): representative of the Montana Committee on Trauma			
Mr. Sam Miller	Governor	reappointed	1/11/2012
Bozeman			11/2/2015
Qualifications (if required): representative of the Eastern Region Trauma Advisory Council			
Ms. Elaine Schuchard	Governor	reappointed	1/11/2012
Glasgow			11/2/2015
Qualifications (if required): representative of the Emergency Nurses Association			

BOARD AND COUNCIL APPOINTEES FROM JANUARY, 2012

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Trauma Care Committee (Governor) cont.			
Mr. Tim Sinton	Governor	reappointed	1/11/2012
Choteau			11/2/2015
Qualifications (if required): representative of the Central Region Trauma Advisory Council			

VACANCIES ON BOARDS AND COUNCILS -- MARCH 1, 2012 THROUGH MAY 31, 2012

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Board of Architects and Landscape Architects (Labor and Industry)		
Mr. James G. Shepard, Billings Qualifications (if required): registered architect with three years continuous practice	Governor	3/27/2012
Mr. Dale Nelson, Ronan Qualifications (if required): registered architect with three years continuous practice	Governor	3/27/2012
Board of Dentistry (Labor and Industry)		
Rep. James Madison, Jefferson City Qualifications (if required): public representative over 55 years of age	Governor	3/29/2012
Mr. Cliff Christenot, Libby Qualifications (if required): denturist	Governor	3/29/2012
Dr. David Johnson, Great Falls Qualifications (if required): dentist	Governor	3/29/2012
Ms. Carol Price, Clancy Qualifications (if required): dental hygienist	Governor	3/29/2012
Board of Hail Insurance (Agriculture)		
Ms. Trudy Laas Skari, Chester Qualifications (if required): public member	Governor	4/18/2012

VACANCIES ON BOARDS AND COUNCILS -- MARCH 1, 2012 THROUGH MAY 31, 2012

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<p>Board of Massage Therapists (Labor and Industry) Mr. Stacy Baird, East Helena Qualifications (if required): massage therapist</p>	Governor	5/6/2012
<p>Board of Nursing Home Administrators (Labor and Industry) Ms. Carla Neiman, Plains Qualifications (if required): representative of an institution caring for the aged</p>	Governor	5/28/2012
<p>Mr. Joshua Brown, Columbia Falls Qualifications (if required): nursing home administrator</p>	Governor	5/28/2012
<p>Board of Optometry (Labor and Industry) Mr. Randall Hoch, Lewistown Qualifications (if required): registered optometrist</p>	Governor	4/3/2012
<p>Board of Plumbers (Labor and Industry) Mr. Jeffrey Gruizenga, Billings Qualifications (if required): professional engineer (mechanical)</p>	Governor	5/4/2012
<p>Board of Real Estate Appraisers (Labor and Industry) Ms. Kathleen Susan Gallaher, Bozeman Qualifications (if required): public representative</p>	Governor	5/1/2012
<p>Mr. Darwin Ernst, Hamilton Qualifications (if required): real estate appraiser</p>	Governor	5/1/2012

VACANCIES ON BOARDS AND COUNCILS -- MARCH 1, 2012 THROUGH MAY 31, 2012

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<p>Board of Realty Regulation (Labor and Industry) Mr. Pat Goodover, Great Falls Qualifications (if required): real estate salesperson</p>	Governor	5/9/2012
<p>Clinical Laboratory Science Practitioners (Labor and Industry) Ms. Wendy Palmer, Raynesford Qualifications (if required): clinical laboratory science practitioner</p>	Governor	4/16/2012
<p>Family Support Services Advisory Council (Public Health and Human Services) Ms. Sylvia Danforth, Miles City Qualifications (if required): provider representative</p>	Governor	4/9/2012
<p>Mr. Theodore Maloney, Helena Qualifications (if required): personnel preparation</p>	Governor	4/9/2012
<p>Ms. Sandi Marisdotter, Helena Qualifications (if required): provider representative</p>	Governor	4/9/2012
<p>Ms. Cristin Volinkaty, Missoula Qualifications (if required): provider representative</p>	Governor	4/9/2012
<p>Ms. Mary Jane Standaert, Helena Qualifications (if required): Head Start/Early Head Start representative</p>	Governor	4/9/2012

VACANCIES ON BOARDS AND COUNCILS -- MARCH 1, 2012 THROUGH MAY 31, 2012

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Family Support Services Advisory Council (Public Health and Human Services) cont. Ms. Lucy Hart-Paulson, Missoula Qualifications (if required): language therapist	Governor	4/9/2012
Ms. Sandy McGennis, Great Falls Qualifications (if required): representative of the School for the Deaf and Blind	Governor	4/9/2012
Ms. Novelene Martin, Miles City Qualifications (if required): parent representative	Governor	4/9/2012
Mr. Ronald Herman, Helena Qualifications (if required): agency representative	Governor	4/9/2012
Ms. Diana Colsgrove, Eureka Qualifications (if required): parent representative	Governor	4/9/2012
Ms. Laurie Frank, Simms Qualifications (if required): parent representative	Governor	4/9/2012
Ms. Priscilla Halcro, Great Falls Qualifications (if required): family support specialist	Governor	4/9/2012
Ms. Paula Sherwood, Missoula Qualifications (if required): agency representative	Governor	4/9/2012

