

# MONTANA ADMINISTRATIVE REGISTER

## ISSUE NO.10

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 The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

In the matter of the adoption of NEW ) NOTICE OF PUBLIC HEARING ON  
RULES I through VI, regarding ) PROPOSED ADOPTION  
Insurer Investments in Derivative )  
Instruments )

TO: All Concerned Persons

1. On June 16, 2011, at 10:00 a.m., the Commissioner of Insurance, Office of the State Auditor, Monica Lindeen, will hold a public hearing in the 2nd floor conference room, at the State Auditor's Office, 840 Helena Ave., Helena, Montana, to consider the proposed adoption of the above-stated rules.

2. The Commissioner of Insurance, Office of the State Auditor, Monica Lindeen, 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., June 9, 2011, to advise us of the nature of the accommodation that you need. Please contact Darla Sautter, State Auditor's Office, 840 Helena Avenue, Helena, Montana, 59601; telephone (406) 444-2726; TDD (406) 444-3246; fax (406) 444-3499; or e-mail dsautter@mt.gov.

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

NEW RULE I PURPOSE (1) The purpose of these rules is to establish standards for the prudent use of derivative instruments by insurers in accordance with Title 33, chapter 12, MCA regarding insurer investments.

AUTH: 33-1-313, 33-12-111, MCA  
IMP: 33-12-210, 33-12-310, MCA

NEW RULE II DEFINITIONS The words and phrases used in these rules have the same meaning as in 33-12-102, MCA, unless a different meaning is required by the context of the particular rule.

AUTH: 33-1-313, 33-12-111, MCA  
IMP: 33-12-210, 33-12-310, MCA

NEW RULE III GUIDELINES AND INTERNAL CONTROL PROCEDURES

(1) Before engaging in a derivative transaction, an insurer shall establish written guidelines, approved by the commissioner, that shall be used for effecting and maintaining derivative transactions. The guidelines shall:

- (a) specify the insurer's objectives for engaging in derivative transactions, derivative strategies, and all applicable risk constraints, including credit risk limits;
- (b) establish counterparty exposure limits and credit equity standards;

(c) identify permissible derivative transactions and the relationship of those transactions to insurer operations; for example, a precise identification of the risks being hedged by a derivative transaction; and

(d) require compliance with internal control procedures.

(2) An insurer shall have a written methodology for determining whether a derivative instrument used for hedging has been effective.

(3) An insurer shall have written policies and procedures describing the credit risk management process and a credit risk management system for over-the-counter derivative transactions that measures credit risk exposure using the counterparty exposure amount.

(4) An insurer's board of directors shall, in accordance with 33-12-104, MCA:

(a) approve the written guidelines, methodology, policies and procedures, and systems required by this rule;

(b) determine whether the insurer has adequate professional personnel, technical expertise, and systems to implement investment practices involving derivatives;

(c) review whether derivatives transactions have been made in accordance with the approved guidelines, and consistent with the stated objectives; and

(d) take action to correct any deficiencies in internal controls relative to derivative transactions.

AUTH: 33-1-313, 33-12-111, MCA

IMP: 33-12-210, 33-12-310, MCA

NEW RULE IV COMMISSIONER APPROVAL (1) Written documentation explaining the insurer's internal guidelines and controls governing derivative transactions shall be submitted for approval to the commissioner. The commissioner shall have the authority to disapprove the guidelines and controls proposed by the insurer if the insurer cannot demonstrate the proposed internal guidelines and controls would be adequate to manage the risks associated with the derivative transactions the insurer intends to engage in.

AUTH: 33-1-313, 33-12-111, MCA

IMP: 33-12-210, 33-12-310, MCA

NEW RULE V INSURER DOCUMENTATION REQUIREMENTS (1) An insurer shall maintain documents and records relating to each derivative transaction, including:

(a) the purpose of the transaction;

(b) the assets or liabilities to which the transaction relates;

(c) the specific derivative instrument used in the transaction;

(d) for over-the-counter derivative instrument transactions, the name of the counterparty and the market value; and

(e) for exchange traded derivative instruments, the name of the exchange and the name of the firm that handled the trade and the market value.

AUTH: 33-1-313, 33-12-111, MCA

IMP: 33-12-210, 33-12-310, MCA

NEW RULE VI TRADING REQUIREMENTS (1) Each derivative instrument shall be:

- (a) traded on a qualified exchange;
- (b) entered into with, or guaranteed by, a business entity;
- (c) issued or written with the issuer of the underlying interest on which the derivative instrument is based; or
- (d) entered into with a qualified foreign exchange.

AUTH: 33-1-313, 33-12-111, MCA

IMP: 33-12-210, 33-12-310, MCA

4. REASONABLE NECESSITY STATEMENT: The Commissioner of Securities and Insurance - Office of the State Auditor, Monica J. Lindeen, (Commissioner) is the statewide elected official responsible for administering the Montana Insurance Department and regulating insurers. The Commissioner is a member of the National Association of Insurance Commissioners (NAIC). The NAIC is an organization of insurance regulators from the 50 states, the District of Columbia, and the U.S. territories. The NAIC provides a forum for the development of uniform policy and regulation when uniformity is appropriate.

Insurer solvency is a principal area in which uniformity is efficient and effective for insurers and regulators. The NAIC has promulgated model regulations regarding insurer investments to promote insurer solvency and protect the interests of insureds. One such model is the NAIC's Derivative Instruments Model Regulation which has been adopted in several states. Derivative instruments are investment vehicles that derive their value from other assets or financial instruments. Examples of derivative instruments include options, caps, floors, collars, swaps, forwards, and futures. Derivative instruments might be used by insurers to hedge against interest rate risks to preserve principal and maintain solvency.

The Commissioner is proposing to adopt new rules regarding insurer investments in derivative instruments based on and consistent with the NAIC Derivative Instruments Model Regulation, as revised in 2009. Adoption of the new rules is reasonably necessary to promote more consistency for insurers and regulators across jurisdictions in regard to the standards and practices considered prudent investing in derivative instruments.

New Rule I is reasonably necessary to provide that the purpose of the subchapter is to set standards for prudent use of derivative instruments by insurers. This rule is consistent with the NAIC model regulation.

New Rule II is reasonably necessary to provide that the words and phrases used throughout the subchapter will have the same meaning as in 33-12-102, MCA, regarding insurer investments unless a different meaning is required by the rule context. This rule is consistent with the NAIC model regulation.

New Rule III is reasonably necessary to provide that insurers establish written guidelines and internal controls for derivative transactions before engaging in any derivative transactions. The written guidelines and internal controls must be approved by the insurer's board of directors and the Commissioner. The guidelines must include the insurer's objectives for engaging in derivative transactions, identification of permissible derivative transactions and the relationship of those transactions to insurer operations, establishment of counterparty exposure limits and credit equity standards, and compliance with internal control procedures. Additionally, insurers are required to have a written methodology for determining whether a derivative instrument used for hedging has been effective. This rule is consistent with the NAIC model regulation.

New Rule IV is reasonably necessary to provide that insurers proposing to engage in derivative transactions submit their guidelines and internal controls to the Commissioner for approval prior to engaging in derivative transactions. The Commissioner may disapprove the proposed guidelines and controls if the insurer cannot demonstrate that the proposed guidelines and controls would be adequate to manage the risks associated with the derivative transactions. This rule is consistent with the NAIC model regulation.

New Rule V is reasonably necessary to provide that insurers maintain documents and records relating to each derivative transaction. Examples of records that must be maintained include the specific derivative instruments used in the transaction, the purpose of the transaction, and the assets or liabilities to which the transaction relates. This rule is consistent with the NAIC model regulation.

New Rule VI is reasonably necessary to establish trading requirements for derivative transactions entered by insurers, such as the derivative instrument used must be traded on a qualified exchange. This rule is consistent with the NAIC model regulation.

5. Concerned persons may submit their data, views, or arguments concerning the proposed actions either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to Jennifer L. Massman, Staff Attorney, Office of the Commissioner of Securities and Insurance, State Auditor, Monica Lindeen, 840 Helena Ave., Helena, Montana, 59601; telephone (406) 444-2040; fax (406) 444-3499; or e-mail [jmassman@mt.gov](mailto:jmassman@mt.gov), and must be received no later than 5:00 p.m., June 24, 2011.

6. Jennifer L. Massman, Staff Attorney, has been designated to preside over and conduct this hearing.

7. The department maintains a list of concerned persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name and mailing address of the person to receive notices and specifies for which program the



person wishes to receive notices. Such written request may be mailed or delivered to Darla Sautter, Office of the Commissioner of Securities and Insurance, 840 Helena Ave., Helena, Montana, 59601; telephone (406) 444-2726; fax (406) 444-3499; or e-mail dsautter@mt.gov 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 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.

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor for SB107 (1999), Senator Mahlum, was notified by regular mail on April 28, 2011, at his home address.

/s/ Christina L. Goe  
Christina L. Goe  
Rule Reviewer

/s/ Jesse L. Laslovich  
Jesse L. Laslovich  
Chief Legal Counsel

Certified to the Secretary of State May 16, 2011.

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

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 12.11.610, 12.11.615, and ) PROPOSED AMENDMENT  
12.11.620 regarding recreational use )  
rules on the Bitterroot River, Blackfoot )  
River, and Clark Fork River

TO: All Concerned Persons

1. On June 16, 2011 at 6:00 p.m. the Fish, Wildlife and Parks Commission (commission) will hold a public hearing at the Fish, Wildlife and Parks Region 2 office located at 3201 Spurgin Road, Missoula, Montana to consider the proposed amendment of the above-stated rules.

2. The commission will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, please contact the commission no later than June 10, 2011, to advise us of the nature of the accommodation that you need. Please contact Jessica Fitzpatrick, Fish, Wildlife and Parks, P.O. Box 200701, Helena, MT 59620-0701; telephone (406) 444-9785; fax (406) 444-7456; e-mail jfitzpatrick@mt.gov.

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

12.11.610 BITTERROOT RIVER ~~(1) Bitterroot River is closed to use for any motor propelled watercraft in the following areas:~~

~~(a) Missoula County from the Ravalli County line to its confluence with the Clark Fork River with the following exceptions:~~

~~(i) any motorized watercraft may be used from May 1 through June 30 on the portion of the Bitterroot River from the Florence Bridge in Ravalli County downstream to the Clark Fork River;~~

~~(b) in Ravalli County from the Bitterroot River headwaters to the Missoula County line with the following exceptions:~~

~~(i) any motorized watercraft may be used from May 1 through June 30 on the portion of the Bitterroot River from the Florence Bridge in Ravalli County downstream to the Clark Fork River;~~

~~(2) Motorized watercraft powered by 15 horsepower or less may operate anywhere on the Bitterroot River from October 1 through January 31.~~

(1) Bitterroot River is closed to use of any motor propelled watercraft except:

(a) watercraft powered by 20 horsepower or less are permitted from October 1 through January 31; and

(b) any motorized watercraft are permitted between Florence Bridge in Ravalli County and the Buckhouse Bridge on Highway 93 in Missoula County from May 1 through June 15.