VACANCIES ON BOARDS AND COUNCILS -- MARCH 1, 2012 THROUGH MAY 31, 2012

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Family Support Services Advisory Council (Public Health and Human Services) cont. Mr. Joseph Miller, Big Sky Qualifications (if required): parent representative	Governor	4/9/2012
Mr. Verne Beffert, Livingston Qualifications (if required): special education representative	Governor	4/9/2012
Ms. Denise Brunett, Helena Qualifications (if required): agency representative	Governor	4/9/2012
Ms. Dawn Piazzzi, Helena Qualifications (if required): agency representative	Governor	4/9/2012
Ms. Beverly Hertweck, Helena Qualifications (if required): agency representative	Governor	4/9/2012
Ms. Danni McCarthy, Helena Qualifications (if required): agency representative	Governor	4/9/2012
Library Commission (Higher Education) Mr. Donald W. Allen, Billings Qualifications (if required): public representative	Governor	5/22/2012
Ms. Anita Scheetz, Sidney Qualifications (if required): public representative	Governor	5/22/2012

VACANCIES ON BOARDS AND COUNCILS -- MARCH 1, 2012 THROUGH MAY 31, 2012

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<p>Montana Cherry Commodity Advisory Committee (Agriculture) Mr. Jan Tusick, Ronan Qualifications (if required): none specified</p>	Director	5/3/2012
<p>Montana Election and Technology Advisory Council (Secretary of State) Ms. Bonnie Ramey, Boulder Qualifications (if required): Jefferson County Clerk & Recorder</p>	Secretary of State	4/26/2012
<p>Ms. Vickie Zeier, Missoula Qualifications (if required): Missoula County Clerk and Recorder</p>	Secretary of State	4/26/2012
<p>Ms. Janice Hoppes, Conrad Qualifications (if required): Pondera County Clerk and Recorder</p>	Secretary of State	4/26/2012
<p>Ms. Sandra Boardman, Chinook Qualifications (if required): Blaine County Clerk and Recorder</p>	Secretary of State	4/26/2012
<p>Ms. Kathie Newgard, Polson Qualifications (if required): Lake County Election Administrator</p>	Secretary of State	4/26/2012
<p>Ms. Jeri Custer, Forsyth Qualifications (if required): Rosebud County Clerk and Recorder</p>	Secretary of State	4/26/2012
<p>Ms. Charlotte Mills, Bozeman Qualifications (if required): Gallatin County Clerk and Recorder</p>	Secretary of State	4/26/2012

VACANCIES ON BOARDS AND COUNCILS -- MARCH 1, 2012 THROUGH MAY 31, 2012

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Montana Election and Technology Advisory Council (Secretary of State) cont. Mr. Bret Rutherford, Billings Qualifications (if required): Yellowstone County Election Administrator	Secretary of State	4/26/2012
Montana Health Coalition (Public Health and Human Services) Ms. Mary Dalton, Helena Qualifications (if required): none specified	Director	5/31/2012
Ms. Kristianne Wilson, Billings Qualifications (if required): none specified	Director	5/31/2012
Rep. Edith J. Clark, Sweet Grass Qualifications (if required): none specified	Director	5/31/2012
Dr. Gary Mihelish, Helena Qualifications (if required): none specified	Director	5/31/2012
Ms. Jane Smilie, P.O. Box 202951 Qualifications (if required): none specified	Director	5/31/2012
Mr. Dave Pierce, Billings Qualifications (if required): none specified	Director	5/31/2012
Dr. Douglas Moore, Billings Qualifications (if required): none specified	Director	5/31/2012

VACANCIES ON BOARDS AND COUNCILS -- MARCH 1, 2012 THROUGH MAY 31, 2012

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<p>Montana Health Coalition (Public Health and Human Services) cont. Mr. Travis Hoffman, Missoula Qualifications (if required): none specified</p>	Director	5/31/2012
<p>Ms. Fawn Tadios, Box Elder Qualifications (if required): none specified</p>	Director	5/31/2012
<p>Ms. Karen Rizor, Ashland Qualifications (if required): none specified</p>	Director	5/31/2012
<p>Dr. Steve Helgerson, Helena Qualifications (if required): none specified</p>	Director	5/31/2012
<p>Montana Heritage Preservation and Development Commission (Commerce) Mr. F.W. Bill Howell, West Yellowstone Qualifications (if required): tourist facility manager</p>	Governor	5/23/2012
<p>Ms. Barbie Durham, Cameron Qualifications (if required): business person</p>	Governor	5/23/2012
<p>Montana Potato Commodity Advisory Committee (Agriculture) Mr. Bill Buyan, Sheridan Qualifications (if required): not specified</p>	Director	5/20/2012

VACANCIES ON BOARDS AND COUNCILS -- MARCH 1, 2012 THROUGH MAY 31, 2012

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Montana Potato Commodity Advisory Committee (Agriculture) cont. Mr. Art Mangels, Dillon Qualifications (if required): not specified	Director	5/20/2012
Public Employees Retirement Board (Administration) Mr. John Nielsen, Glendive Qualifications (if required): public employee active in retirement system	Governor	4/1/2012
UM Western Local Executive Board (University System) Commissioner Garth Haugland, Dillon Qualifications (if required): public representative	Governor	4/15/2012