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

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

12.11.615 BLACKFOOT RIVER ~~(1) The Blackfoot River is limited to a controlled no wake speed, as defined in ARM 12.11.101(1) in the following areas:~~

~~(a) in Missoula County downstream from the Stimson Lumber Company chainlink fence, as posted, to and including the Milltown Reservoir, then upstream on the Clark Fork River to the old Milwaukee Railroad Bridge pilings.~~

~~(2) The Blackfoot River is closed to use for any motor propelled watercraft in the following areas:~~

~~(a) in Lewis and Clark County, the Blackfoot River and tributaries from their headwaters to the Powell County line;~~

~~(b) in Missoula County, the Blackfoot River and its tributaries from Missoula County line to the Stimson Lumber Mill Dam at Bonner; and~~

~~(c) in Powell County, the Blackfoot River and tributaries from the Lewis and Clark County line to the Missoula County line.~~

(1) The Blackfoot River and its tributaries from its headwaters to the confluence with the Clark Fork River is closed to use for any motor propelled watercraft.

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

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

12.11.620 CLARK FORK RIVER ~~(1) The Clark Fork River is closed to use for any motor propelled watercraft in the following areas:~~

~~(a) in Deer Lodge County;~~

~~(i) the Clark Fork River and tributaries from their headwaters to the Powell County line;~~

~~(b) in Granite County;~~

~~(i) the Clark Fork River and tributaries from Powell County line to Missoula County line;~~

~~(c) in Mineral County;~~

~~(i) the Clark Fork River from St. John's fishing access site to the mouth of Fish Creek, also known as the Alberton Gorge Whitewater section;~~

~~(d) in Missoula County;~~

~~(i) the Clark Fork River and tributaries from the Granite County line to the Milwaukee Bridge abutments on Milltown Reservoir;~~

~~(ii) the Clark Fork River from the north side of the Interstate Bridge nearest East Missoula to the Fish, Wildlife and Parks fishing access site and boat ramp located off Spurgin Road and Kelly Island, from July 1 through September 30; and~~

~~(e) in Powell County;~~

~~(i) the Clark Fork River and tributaries from Deer Lodge County line to the Granite County line.~~

(1) The Clark Fork River:

(a) and its tributaries are closed to any motor propelled watercraft from the headwaters to the confluence with the Bitterroot River;

(b) is restricted to motor propelled watercraft 20 horsepower or less from the confluence with the Bitterroot River to the Interstate Bridge east of Ninemile Creek; and

(c) is closed to any motor propelled watercraft from St. Johns Fishing Access Site to the mouth of Fish Creek.

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

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

Reasonable Necessity: The commission is proposing reorganizing the structure of ARM 12.11.610, 12.11.615, and 12.11.620 consistent with the flow of the river instead of basing the structure on county lines.

The commission is proposing amending ARM 12.11.610 to increase the horsepower of motorized watercraft allowed on the Bitterroot River from October 1 through January 31 from 15 to 20 horsepower because 20 horsepower is typically the largest portable motor available. The commission is proposing a decrease in the number of days and the section of river where any motorized watercraft may be used on the Bitterroot River. Currently, any motorized watercraft may be used from May 1 through June 30 on the portion of the Bitterroot River from the Florence Bridge in Ravalli County downstream to the Clark Fork River. The commission is proposing decreasing the days allowed by 15 days ending on June 15 and reducing the affected section of river to end at Buckhouse Bridge. The commission is proposing shortening the time any motorized watercraft may be allowed to reduce overlap between spring water use of large, fast-moving watercraft and more summertime use by slower, less maneuverable watercraft, wade anglers, and swimmers. The portion of the Bitterroot River downstream from Buckhouse Bridge is more urban with residences near the river and heavily used for nonmotorized recreation. Restricting motorized use addresses issues with noise and unsafe conditions associated with high horsepower watercraft. Watercraft powered by 20 horsepower or less will be allowed from October 1 through January 31 maintaining a time period in the fall for uses including waterfowl hunting.

Milltown Dam was removed in March 2008 making portions of ARM 12.11.615 and 12.11.620 obsolete. The Blackfoot River and its tributaries are closed to motorized watercraft. The proposed rule amendment would extend the closure of motorized use on the Blackfoot River to its confluence with the Clark Fork River, a section of river less than one mile, and extend the closure of motorized use on the Clark Fork River for less than one mile to its confluence with the Blackfoot River where Milltown Reservoir previously existed. Furthermore, the proposed amendment to ARM 12.11.620 would extend the closure of motorized use on the Clark Fork River and its tributaries from the confluence with the Blackfoot to its confluence with the Bitterroot River. This would help address social conflicts and safety concerns on a relatively narrow section of the river that is popular among other users that are, at times, not compatible with large, fast-moving watercraft. Use in this section of river is expected to increase with the removal of Milltown Dam that was a barrier to watercraft use traveling from above the Milltown area to urban

Missoula, as well as the popularity and development of recreational waves and river access.

Below the Clark Fork River's confluence with the Bitterroot River downstream to just above Ninemile Creek, the amendments would reduce the horsepower to 20 horsepower from currently being unrestricted. This is intended to reduce social conflicts and safety concerns in a stretch of river from the confluence of the Bitterroot to Harpers Bridge FAS that is popular with other users. Below Harpers Bridge FAS to about Ninemile Creek, the amendment promotes a unique and more remote experience by limiting horsepower and therefore the speed a boat can travel this section. This will limit encounters with other boats, or the number of times a single boat will be encountered.

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 Sharon Rose, Fish, Wildlife and Parks, 3201 Spurgin Rd., Missoula, MT 59804; fax 406-542-5529; e-mail [shrose@mt.gov](mailto:shrose@mt.gov), and must be received no later than June 27, 2011.

5. Mack Long or another hearing officer appointed by the department has been designated to preside over and conduct the hearing.

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

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

/s/ Bob Ream

Bob Ream, Chairman  
Fish, Wildlife and Parks Commission

/s/ Rebecca Jakes Dockter

Rebecca Jakes Dockter  
Rule Reviewer

Certified to the Secretary of State May 16, 2011

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM )	NOTICE OF PUBLIC HEARING ON
17.30.1201, 17.30.1202, 17.30.1203, )	PROPOSED AMENDMENT,
17.30.1206, and 17.30.1207; the )	ADOPTION, AND REPEAL
adoption of new rules I through V; and )	
the repeal of ARM 17.30.1208 and )	(WATER QUALITY)
17.30.1209 pertaining to Montana )	
pollutant discharge elimination system )	
effluent limitations and standards, )	
standards of performance, and treatment) )	
requirements )	

TO: All Concerned Persons

1. On July 7, 2011, at 1:00 p.m., the Board of Environmental Review will hold a public hearing in Room 111, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment, adoption, and repeal of the above-stated rules.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact Elois Johnson, Paralegal, no later than 5:00 p.m., June 13, 2011, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

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

17.30.1201 PURPOSE AND SCOPE (1) The purpose of this subchapter is to establish effluent limitations and standards, treatment ~~standards~~ requirements, standards of performance, and other requirements for point sources discharging wastes into state surface waters. These requirements, together with the rules in subchapters 13 ~~and 14~~, are adopted to discharge the responsibilities of the board ~~and department~~ under Title 75, chapter 5, parts 3 and 4, Montana Code Annotated, the Montana Water Quality Act, to adopt effluent limitations and standards, standards of performance, and treatment requirements ~~and to require compliance with such standards in for~~ permits issued to point sources discharging into state surface waters. These requirements are adopted in a manner that implements the national pollutant discharge elimination system (NPDES) established ~~and administered for the EPA~~ under sections 301, 302, 304, 306, 307, 316, 318, and 402 of the federal Clean Water Act.

AUTH: 75-5-304, MCA

IMP: 75-5-304, 75-5-401, MCA

17.30.1202 DEFINITIONS ~~For the purposes of this subchapter, the~~ following definitions, in addition to those in 75-5-103, MCA, apply throughout this subchapter:

(1) "Alternative effluent limitations" means all effluent limitations or standards of performance for the control of the thermal component of any discharge which are established under section 316(a) of the federal Clean Water Act and this subchapter.

(2) "Annual mean flow" means the average of daily flows over a calendar year. Historical data, up to ten years, must be used where available.

(3) "Applicable standards and limitations" is defined in ARM 17.30.1304.

(4) "Balanced, indigenous community" means a biotic community typically characterized by diversity, the capacity to sustain itself through cyclic changes, presence of necessary food chain species, and a lack of domination by pollution-tolerant species. Such a community may include historically non-native species introduced in connection with a program of wildlife management and species whose presence or abundance results from substantial, irreversible environmental modifications. Normally, however, such a community will not include species whose presence or abundance is attributable to the introduction of pollutants that will be eliminated by compliance by all sources with section 301(b)(2) of the federal Clean Water Act, and may not include species whose presence or abundance is attributable to alternative effluent limitations imposed pursuant to section 316(a) of the federal Clean Water Act.

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

(6) "Closed-cycle recirculating system" means a system designed, using minimized makeup and blowdown flows, to withdraw water from a natural or other water source to support contact and/or noncontact cooling uses within a facility. The water is usually sent to a cooling canal or channel, lake, pond, or tower to allow waste heat to be dissipated to the atmosphere and then is returned to the system. Some facilities divert the waste heat to other process operations. New source water (make-up water) is added to the system to replenish losses that have occurred due to blowdown, drift, and evaporation.

(7) "Conventional pollutant" means the following list of pollutants:

(a) biochemical oxygen demand (BOD);

(b) total suspended solids (nonfilterable) (TSS);

(c) pH;

(d) fecal coliform; and

(e) oil and grease.

(8) "Cooling water" means water used for contact or noncontact cooling, including water used for equipment cooling, evaporative cooling tower makeup, and dilution of effluent heat content. The intended use of the cooling water is to absorb waste heat rejected from the process or processes used, or from auxiliary operations on the facility's premises. Cooling water that is used in a manufacturing process, either before or after it is used for cooling, is considered process water for the purposes of calculating the percentage of a new facility's intake flow that is used for cooling purposes in [New Rule II(6)].

(9) "Cooling water intake structure" means the total physical structure and

any associated constructed waterways used to withdraw cooling water from state surface water. The cooling water intake structure extends from the point at which water is withdrawn from the surface water source up to, and including, the intake pumps.

(2) remains the same, but is renumbered (10).

(11) "Design intake flow" means the value assigned, during the facility's design, to the total volume of water withdrawn from a source waterbody over a specific time period.

(12) "Design intake velocity" means the value assigned, during the design of a cooling water intake structure, to the average speed at which intake water passes through the open area of the intake screen, or other device, against which organisms might be impinged or through which they might be entrained.

(13) "Effluent limitation" means any restriction or prohibition imposed by the department on quantities, discharge rates, and concentrations of chemical, physical, biological, and other constituents that are discharged from point sources, other than new sources, into state surface waters, including schedules of compliance.

(14) "Effluent limitations guidelines" means a regulation published by EPA in 40 CFR Chapter I, Subchapter N, pursuant to the requirements in section 304(b) of the federal Clean Water Act to adopt or revise effluent limitations.

(15) "Effluent standard" is defined in 75-5-103, MCA, and is synonymous with the term "effluent limitation," as defined in this subchapter, with the exception that it does not include a schedule of compliance.

(16) "Entrainment" means the incorporation of all life stages of fish and shellfish with intake water flow entering and passing through a cooling water intake structure and into a cooling water system.

(3) remains the same, but is renumbered (17).

(18) "Existing facility" means any facility that is not a new facility.

(19) "Existing Source" is defined in ARM 17.30.1304.

(4) remains the same, but is renumbered (20).

(21) "Freshwater river or stream" means a lotic (free-flowing) system that does not receive significant inflows of water from oceans or bays due to tidal action. For the purposes of this subchapter, a flow-through reservoir with a retention time of seven days or less will be considered a freshwater river or stream.

(22) "Hazardous substance" means any element or compound designated by EPA pursuant to section 311(b)(2)(A) of the federal Clean Water Act and listed in 40 CFR 116.4.

(23) "Hydraulic zone of influence" means that portion of the source waterbody hydraulically affected by the cooling water intake structure withdrawal of water.

(24) "Impingement" means the entrapment of all life stages of fish and shellfish on the outer part of an intake structure or against a screening device during periods of intake water withdrawal.

(25) "Lake or reservoir" means any inland body of open water with some minimum surface area free of rooted vegetation and with an average hydraulic retention time of more than seven days. Lakes or reservoirs might be natural water bodies or impounded streams, usually fresh, surrounded by land or by land and a man-made retainer (e.g., a dam). Lakes or reservoirs might be fed by rivers,



streams, springs, and/or local precipitation. Flow-through reservoirs with an average hydraulic retention time of seven days or less should be considered a freshwater river or stream.

(26) "Maximize" means to increase to the greatest amount, extent, or degree reasonably possible.

(27) "Minimize" means to reduce to the smallest amount, extent, or degree reasonably possible.

(5) remains the same, but is renumbered (28).

(29) "Natural thermal stratification" means the naturally-occurring division of a waterbody into horizontal layers of differing densities as a result of variations in temperature at different depths.

(30) "New facility" means any building, structure, facility, or installation that meets the definition of a "new source" in ARM 17.30.1304(37)(a) and (b) or "new discharger" in ARM 17.30.1304(36) and that is a greenfield or stand-alone facility, commences construction after January 17, 2002, and uses either a newly constructed cooling water intake structure, or an existing cooling water intake structure whose design capacity is increased to accommodate the intake of additional cooling water. New facilities include only "greenfield" and "stand-alone" facilities. A greenfield facility is a facility that is constructed at a site at which no other source is located, or that totally replaces the process or production equipment at an existing facility. A stand-alone facility is a new, separate facility that is constructed on property where an existing facility is located and whose processes are substantially independent of the existing facility at the same site. New facility does not include new units that are added to a facility for purposes of the same general industrial operation (for example, a new peaking unit at an electrical generating station).

(a) Examples of "new facilities" include, but are not limited to, the following scenarios:

(i) A new facility is constructed on a site that has never been used for industrial or commercial activity. It has a new cooling water intake structure for its own use;

(ii) A facility is demolished and another facility is constructed in its place. The newly constructed facility uses the original facility's cooling water intake structure, but modifies it to increase the design capacity to accommodate the intake of additional cooling water;

(iii) A facility is constructed on the same property as an existing facility, but is a separate and independent industrial operation. The cooling water intake structure used by the original facility is modified by constructing a new intake bay for the use of the newly constructed facility or is otherwise modified to increase the intake capacity for the new facility.

(b) Examples of facilities that would not be considered a "new facility" include, but are not limited to, the following scenarios:

(i) A facility in commercial or industrial operation is modified and either continues to use its original cooling water intake structure or uses a new or modified cooling water intake structure.

(ii) A facility has an existing intake structure. Another facility (a separate and independent industrial operation), is constructed on the same property and connects

to the facility's cooling water intake structure behind the intake pumps, and the design capacity of the cooling water intake structure has not been increased. This facility would not be considered a "new facility" even if routine maintenance or repairs that do not increase the design capacity were performed on the intake structure.

(31) "New source" is defined in ARM 17.30.1304.

(32) "Publicly owned treatment works" (POTW) is defined in ARM 17.30.1304.

(33) "Representative important species" means species that are representative, in terms of biological needs, of a balanced, indigenous community of shellfish, fish, and wildlife in the body of water into which a discharge of heat is made.

(34) "Source water" means the state waterbody (state surface waters) from which the cooling water is withdrawn.

(35) "Standard of performance" is defined in 75-5-103, MCA.

(36) "Toxic pollutant" means any pollutant designated by EPA under section 307(a)(1) of the federal Clean Water Act and listed in 40 CFR 401.15.

(37) "Variance" means any mechanism or provision under sections 301 or 316 of the federal Clean Water Act, or in the applicable "effluent limitations guidelines," which allows modification to, or waiver of, the generally applicable effluent limitation requirements or time deadlines. This includes provisions that allow the establishment of alternative limitations based on fundamentally different factors or on sections 301(c), 301(g), or 316(a) of the federal Clean Water Act.

(38) The board adopts and incorporates by reference the following federal regulations as part of the Montana pollutant discharge elimination system:

(a) 40 CFR 401.15 (July 1, 2010), which identifies the list of toxic pollutants designated pursuant to section 307(a)(1) of the federal Clean Water Act.

(b) 40 CFR 116.4 (July 1, 2010), which identifies elements and compounds designated as hazardous substances pursuant to section 311(b)(2)(A) of the federal Clean Water Act.

(c) Copies of these federal regulations may be obtained from the Department of Environmental Quality, Water Protection Bureau, P.O. Box 200901, Helena, MT 59620.

AUTH: 75-5-304, MCA

IMP: 75-5-304, 75-5-401, MCA

17.30.1203 CRITERIA AND STANDARDS FOR IMPOSING TECHNOLOGY-BASED TREATMENT REQUIREMENTS IN MPDES PERMITS - VARIANCE PROCEDURES (1) The board hereby adopts and incorporates herein by reference 40 CFR Part 125, which is a series of federal agency rules setting forth criteria and standards for the imposition of technology-based treatment requirements in MPDES permits. Copies of 40 CFR Part 125 may be obtained from the Department of Environmental Quality, P.O. Box 200901, Helena, MT 59620-0901. Technology-based treatment requirements under section 301(b) of the federal Clean Water Act represent the minimum level of control that must be imposed in MPDES permits. Unless a more stringent effluent limitation applies under ARM 17.30.1344, permits

issued by the department must contain the applicable technology-based treatment requirements provided in (2) and (3), according to the applicable deadlines.

(2) The criteria and standards incorporated and adopted herein may be incorporated in any MPDES permit, modification, or renewal thereof issued in accordance with ARM Title 17, chapter 30, subchapters 13 or 14. For POTW's, effluent limitations must be based upon:

(a) Secondary treatment as defined in 40 CFR Part 133, from date of permit issuance; and

(b) The best practicable waste treatment technology, not later than July 1, 1983.

(3) For dischargers other than POTWs except as provided in ARM 17.30.1340(5), effluent limitations must require:

(a) The best practicable control technology currently available (BPT) in accordance with the following schedules:

(i) for effluent limitations promulgated under section 304(b) of the federal Clean Water Act after January 1, 1982, and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance is required as expeditiously as practicable, but in no case later than March 31, 1989;

(ii) for effluent limitations established on a case-by-case basis based on best professional judgment (BPJ) under (5) in a permit issued after February 4, 1987, compliance is required as expeditiously as practicable, but in no case later than March 31, 1989;

(iii) for all other BPT effluent limitations compliance is required from the date of permit issuance.

(b) For conventional pollutants, the best conventional pollutant control technology (BCT) in accordance with the following schedule:

(i) for effluent limitations promulgated under section 304(b) of the federal Clean Water Act, compliance is required as expeditiously as practicable, but in no case later than such limitations are promulgated, and in no case later than March 31, 1989;

(ii) for effluent limitations established on a case-by-case basis based on (BPJ) under (5) in a permit issued after February 4, 1987, compliance is required as expeditiously as practicable, but in no case later than March 31, 1989.

(c) For all toxic pollutants identified in 40 CFR 401.15, the best available technology economically achievable (BAT) in accordance with the following schedule:

(i) for effluent limitations promulgated under section 304(b) of the federal Clean Water Act, compliance is required as expeditiously as practicable, but in no case later than March 31, 1989;

(ii) for permits issued on a case-by-case basis based on (BPJ) under (5) after February 4, 1987, compliance is required as expeditiously as practicable, but in no case later than March 31, 1989.

(d) For all pollutants which are neither toxic nor conventional pollutants, effluent limitations based on BAT in accordance with the following schedule:

(i) for effluent limitations promulgated under section 304(b) of the federal Clean Water Act, compliance is required as expeditiously as practicable, but in no

case later than March 31, 1989;

(ii) for permits issued on a case-by-case basis based on (BPJ) under (5) after February 4, 1987 establishing BAT effluent limitations, compliance is required as expeditiously as practicable but in no case later than March 31, 1989.

(4) The following variances from technology-based treatment requirements may be applied for and incorporated into MPDES permits:

(a) for dischargers other than POTWs, a variance from effluent limitations promulgated under sections 301 and 304 of the federal Clean Water Act based on fundamentally different factors in accordance with 40 CFR Part 125, Subpart D;

(b) for dischargers other than POTWs, a water quality related variance from BAT for certain nonconventional pollutants under section 301(g) of the federal Clean Water Act; and

(c) a thermal variance from BPT, BCT and BAT under section 316(a) of the federal Clean Water Act in accordance with [New Rule I].

(5) Technology-based treatment requirements may be imposed through one of the following methods provided in (a) through (c):

(a) application of EPA promulgated effluent limitations guidelines for dischargers by category or subcategory. These effluent limitations are not applicable to the extent that they have been remanded or withdrawn. However, in the case of a court remand, determinations underlying effluent limitations must be binding in permit issuance proceedings where those determinations are not required to be reexamined by a court remanding the regulations. In addition, dischargers may seek fundamentally different factors variances from these effluent limitations pursuant to 40 CFR, Part 125, Subpart D;

(b) on a case-by-case basis using best professional judgment (BPJ) to the extent that EPA-promulgated effluent limitations are inapplicable. The permit writer shall apply the appropriate factors listed in (6) and shall consider:

(i) the appropriate technology for the category or class of point sources of which the applicant is a member, based upon all available information; and

(ii) any unique factors relating to the applicant.

(c) through a combination of the methods described in (a) and (b). Where promulgated effluent limitations guidelines only apply to certain aspects of the discharger's operation, or to certain pollutants, other aspects or activities are subject to regulation on a case-by-case basis in order to carry out the provisions of the federal Clean Water Act;

(d) limitations developed under (6)(b) may be expressed, where appropriate, in terms of toxicity (e.g., "the LC50 for fat head minnow of the effluent from outfall 001 shall be greater than 25%"), provided that the limits reflect the appropriate requirements (for example, technology-based or water-quality-based standards) of the federal Clean Water Act.

(6) In setting case-by-case limitations pursuant to (5), the permit writer shall consider the following factors:

(a) For BPT requirements:

(i) the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application;

(ii) the age of equipment and facilities involved;

(iii) the process employed;

(iv) the engineering aspects of the application of various types of control techniques;

(v) process changes; and

(vi) non-water quality environmental impact (including energy requirements).

(b) For BCT requirements:

(i) the reasonableness of the relationship between the costs of attaining a reduction in effluent and the effluent reduction benefits derived;

(ii) the comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources;

(iii) the age of equipment and facilities involved;

(iv) the process employed;

(v) the engineering aspects of the application of various types of control techniques;

(vi) process changes; and

(vii) non-water quality environmental impact (including energy requirements).

(c) For BAT requirements:

(i) the age of equipment and facilities involved;

(ii) the process employed;

(iii) the engineering aspects of the application of various types of control techniques;

(iv) process changes;

(v) the cost of achieving such effluent reduction; and

(vi) non-water quality environmental impact (including energy requirements).

(7) Technology-based treatment requirements are applied prior to or at the point of discharge.

(8) Technology-based treatment requirements cannot be satisfied through the use of "non-treatment" techniques such as flow augmentation and in-stream mechanical aerators. However, these techniques may be considered as a method of achieving water quality standards on a case-by-case basis when:

(a) the technology-based treatment requirements applicable to the discharge are not sufficient to achieve the standards;

(b) the discharger agrees to waive any opportunity to request a variance under section 301(c), (g), or (h) of the federal Clean Water Act; and

(c) the discharger demonstrates that such a technique is the preferred environmental and economic method to achieve the standards after consideration of alternatives such as advanced waste treatment, recycle and reuse, land disposal, changes in operating methods, and other available methods.

(9) Technology-based effluent limitations must be established under this rule for solids, sludges, filter backwash, and other pollutants removed in the course of treatment or control of wastewaters in the same manner as for other pollutants.

(10) The department may set a permit limit for a conventional pollutant at a level more stringent than the best conventional pollution control technology (BCT), or a limit for a nonconventional pollutant which must not be subject to modification under section 301(c) or (g) of the federal Clean Water Act where:

(a) effluent limitations guidelines specify the pollutant as an indicator for a toxic pollutant; or

(b) the limitation reflects BAT-level control of discharges of one or more toxic pollutants that are present in the waste stream, and a specific BAT limitation upon the toxic pollutant(s) is not feasible for economic or technical reasons;

(c) the permit identifies which toxic pollutants are intended to be controlled by use of the limitation; and

(d) the fact sheet required by ARM 17.30.1371 sets forth the basis for the limitation, including a finding that compliance with the limitation will result in BAT-level control of the toxic pollutant discharges identified in (c), and a finding that it would be economically or technically infeasible to directly limit the toxic pollutant(s).

(11) The department may set a permit limit for a conventional pollutant at a level more stringent than BCT when:

(a) effluent limitations guidelines specify the pollutant as an indicator for a hazardous substance; or

(b) the limitation reflects BAT-level control of discharges, or an appropriate level determined under section 301(c) or (g) of the federal Clean Water Act, of one or more hazardous substance(s) that are present in the waste stream, and a specific BAT or other appropriate limitation upon the hazardous substance(s) is not feasible for economic or technical reasons;

(c) the permit identifies which hazardous substances are intended to be controlled by use of the limitation; and

(d) the fact sheet required by ARM 17.30.1371 sets forth the basis for the limitation, including a finding that compliance with the limitations will result in BAT-level (or other appropriate level) control of the hazardous substances discharges identified in (c), and a finding that it would be economically or technically infeasible to directly limit the hazardous substance(s).

(e) Hazardous substances that are also toxic pollutants are subject to (10).

(12) The department may not set a more stringent limit under the preceding sections if the method of treatment required to comply with the limit differs from that which would be required if the toxic pollutant(s) or hazardous substance(s) controlled by the limit were limited directly.

(13) Toxic pollutants identified under (10) remain subject to the requirements of ARM 17.30.1343(1)(a) (notification of increased discharges of toxic pollutants above levels reported in the application form).

(14) The board adopts and incorporates by reference the following federal regulations as part of the Montana Pollutant Discharge Elimination System:

(a) 40 CFR Part 133 (July 1, 2010), which sets forth the level of effluent quality attainable through the application of secondary treatment or equivalent treatment for POTWs;

(b) 40 CFR Part 125, Subpart D (July 1, 2010), which sets forth criteria and standards for determining fundamentally different factors under section 301 of the federal Clean Water Act;

(c) 40 CFR 401.15 (July 1, 2010), which is a list of toxic pollutants identified by EPA under section 307(a)(1) of the federal Clean Water Act.

(d) Copies of these federal regulations may be obtained from the Department of Environmental Quality, Water Protection Bureau, P.O. Box 200901, Helena, MT 59620.

AUTH: 75-5-304, MCA  
IMP: 75-5-304, 75-5-401, MCA

17.30.1206 TOXIC POLLUTANT EFFLUENT STANDARDS (1) The board hereby adopts and incorporates herein by reference 40 CFR Part 129 which is a series of federal agency rules setting forth standards and prohibitions applicable to owners and operators of specified point source dischargers discharging into state waters. Copies of 40 CFR Part 129 may be obtained from the Department of Environmental Quality, P.O. Box 200901, Helena, MT 59620-0901. This rule is applicable to owners or operators of facilities specified in 40 CFR Part 129 that discharge into state surface waters.

(2) The toxic pollutant effluent standards and prohibitions incorporated and adopted herein may be incorporated in any MPDES permit, modification, or renewal thereof issued in accordance with ARM Title 17, chapter 30, subchapters 13 or 14. The effluent standards or prohibitions for toxic pollutants established in 40 CFR Part 129 shall be applicable to the sources and pollutants set forth in 40 CFR Part 129, and may be incorporated into any MPDES permit, renewed MPDES permit, or permit modification, in accordance with the provisions of 40 CFR Part 129.

(3) The effluent standards and prohibitions established in 40 CFR Part 129 apply to the following toxic pollutants:

(a) Aldrin, which means the compound aldrin as identified by the chemical name, 1,2,3,4,10,10-hexachloro-1,4,4a,5,8,8a-hexahydro-1,4 -endo-5,8-exo-dimethanonaphthalene and Dieldrin, which means the compound dieldrin as identified by the chemical name 1,2,3,4,10,10-hexachloro-6,7-epoxy-1,4,4a,5,6,7,8,8a-octahydro-1,4-endo-5,8-exo-dimethanonaphthalene;

(b) DDT, which means the compounds DDT, DDD, and DDE as identified by the chemical names: (DDT)-1,1,1-trichloro-2,2-bis(p-chlorophenyl) ethane and someo,p'-isomers; (DDD) or (TDE)-1,1-dichloro-2,2-bis(p-chlorophenyl) ethane and some o,p'-isomers; and (DDE)-1,1-dichloro-2,2-bis(p-chlorophenyl) ethylene;

(c) Endrin, which means the compound as identified by the chemical name 1,2,3,4,10,10-hexachloro-6,7-epoxy-1,4,4a,5,6,7,8,8a-octahydro-1,4-endo-5,8-endodimethanonaphthalene;

(d) Toxaphene, which means a material consisting of technical grade chlorinated camphene having the approximate formula of C<sub>10</sub>H<sub>10</sub>Cl<sub>8</sub> and normally containing 67-69 percent chlorine by weight;

(e) Benzdine, which means the compound benzdine and its salts as identified by the chemical name 4,4'-diaminobiphenyl;

(f) Polychlorinated biphenyls (PCBs), which means a mixture of compounds composed of the biphenyl molecule which has been chlorinated to varying degrees.

(4) The board adopts and incorporates by reference 40 CFR Part 129 (July 1, 2010), which establishes toxic effluent standards pursuant to section 307 of the federal Clean Water Act, as part of the Montana pollutant discharge elimination system. A copy of the incorporated federal regulation may be obtained from the Department of Environmental Quality, Water Protection Bureau, P.O. Box 200901, Helena, MT 59620.

AUTH: 75-5-304, MCA

IMP: 75-5-304, 75-5-401, MCA

17.30.1207 EFFLUENT LIMITATIONS AND STANDARDS OF PERFORMANCE (1) ~~The board hereby adopts and incorporates herein by reference 40 CFR Subpart N (except 40 CFR Part 403), which is a series of federal agency rules setting forth effluent limitations for existing point source dischargers and standards of performance for new point source dischargers discharging into state waters. Copies of 40 CFR Subpart N (except 40 CFR Part 403) may be obtained from the Department of Environmental Quality, P.O. Box 200901, Helena, MT 59620-0901. Permits issued to point source dischargers, other than POTWs, must include effluent limitations or standards of performance applicable to the point source that are set forth in 40 CFR Chapter I, Subchapter N, as provided below:~~

(a) for existing sources, effluent limitations representing the degree of effluent reduction attainable by the application of:

(i) the best practicable control technology currently achievable (BPT) for all pollutants;

(ii) the best available technology economically achievable (BAT) for toxic and non-conventional pollutants; and

(iii) the best conventional pollutant control technology (BCT) for conventional pollutants;

(b) for new sources, new source performance standards (NSPS) reflecting the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge.

(2) ~~The effluent limitations and standards of performance adopted and incorporated herein may be incorporated in any MPDES permit, modification, or renewal thereof issued in accordance with ARM Title 17, chapter 30, subchapters 13 or 14. The department shall ensure that the applicable effluent limitations or standards of performance set forth in 40 CFR Chapter I, Subchapter N, are included in any new MPDES permit, renewed MPDES permit, or permit modification issued in accordance with ARM Title 17, chapter 30, subchapter 13.~~

(3) 40 CFR Part 403, which is excluded from this incorporation by reference, sets forth general pretreatment requirements for new and existing sources of pollution. Montana pretreatment requirements appear in ARM Title 17, chapter 30, subchapter 14. The board adopts and incorporates by reference 40 CFR Chapter I, Subchapter N (except 40 CFR Part 403) (July 1, 2010), which sets forth federal effluent limitations and standards for existing sources and standards of performance for new sources, which are promulgated by EPA under sections 301, 304(b), 306(b), and 316(b) of the federal Clean Water Act. 40 CFR Part 403, which is excluded from this incorporation by reference, sets forth general pretreatment requirements for new and existing sources. A copy of the incorporated federal regulations may be obtained from the Department of Environmental Quality, Water Protection Bureau, P.O. Box 200901, Helena, MT 59620.

AUTH: 75-5-304, MCA

IMP: 75-5-304, 75-5-401, MCA



4. The proposed new rules provide as follows:

NEW RULE I CRITERIA AND STANDARDS FOR DETERMINING  
ALTERNATIVE EFFLUENT LIMITATIONS FOR THERMAL DISCHARGES

(1) Thermal discharge effluent limitations or standards established in permits may be less stringent than those required by applicable standards and limitations, if the discharger demonstrates to the satisfaction of the department that such effluent limitations are more stringent than necessary to assure the protection and propagation of a balanced, indigenous community of shellfish, fish, and wildlife in and on the body of water into which the discharge is made. This demonstration must show that the alternative effluent limitation desired by the discharger, considering the cumulative impact of its thermal discharge together with all other significant impacts on the species affected, will assure the protection and propagation of a balanced indigenous community of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made.

(2) In determining whether or not the protection and propagation of the affected species will be assured, the department may consider any information contained or referenced in any applicable thermal water quality criteria and thermal water quality information published by the EPA under section 304(a) of the federal Clean Water Act, or any other information the department deems relevant.

(3) Existing dischargers may base their demonstration upon the absence of prior appreciable harm in lieu of predictive studies. Any such demonstrations must show:

(a) that no appreciable harm has resulted from the normal component of the discharge, taking into account the interaction of such thermal component with other pollutants and the additive effect of other thermal sources to a balanced, indigenous community of shellfish, fish, and wildlife in and on the body of water into which the discharge has been made; or

(b) that, despite the occurrence of such previous harm, the desired alternative effluent limitations, or appropriate modifications thereof, will nevertheless assure the protection and propagation of a balanced, indigenous community of shellfish, fish, and wildlife in and on the body of water into which the discharge is made.

(4) In determining whether or not prior appreciable harm has occurred under (3)(a), the department shall consider the length of time that the applicant has been discharging and the nature of the discharge.

(5) Any initial application for a variance from thermal effluent limitations pursuant to section 316(a) of the federal Clean Water Act must include the following early screening information:

(a) description of the alternative effluent limitation requested;

(b) a general description of the method by which the discharger proposes to demonstrate that the otherwise applicable thermal discharge effluent limitations are more stringent than necessary;

(c) a general description of the type of data, studies, experiments, and other information which the discharger intends to submit for the demonstration; and

(d) such data and information as may be available to assist the department in selecting the appropriate representative important species.

(6) After submitting the early screening information under (5), the discharger shall consult with the department at the earliest practicable time, but not later than 30 days after the application is filed, to discuss the discharger's early screening information. Within 60 days after the application is filed, the discharger shall submit for department approval a detailed plan of study that the discharger will undertake to support its demonstration for a variance under section 316(a). The discharger shall specify the nature and extent of the following type of information to be included in the plan of study: biological, hydrographical, and meteorological data; physical monitoring data; engineering or diffusion models; laboratory studies; representative important species; and other relevant information. In selecting representative important species, special consideration must be given to species mentioned in applicable water quality standards. After the discharger submits its detailed plan of study, the department shall either approve the plan or specify any necessary revisions to the plan. The discharger shall provide any additional information or studies that the department subsequently determines are necessary to support the demonstration, including such studies or inspections as may be necessary to select representative important species. The discharger may provide any additional information or studies that the discharger feels are appropriate to support the demonstration.

(7) Any discharger that intends to apply for a renewal of a section 316(a) thermal variance must notify the department of its intent in writing. Within 60 days after receipt of the notification, the department shall request that the discharger include in its renewal application only such information described in (5) and (6) that the department determines is necessary to evaluate the request.

(8) In making the demonstration, the discharger shall consider any information or guidance published by EPA to assist in making such demonstrations.

(9) If an applicant desires a ruling on a section 316(a) variance before the ruling on any other necessary permit terms and conditions, it shall make such request upon filing its application under (5). This request must be granted or denied at the discretion of the department.

(10) At the expiration of the permit, any discharger holding a thermal variance must support the continuation of the variance with studies based on the discharger's actual operation experience.

AUTH: 75-5-305, 75-5-401, MCA

IMP: 75-5-305, 75-5-401, MCA

NEW RULE II TECHNOLOGY-BASED REQUIREMENTS FOR COOLING WATER INTAKE STRUCTURES FOR NEW FACILITIES (1) The purpose of this rule is to establish technology-based requirements that apply to the location, design, construction, and capacity of the cooling water intake structures at new facilities. This rule implements section 316(b) of the federal Clean Water Act for new facilities. These requirements are implemented through MPDES permits.

(2) Section 316(b) of the federal Clean Water Act provides that any standards established pursuant to sections 301 or 306 of the federal Clean Water Act and applicable to a point source must require that the location, design, construction, and capacity of cooling water intake structures reflect the best

technology available for minimizing adverse environmental impact.

(3) New facilities that do not meet the threshold requirements regarding amount of water withdrawn or percentage of water withdrawn for cooling water purposes in (4) must meet requirements determined on a case-by-case, best professional judgment (BPJ) basis. The owner or operator of a new facility that does not meet the threshold requirements in (4) must submit the application information required in 40 CFR 122.21(r).

(4) This rule applies to a new facility if it:

(a) is a point source that uses or proposes to use a cooling water intake structure;

(b) has at least one cooling water intake structure that uses at least 25 percent of the water it withdraws for cooling purposes as specified in (6); and

(c) has a design intake flow greater than two million gallons per day (MGD).

(5) Use of a cooling water intake structure includes obtaining cooling water by any sort of contract or arrangement with an independent supplier, or multiple suppliers, of cooling water if the supplier or suppliers withdraw(s) water from state surface waters. Use of cooling water does not include obtaining cooling water from a public water system or the use of treated effluent that otherwise would be discharged to a state surface water. This provision is intended to prevent circumvention of these requirements by creating arrangements to receive cooling water from an entity that is not itself a point source.

(6) The threshold requirement that at least 25 percent of water withdrawn be used for cooling purposes must be measured on an average monthly basis. A new facility meets the 25 percent cooling water threshold if, based on the new facility's design, any monthly average over a year for the percentage of cooling water withdrawn is expected to equal or exceed 25 percent of the total water withdrawn.

(7) The owner or operator of a new facility that will withdraw equal to or greater than 10 MGD shall comply with either the requirements of (9) or the following:

(a) reduce the facility's intake flow, at a minimum, to a level commensurate with that which can be attained by a closed-cycle recirculating cooling water system;

(b) design and construct each cooling water intake structure at the facility to a maximum through-screen design intake velocity of 0.5 feet per second;

(c) design and construct the cooling water intake structure at the facility such that the total design intake flow from all cooling water intake structures at the facility meets the following requirements:

(i) for cooling water intake structures located in a freshwater river or stream, the total design intake flow must be no greater than five percent of the source water annual mean flow;

(ii) for cooling water intake structures located in a lake or reservoir, the total design intake flow must not disrupt the natural thermal stratification or turnover pattern, where present, of the source water except in cases where the disruption is determined to be beneficial to the management of fisheries for fish and shellfish by any fishery management agency;

(d) select and implement design and construction technologies or operational measures for minimizing the impingement mortality of fish and shellfish if:

(i) there are threatened, endangered, or otherwise protected federal, state, or

tribal species, or critical habitat for these species, within the hydraulic zone of influence of the cooling water intake structure;

(ii) based on information submitted by any fishery management agency or other relevant information, there are migratory and/or sport or commercial species of impingement concern to the department that pass through the hydraulic zone of influence of the cooling water intake structure; or

(iii) it is determined by the department, based on information submitted by any fishery management agency or other relevant information, that the proposed facility, after meeting the technology-based performance requirements in (7)(a), (b), and (c), would still contribute unacceptable stress to the protected species, critical habitat of those species, or species of concern;

(e) select and implement design and construction technologies or operational measures for minimizing entrainment of entrainable life stages of fish and shellfish if:

(i) there are threatened, endangered, or otherwise protected federal, state, or tribal species, or critical habitat for these species, within the hydraulic zone of influence of the cooling water intake structure; or

(ii) based on information submitted by any fishery management agency or other relevant information, there are or would be undesirable cumulative stressors affecting entrainable life stages of species of concern to the department and the department determines that the proposed facility, after meeting the technology-based performance requirements in (7)(a), (b), and (c), would still contribute unacceptable stress to the protected species, critical habitat of those species, or these species of concern;

(f) submit the application information required in 40 CFR 122.21(r) and [New Rule III(2)];

(g) implement the monitoring requirements specified in 40 CFR 125.87; and

(h) implement the record-keeping requirements in 40 CFR 125.88.

(8) The owner or operator of a new facility that will withdraw equal to or greater than 2 MGD and less than 10 MGD, and that chooses not to comply with (7), shall comply with either the requirements of (9) or the following:

(a) design and construct each cooling water intake structure at the facility to a maximum through-screen design intake velocity of 0.5 feet per second;

(b) design and construct the cooling water intake structure at the facility such that the total design intake flow from all cooling water intake structures at the facility meets the following requirements:

(i) for cooling water intake structures located in a freshwater river or stream, the total design intake flow must be no greater than five percent of the source water annual mean flow;

(ii) for cooling water intake structures located in a lake or reservoir, the total design intake flow must not disrupt the natural thermal stratification or turnover pattern, where present, of the source water except in cases where the disruption is determined to be beneficial to the management of fisheries for fish and shellfish by any fishery management agency;

(c) select and implement design and construction technologies or operational measures for minimizing the impingement mortality of fish and shellfish if:

(i) there are threatened, endangered, or otherwise protected federal, state, or tribal species, or critical habitat for these species, within the hydraulic zone of

influence of the cooling water intake structure;

(ii) based on information submitted by any fishery management agency or other relevant information, there are migratory and/or sport or commercial species of impingement concern to the department that pass through the hydraulic zone of influence of the cooling water intake structure; or

(iii) it is determined by the department, based on information submitted by any fishery management agency or other relevant information, that the proposed facility, after meeting the technology-based performance requirements in (8)(a) and (b), would still contribute unacceptable stress to the protected species, critical habitat of those species, or species of concern;

(d) select and implement design and construction technologies or operational measures that minimize entrainment of entrainable life stages of fish and shellfish;

(e) submit the application information required in 40 CFR 122.21(r) and [New Rule III(2)(b),(c),(d)];

(f) implement the monitoring requirements specified in 40 CFR 125.87; and

(g) implement the recordkeeping requirements specified in 40 CFR 125.88.

(9) The owner or operator of a new facility that will withdraw equal to or greater than 2 MGD, and that chooses not to comply with (7) or (8), shall comply with the following:

(a) demonstrate to the department that the technologies employed will reduce the level of adverse environmental impact from the cooling water intake structure located at the facility to a level comparable to that which would be achieved if the facility implemented the requirements of (7)(a) and (b). This demonstration must include a showing that the impacts to fish and shellfish, including important forage and predator species, within the watershed will be comparable to those that would result if the facility implemented the requirements of (7)(a) and (b). This showing may include consideration of impacts other than impingement mortality and entrainment, including measures that will result in increases in fish and shellfish, but it must demonstrate comparable performance for species that the department identifies as species of concern. In identifying such species, the department may consider information provided by any fishery management agency along with data and information from other sources;

(b) design and construct the cooling water intake structure such that the total design intake flow from all cooling water intake structures at the facility meet the following requirements:

(i) for cooling water intake structures located in a freshwater river or stream, the total design intake flow must be no greater than five percent of the source water annual mean flow; and

(ii) for cooling water intake structures located in a lake or reservoir, the total design intake flow must not disrupt the natural thermal stratification or turnover pattern, where present, of the source water except in cases where the disruption is determined to be beneficial to the management of fisheries for fish and shellfish by any fishery management agency;

(c) submit the application information required in 40 CFR 122.21(r) and [New Rule III(3)];

(d) implement the monitoring requirements specified in 40 CFR 125.87; and

(e) implement the recordkeeping requirements specified in 40 CFR 125.88.

(10) In addition to the technology-based requirements of (7), (8), and (9), the owner or operator of a new facility must comply with any more stringent requirements relating to the location, design, construction, and capacity of a cooling water intake structure or monitoring requirements that the department determines are reasonably necessary to comply with applicable water quality standards adopted by the board pursuant to 75-5-301 and 75-5-303, MCA.

(11) The board adopts and incorporates by reference the following federal regulations as part of the Montana Pollutant Discharge Elimination System:

(a) 40 CFR 125.87 (July 1, 2010), which sets forth monitoring requirements for new facilities with cooling water intake structures;

(b) 40 CFR 125.88 (July 1, 2010), which sets forth record and reporting requirements for new facilities with cooling water intake structures; and

(c) 40 CFR 122.21(r) (July 1, 2010), which sets forth application requirements for new facilities with cooling water intake structures.

(d) Copies of these federal regulations may be obtained from the Department of Environmental Quality, Water Protection Bureau, P.O. Box 200901, Helena, MT 59620.

AUTH: 75-5-305, 75-5-401, MCA

IMP: 75-5-305, 75-5-401, MCA

NEW RULE III INFORMATION REQUIREMENTS FOR COOLING WATER INTAKE STRUCTURES FOR NEW FACILITIES (1) The owner or operator of a new facility with cooling water intake structures shall submit to the department a statement specifying its intent to comply with the technology-based requirements in either (7), (8), or (9) of [New Rule II].

(2) The owner or operator of a new facility that chooses to comply with the requirements of either (7) or (8) of [New Rule II] shall, in addition to meeting the application requirements of 40 CFR 122.21(r), collect and submit to the department the following information, when applying for a new or reissued permit, to demonstrate compliance with (7) or (8) of [New Rule II]. (The information required under (a) applies only to an owner or operator that chooses to comply with (7) of [New Rule II]):

(a) flow reduction information demonstrating a reduction in flow to a level that is commensurate with that which can be attained by a closed-cycle recirculating cooling water system, including:

(i) a narrative description of the facility's system that has been designed to reduce the facility's intake flow to a level commensurate with that which can be attained by a closed-cycle recirculating cooling water system and any engineering calculations, including documentation demonstrating that make-up and blowdown flows have been minimized; and

(ii) if the flow reduction requirement is met entirely, or in part, by reusing or recycling water withdrawn for cooling purposes in subsequent industrial processes, documentation that the amount of cooling water that is not reused or recycled has been minimized;

(b) velocity information demonstrating that the facility complies with the requirement to meet a maximum through-screen design intake velocity of no more

than 0.5 feet per second at each cooling water intake structure as required in (7)(b) and (8)(a) of [New Rule II], including:

- (i) a narrative description of the design, structure, equipment, and operation used to meet the velocity requirement; and

- (ii) design calculations showing that the velocity requirement will be met at minimum ambient source water surface elevations, based on best professional judgment using available hydrological data, and maximum head loss across the screens or other device;

- (c) source waterbody flow information demonstrating that the facility's cooling water intake structure meets the flow requirements in (7)(c) and (8)(b) of [New Rule II], including:

- (i) for cooling water intake structures located in a freshwater river or stream, the annual mean flow and any supporting documentation and engineering calculations to show that the facility's cooling water intake structure meets the flow requirements; and

- (ii) for cooling water intake structures located in a lake or reservoir, a narrative description of the waterbody thermal stratification and any supporting documentation and engineering calculations to show that the natural thermal stratification and turnover pattern will not be disrupted by the total design intake flow. In cases where the disruption is determined to be beneficial to the management of fisheries for fish and shellfish, supporting documentation and a written concurrence from any fisheries management agency with responsibility for fisheries potentially affected by the facility's cooling water intake structure(s); and

- (d) a design and construction technology plan demonstrating compliance with (7)(d) and (e) or (8)(c) and (d) of [New Rule II], including:

- (i) information to demonstrate whether or not the facility meets the criteria of (7)(d) and (e) or (8)(c) and (d) of [New Rule II];

- (ii) delineation of the hydraulic zone of influence for the facility's cooling water intake structure; and

- (iii) new facilities required to install design and construction technologies and/or operational measures must develop a plan explaining the technologies and measures that have been selected based on information collected for the source water biological baseline characterization required by 40 CFR 122.21(r)(3).

(Examples of appropriate technologies include, but are not limited to, wedgewire screens, fine mesh screens, fish handling and return systems, barrier nets, aquatic filter barrier systems, and similar technologies. Examples of appropriate operational measures include, but are not limited to, seasonal shutdowns or reductions in flow, continuous operations of screens, and similar measures.) The plan must contain the following information:

- (A) a narrative description of the design and operation of the design and construction technologies, including fish-handling and return systems, that will be used to maximize the survival of those species expected to be most susceptible to impingement, including species-specific information that demonstrates the efficacy of the technology;

- (B) a narrative description of the design and operation of the design and construction technologies that will be used to minimize entrainment of those species

expected to be the most susceptible to entrainment, including species-specific information that demonstrates the efficacy of the technology; and

(C) design calculations, drawings, and estimates to support the descriptions provided in (2)(d)(iii)(A) and (B).

(3) The owner or operator of a new facility that chooses to comply with (9) of [New Rule II] shall, in addition to meeting the application requirements of 40 CFR 122.21(r), collect and submit to the department the following information, when applying for a new or reissued permit, to demonstrate compliance with (9) of [New Rule II]:

(a) source waterbody flow information to demonstrate that the facility's cooling water intake structure meets the source waterbody requirements in (9)(b) of [New Rule II]:

(i) for cooling water intake structures located in a freshwater river or stream, the annual mean flow and any supporting documentation and engineering calculations to show that the facility's cooling water intake structure meets the flow requirements; and

(ii) for cooling water intake structures located in a lake or reservoir, a narrative description of the waterbody thermal stratification, and any supporting documentation and engineering calculations to show that the natural thermal stratification and turnover pattern will not be disrupted by the total design intake flow. In cases where the disruption is determined to be beneficial to the management of fisheries for fish and shellfish, supporting documentation and a written concurrence from any fisheries management agency with responsibility for fisheries potentially affected by the facility's cooling water intake structure(s);

(b) a comprehensive demonstration study to characterize the source water baseline in the vicinity of the cooling water intake structure(s), to characterize operation of the cooling water intake(s), and to confirm that the technology(ies) proposed and/or implemented for the facility's cooling water intake structure reduce the impacts to fish and shellfish to levels comparable to those achieved by implementing the requirements of (7)(a) and (b) in [New Rule II]. To meet the "comparable level" requirement, the owner or operator shall demonstrate that:

(i) there is a reduction in both impingement mortality and entrainment of all life stages of fish and shellfish to 90 percent or greater of the reduction that would be achieved through (7)(a) and (b) of [New Rule II]; or

(ii) if the demonstration includes consideration of impacts other than impingement mortality and entrainment, that the measures taken will maintain the fish and shellfish in the waterbody at a level substantially similar to that which would be achieved through (7)(a) and (b) of [New Rule II];

(c) a plan containing a proposal for how information will be collected to support the comprehensive demonstration study required in (3)(b). The plan must include:

(i) a description of the proposed and/or implemented technology(ies) to be evaluated in the study;

(ii) a list and description of any historical studies characterizing the physical and biological conditions in the vicinity of the proposed or actual intakes and their relevancy to the proposed study. If an owner or operator proposes to rely on existing source waterbody data, it must be no more than five years old, and the



owner or operator must demonstrate that the existing data are sufficient to develop a scientifically valid estimate of potential impingement and entrainment impacts and provide documentation showing that the data were collected using appropriate quality assurance and quality control procedures;

(iii) any public participation or consultation with federal or state agencies undertaken in developing the plan; and

(iv) a sampling plan for data that will be collected using actual field studies in the source waterbody. The sampling plan must document all methods and quality assurance procedures for sampling and data analysis. The proposed sampling and data analysis methods must be appropriate for a quantitative survey and must be based on consideration of methods used in other studies performed in the source waterbody. The sampling plan must include:

(A) a description of the study area, including the area of influence of the cooling water intake structure and at least 100 meters beyond;

(B) taxonomic identification of the sampled or evaluated biological assemblages, including all life stages of fish and shellfish; and

(C) a description of all sampling and data analysis methods; and

(d) documentation of the results of the comprehensive demonstration study required in (3)(b), including:

(i) a source water biological study, which must include:

(A) a taxonomic identification and characterization of aquatic biological resources including:

(I) a summary of historical and contemporary aquatic biological resources;

(II) determination and description of the target populations of concern (those species of fish and shellfish and all life stages that are most susceptible to impingement and entrainment); and

(III) a description of the abundance and temporal/spatial characterization of the target populations based on the collection of multiple years of data to capture the seasonal and daily activities (such as, spawning, feeding, and water column migration) of all life stages of fish and shellfish found in the vicinity of the cooling water intake structure;

(B) an identification of all threatened or endangered species that might be susceptible to impingement and entrainment by the proposed cooling water intake structure(s); and

(C) a description of additional chemical, water quality, and other anthropogenic stresses on the source waterbody;

(ii) an evaluation of potential cooling water intake structure effects, which must include:

(A) calculations of the reduction in impingement mortality and entrainment of all life stages of fish and shellfish that would need to be achieved by the technologies that have been selected to implement and to meet requirements under (9) of [New Rule II]. In order to do the calculation, the owner or operator shall determine the reduction in impingement mortality and entrainment that would be achieved by implementing the requirements of (7)(a) and (b) of [New Rule II] at the facility; and

(B) an engineering estimate of efficacy for the proposed or implemented technologies used to minimize impingement mortality and entrainment of all life

stages of fish and shellfish and maximize survival of impinged life stages of fish and shellfish. The estimate of efficacy must include a demonstration that the proposed or implemented technologies reduce impingement mortality and entrainment of all life stages of fish and shellfish to a comparable level to that which would be achieved if the requirements in (7)(a) and (b) of [New Rule II] were implemented. The efficacy projection must also include a site-specific evaluation of the technology's suitability for reducing impingement mortality and entrainment based on the results of the source water biological study described in (3)(d)(i). The efficacy estimates may be determined based on case studies that have been conducted in the vicinity of the cooling water intake structure or site-specific technology prototype studies;

(iii) an evaluation of proposed restoration measures, if the owner or operator proposes to use restoration measures to maintain the fish and shellfish as allowed in (9)(a) of [New Rule II]. The evaluation must include the following:

(A) information and data to show coordination with the appropriate fishery management agency(ies); and

(B) a plan that provides a list of the measures proposed to be implemented and an explanation of how the owner or operator will demonstrate and continue to ensure that the proposed restoration measures will maintain the fish and shellfish in the waterbody to a substantially similar level to that which would be achieved through (7)(a) and (b) of [New Rule II]; and

(iv) a verification monitoring plan that must include:

(A) a plan to conduct, at a minimum, two years of monitoring to verify the full-scale performance of the proposed or implemented technologies and operational measures. The verification plan must begin at the start of operations of the cooling water intake structure and continue for a sufficient period of time to demonstrate that the facility is reducing the level of impingement and entrainment to the level documented in (3)(d)(ii). The plan must describe the frequency of monitoring and the parameters to be monitored. The department will use the verification monitoring to confirm that the facility is meeting the level of impingement mortality and entrainment reduction required in (9) of [New Rule II]; and

(B) a plan to conduct monitoring to verify that the restoration measures will maintain the fish and shellfish in the waterbody to a substantially similar level as that which would be achieved through (7)(a) and (b) of [New Rule II].

(4) The department shall review the materials submitted by an owner or operator of a new facility with cooling water intake structures and impose appropriate requirements and conditions in permits to ensure compliance with [New Rule II], in accordance with 40 CFR 125.89.

(5) The board adopts and incorporates by reference the following federal regulations as part of the Montana Pollutant Discharge Elimination System:

(a) 40 CFR 125.89 (July 1, 2010), which sets forth procedures and requirements for imposing permit conditions for new facilities with cooling water intake structures; and

(b) 40 CFR 122.21(r) (July 1, 2010), which sets forth application requirements for new facilities with cooling water intake structures.

(c) Copies of these federal regulations may be obtained from the Department of Environmental Quality, Water Protection Bureau, P.O. Box 200901, Helena, MT

59620.

AUTH: 75-5-305, 75-5-401, MCA  
IMP: 75-5-305, 75-5-401, MCA

NEW RULE IV ALTERNATIVE REQUIREMENTS FOR COOLING WATER INTAKE STRUCTURES FOR NEW FACILITIES (1) Any interested person may request that alternative requirements less stringent than those required in [New Rule II(7) through (10)] be imposed in a permit. The department may establish alternative requirements less stringent than the requirements of [New Rule II(7) through (10)] only if:

- (a) there is an applicable requirement under [New Rule II(7) through (10)];
  - (b) the department determines that data specific to the facility indicate that compliance with the requirement at issue would result in compliance costs wholly out of proportion to the costs EPA considered in establishing the requirement at issue or would result in significant adverse impacts on local air quality, significant adverse impacts on local water resources other than impingement or entrainment, or significant adverse impacts on local energy markets;
  - (c) the alternative requirement requested is no less stringent than justified by the wholly out of proportion costs or the significant adverse impacts on local air quality, significant adverse impacts on local water resources other than impingement or entrainment, or significant adverse impacts on local energy markets; and
  - (d) the alternative requirement will ensure compliance with other applicable provisions of the Montana Water Quality Act, Title 75, chapter 5, MCA, and the federal Clean Water Act.
- (2) The burden is on the person requesting the alternative requirement to demonstrate that alternative requirements should be authorized.

AUTH: 75-5-305, 75-5-401, MCA  
IMP: 75-5-305, 75-5-401, MCA

NEW RULE V TECHNOLOGY-BASED REQUIREMENTS FOR COOLING WATER INTAKE STRUCTURES FOR EXISTING FACILITIES (1) The purpose of this rule is to establish technology-based requirements that apply to the location, design, construction, and capacity of the cooling water intake structures at existing facilities. This rule implements section 316(b) of the federal Clean Water Act for existing facilities. These requirements are implemented through MPDES permits.

(2) Section 316(b) of the federal Clean Water Act provides that any standards established pursuant to section 301 and 306 of the federal Clean Water Act and applicable to point sources shall require that the location, design, construction, and capacity of the cooling water intake structure reflect the best technology available for minimizing adverse environmental impact.

(3) Existing facilities with cooling water intake structures that are not subject to technology-based requirements under [New Rule II] must meet the requirements of section 316(b) of the federal Clean Water Act, as determined by the department on a case-by-case, best professional judgment (BPJ) basis.

AUTH: 75-5-305, 75-5-401, MCA

IMP: 75-5-305, 75-5-401, MCA

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

17.30.1208 HAZARDOUS SUBSTANCES (AUTH: 75-5-304, MCA; IMP, 75-5-304, 75-5-401, MCA), located at page 17-2892, Administrative Rules of Montana.

17.30.1209 SECONDARY TREATMENT (AUTH: 75-5-304, MCA; IMP, 75-5-304, 75-5-401, MCA), located at page 17-2892, Administrative Rules of Montana.

REASON: The board is proposing amendments to rules establishing effluent limitations, standards of performance, and treatment requirements in order to maintain compliance with federal regulations governing states with delegated authority to implement the federal Clean Water Act's permitting program, as set forth in 40 CFR 123.25. That regulation requires delegated states to adopt the technology-based effluent limitations and standards found in subparts A, B, D, H, I, and N of 40 CFR Part 125, 40 CFR Part 133, 40 CFR Part 129, and 40 CFR Chapter I, subchapter N. The board's existing rules, set forth in ARM Title 17, chapter 30, subchapter 12, incorporate by reference the technology-based effluent limitations and standards of performance that were promulgated by the U.S. Environmental Protection Agency (EPA) prior to 1989. The proposed amendments are necessary, in part, to adopt effluent limitations and standards promulgated by EPA after 1989. The proposed amendments are also necessary to eliminate some federal requirements that are not applicable to Montana's MPDES program (e.g., federal requirements for ocean discharges and pretreatment requirements), clarify existing language, and provide ease of access to federal requirements that are applicable to permits issued by a delegated state.

The proposed amendments fall into the following categories: (1) eliminating existing incorporations by reference adopted prior to 1989 and adopting the text of some of those federal regulations into state rules; (2) adopting the text of relatively recent federal regulations that impose treatment requirements on cooling water intake structures; (3) updating incorporations by reference of federal rules that are too cumbersome to publish into state rules; (4) repealing existing incorporations by reference that are either duplicative or inapplicable to state permit programs; and (5) clarifying existing language.

#### ARM 17.30.1201 - Purpose

The board is proposing to amend the text of ARM 17.30.1201 to clarify that the standards adopted in ARM Title 17, chapter 30, subchapter 12 are technology-based treatment requirements promulgated by EPA, and different from the standards relating to water quality adopted by the board in ARM Title 17, chapter 30, subchapter 6. This amendment is necessary because the existing language simply refers to "standards" for MPDES permits, which would include both technology-based and water quality-based standards. Other minor amendments are proposed to clarify that the rules apply only to surface water discharges and to eliminate

reference to pre-treatment rules in ARM Title 17, chapter 30, subchapter 14, because the department has not been delegated the authority to administer the federal Clean Water Act's pretreatment program.

#### ARM 17.30.1202 - Definitions

The board is proposing to amend the definitions in ARM 17.30.1202 to include the statutory definitions in Montana's Water Quality Act, Title 75, chapter 5, MCA, and add new definitions that explain the terms of the technology-based requirements that are proposed for adoption in this rulemaking. This amendment is necessary in order to clarify the meaning of technical terms used in New Rules I through V and in the amended text of ARM 17.30.1203, 17.30.1206, and 17.30.1207.

#### ARM 17.30.1203 - Criteria and Standards for MPDES

The board is proposing to amend ARM 17.30.1203 to eliminate the incorporation by reference of 40 CFR Part 125 and replace it with the text of 40 CFR 125.3 (July 1, 2010 edition). Other federal regulations, which will be eliminated by removing the incorporation by reference of 40 CFR Part 125, are addressed in other amendments proposed by the board, including incorporating some of those regulations by reference into the revised text of ARM 17.30.1203 and 17.30.1207 and adopting the text of some of those federal regulations in New Rules I through V.

The board is proposing this revision because 40 CFR 125.3 establishes the framework for imposing minimum technology-based treatment requirements mandated by section 301 of the federal Clean Water Act. Adoption of the text will assist the regulated community in understanding which technology-based requirements will apply to any new, revised, or modified MPDES permit for an existing point source discharge. The proposed amendment is necessary in order to provide transparency to the criteria used when imposing technology-based standards in the permitting process and also to maintain the required elements of a state-delegated permit program, as set forth in 40 CFR 123.25.

The proposed revision will not result in a change in existing permit requirements, because 40 CFR 125.3 is one of the federal rules that were incorporated by reference in 1989. Since 40 CFR 125.3 has not been revised by EPA since it was incorporated into state rules, this amendment will not result in new permit requirements.

The board is also proposing to amend ARM 17.30.1203 in order to incorporate by reference the following federal regulations: 40 CFR Part 133 (July 1, 2010 edition), which establishes secondary treatment requirements for publicly owned treatment works (POTWs); 40 CFR Part 125, subpart D (July 1, 2010 edition), which allows variances from certain technology-based limits based upon fundamentally different factors; and 40 CFR 401.15 (July 1, 2010 edition), which is a list of toxic pollutants identified by EPA under section 307(a)(1) of the federal Clean Water Act. These updates to the incorporations by reference of federal regulations do not result in new permit requirements, because these federal regulations have not been revised since they were originally incorporated into ARM Title 17, chapter

30, subchapter 12. Updating these incorporations by reference is necessary because these regulations are referenced as applicable federal requirements in the amendments to ARM 17.30.1203. Incorporating these federal regulations is also necessary to maintain compliance with federal rules governing delegated states' permit programs. See, 40 CFR 123.25(a)(36), (37).

#### ARM 17.30.1206 - Toxic Effluent Standards

The board is proposing to amend ARM 17.30.1206 in order to clarify that the technology-based requirements in 40 CFR Part 129 apply only to specific facilities that discharge specific toxic pollutants. The proposed amendment does not result in new permit requirements, because the provisions of 40 CFR Part 129 have not been revised by EPA since those provisions were originally incorporated by reference into state rules in 1989. The board is also proposing to update the incorporation by reference of 40 CFR Part 129 in order to maintain compliance with rules governing a state's delegated program. See, 123.25(a)(37).

#### ARM 17.30.1207 - Effluent Limitations and Standards of Performance

The board is proposing to amend ARM 17.30.1207 in order to clarify how the effluent limitations and standards of performance promulgated by EPA and published in 40 CFR Chapter I, subchapter N will be applied to new and existing point sources. The board is also proposing to update the incorporation by reference of 40 CFR Chapter I, subchapter N, so that any effluent limitations and standards of performance that have been promulgated by EPA since 1989 will be adopted into state rule. Updating the incorporation by reference of these federal regulations is necessary, because they are a required element of a delegated state's permit program. See, 40 CFR 123.25(a)(37).

#### New Rule I - Criteria and Standards for Determining Alternative Effluent Limitations for Thermal Discharges

The board is proposing to adopt the text of 40 CFR 125.72 and 40 CFR 125.73 into New Rule I in order to make the requirements for obtaining alternative effluent limitations for thermal discharges readily available to the regulated community. Adoption of New Rule I will not result in new requirements for Montana permittees because the text of the federal regulations has not changed since 1989, when they were first incorporated into state rule. See, 40 CFR Part 125, subpart H.

Since the board is proposing to adopt the text of federal requirements for thermal discharges, the board is also proposing to amend ARM 17.30.1202 in order to include the special definitions that apply to alternative requirements for thermal discharges. The proposed adoption of New Rule I and the inclusion of special definitions in ARM 17.30.1202 are necessary because the federal criteria and standards for allowing alternative effluent limitations for thermal discharges are required elements of a delegated state's permit program. See, 40 CFR 123.25(a)(36).

## New Rules II through IV

The board is proposing to adopt portions of the text of 40 CFR Part 125, subpart I, into New Rules II through IV. The board is also proposing to incorporate by reference the remaining portions of 40 CFR Part 125, subpart I, which will not be adopted as text within the new rules. The federal regulations proposed for adoption into New Rules II through IV were promulgated by EPA in 2001 for the purpose of establishing technology-based treatment requirements for cooling water intake structures at new facilities. The board is proposing to adopt New Rules II through IV, because the federal regulations in 40 CFR Part 125, subpart I, are required elements of a delegated state's permit program. See, 40 CFR 123.25(a)(36). A more detailed explanation of the content of New Rules II through IV is provided below.

### New Rule II - Technology-Based Requirements for Cooling Water Intake Structures for New Facilities

The board is proposing to adopt New Rule II, which contains the text of 40 CFR 125.80, 40 CFR 125.81, and 40 CFR 125.84. The text proposed for adoption explains the purpose of adopting federal requirements for cooling water intake structures, provides thresholds for determining which new facilities are subject to those requirements, and provides three options among which an owner or operator may choose in order to comply with the technology-based requirements in section 316(b) of the federal Clean Water Act. In addition, the board proposes to incorporate by reference into New Rule II the following federal regulations: 40 CFR 125.87 (July 1, 2010), which sets forth monitoring requirements for cooling water intake structures at new facilities; 40 CFR 125.88 (July 1, 2010), which sets forth record and reporting requirements for new facilities; and 40 CFR 122.21(r) (July 1, 2010), which sets forth application requirements for new facilities with cooling water intakes. These proposed incorporations by reference are necessary because the text of New Rule II requires owners or operators of cooling water intake structures at new facilities to comply with these federal regulations.

### New Rule III - Information Requirements for Cooling Water Intake Structures for New Facilities

The board is proposing to adopt New Rule III, which contains the text of 40 CFR 125.86. The text of that federal regulation describes the information that must be submitted by an owner or operator of a new facility with a cooling water intake structure when applying for a new or renewed MPDES permit.

In addition, the board is proposing to incorporate by reference the following federal regulations: 40 CFR 125.89, which establishes the procedures and requirements the department must follow when imposing permit requirements for new facilities with cooling water intake structures; and 40 CFR 122.21(r), which sets forth application requirements for new facilities with cooling water intake structures. The proposed incorporations by reference are necessary because the text of New Rule III requires compliance with those regulations.

#### New Rule IV - Alternative Requirements for Cooling Water Intake Structures for New Facilities

The board is proposing to adopt New Rule IV, which contains the text of 40 CFR 125.85. The text of that regulation authorizes the department to establish alternative requirements less stringent than the requirements of New Rule II, provided that the person requesting the alternative requirements demonstrates that they should be allowed.

#### New Rule V - Technology-Based Requirements for Cooling Water Intake Structures for Existing Facilities

The board is proposing to adopt New Rule V, which establishes technology-based treatment requirements for existing facilities with cooling water intake structures. Adoption of New Rule V is necessary to comply with federal requirements governing a delegated state's permit program. See, 40 CFR 123.25(a)(36).

#### Repeal of ARM 17.30.1208 – Hazardous Substances

The board is proposing to repeal ARM 17.30.1208, which incorporates by reference a list of hazardous substances identified by EPA under section 311(b) of the federal Clean Water Act. Section 311(b) prohibits the discharge of oil and hazardous substances into the navigable waters of the United States and its adjoining shorelines and is administered by EPA and the U.S. Coast Guard. Since states have no delegated authority to administer and enforce section 311(b), the board is repealing the rule implementing that provision of the federal Clean Water Act.

#### Repeal of ARM 17.30.1209 – Secondary Treatment

The board is proposing to repeal ARM 17.30.1209, which currently incorporates by reference federal regulations establishing secondary treatment for POTWs. Since the proposed amendments to ARM 17.30.1203 clarify the application of minimum treatment requirements, including the application of secondary treatment requirements to POTWs, the existing incorporation by reference in ARM 17.30.1209 is no longer necessary.

6. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to [ejohnson@mt.gov](mailto:ejohnson@mt.gov), no later than 5:00 p.m., July 8, 2011. To be guaranteed consideration, mailed comments must be postmarked on or before that date.



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

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

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

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

/s/ James M. Madden

JAMES M. MADDEN  
Rule Reviewer

BY: /s/ Joseph W. Russell

JOSEPH W. RUSSELL, M.P.H.,  
Chairman

Certified to the Secretary of State, May 16, 2011.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM )  
17.8.801, 17.8.804, 17.8.818, 17.8.820, )  
17.8.822, 17.8.825, 17.8.901, 17.8.904, )  
and 17.8.1007 pertaining to definitions, )  
ambient air increments, major stationary )  
sources, source impact analysis, source )  
information, sources impacting federal )  
class I areas, definitions, when air )  
quality permit required, baseline for )  
determining credit for emissions and air )  
quality offsets )

NOTICE OF PUBLIC HEARING ON  
PROPOSED AMENDMENT

(AIR QUALITY)

TO: All Concerned Persons

1. On July 7, 2011, at 2:00 p.m., or upon the conclusion of the public hearing for MAR Notice No. 17-322, the Board of Environmental Review will hold a public hearing in Room 111, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact Elois Johnson, Paralegal, no later than 5:00 p.m., June 13, 2011, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

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

17.8.801 DEFINITIONS (1) through (2)(c) remain the same.

(3) "Baseline area" means any intrastate area (and every part thereof) designated as attainment or unclassifiable in 40 CFR 81.327 in which the major source or major modification establishing the minor source baseline date would construct or would have an air quality impact equal to or greater than one  $\mu\text{g}/\text{m}^3$  (annual average) of the pollutant for which the minor source baseline date is established, except baseline areas for PM-2.5 are designated when a major source or major modification establishing the minor source baseline date would construct or would have an air quality impact equal to or greater than 0.3  $\mu\text{g}/\text{m}^3$  as an annual average for PM-2.5.

(a) through (20)(b)(vii) remain the same.

(21) The following apply to the definitions of the terms "major source baseline date" and "minor source baseline date":

(a) "major source baseline date" means:

- (i) in the case of ~~particulate matter~~ PM-10 and ~~sulfur dioxide~~ SO<sub>2</sub>, January 6, 1975; ~~and~~
  - (ii) in the case of ~~nitrogen dioxide~~ NO<sub>2</sub>, February 8, 1988; ~~and~~
  - (iii) in the case of PM-2.5, October 20, 2010.
- (b) "Minor source baseline date" means the earliest date after the trigger date on which a major stationary source or a major modification subject to 40 CFR 52.21 or to regulations approved pursuant to 40 CFR 51.166 submits a complete application under the relevant regulation. The trigger date is:
- (i) in the case of ~~particulate matter~~ PM-10 and ~~sulfur dioxide~~ SO<sub>2</sub>, August 7, 1977; ~~and~~
  - (ii) in the case of ~~nitrogen dioxide~~ NO<sub>2</sub>, February 8, 1988; ~~and~~
  - (iii) in the case of PM-2.5, October 20, 2011.
- (c) through (26) remain the same.
- (27) The following apply to the definition of the term "significant":
- (a) "significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)  
Nitrogen oxides: 40 tpy  
Sulfur dioxide: 40 tpy  
Particulate matter: 25 tpy of particulate matter emissions  
15 tpy of PM-10 emissions  
PM-2.5: 10 tpy of direct PM-2.5 emissions, 40 tpy of SO<sub>2</sub> emissions, or 40 tpy of NO<sub>2</sub> emissions unless demonstrated not to be a PM-2.5 precursor  
Ozone: 40 tpy of volatile organic compounds  
Lead: 0.6 tpy  
Fluorides: 3 tpy  
Sulfuric acid mist: 7 tpy  
Hydrogen sulfide (H<sub>2</sub>S): 10 tpy  
Total reduced sulfur (including H<sub>2</sub>S): 10 tpy  
Reduced sulfur compounds (including H<sub>2</sub>S): 10 tpy  
Municipal waste combustor organics (measured as total tetra- through octa-chlorinated dibenzo-p-dioxins and dibenzofurans):  $3.2 * 10^{-6}$  megagrams per year ( $3.5 * 10^{-6}$  tpy)  
Municipal waste combustor metals (measured as particulate matter): 14 megagrams per year (15 tpy)  
Municipal waste combustor acid gases (measured as sulfur dioxide and hydrogen chloride): 36 megagrams per year (40 tpy)  
(b) through (29) remain the same.

AUTH: 75-2-111, 75-2-203, MCA

IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.804 AMBIENT AIR INCREMENTS (1) In areas designated as Class I, II, or III, increases in pollutant concentration over the baseline concentration shall be

limited to the following:

Pollutant	Maximum allowable increase (micrograms per cubic meter)
<b>CLASS I</b>	
Particulate matter:	
PM-2.5, annual arithmetic mean .....	<u>1</u>
PM-2.5, 24-hr maximum .....	<u>2</u>
PM-10, annual arithmetic mean .....	4
PM-10, 24-hr maximum .....	8
Sulfur dioxide:	
Annual arithmetic mean .....	2
24-hr maximum .....	5
3-hr maximum .....	25
Nitrogen dioxide:	
Annual arithmetic mean .....	2.5
<b>CLASS II</b>	
Particulate matter:	
PM-2.5, annual arithmetic mean .....	<u>4</u>
PM-2.5, 24-hr maximum .....	<u>9</u>
PM-10, annual arithmetic mean .....	17
PM-10, 24-hr maximum .....	30
Sulfur dioxide:	
Annual arithmetic mean .....	20
24-hr maximum .....	91
3-hr maximum .....	512
Nitrogen dioxide:	
Annual arithmetic mean .....	25
<b>CLASS III</b>	
Particulate matter:	
PM-2.5, annual arithmetic mean .....	<u>8</u>
PM-2.5, 24-hr maximum .....	<u>18</u>
PM-10, annual arithmetic mean .....	34
PM-10, 24-hr maximum .....	60
Sulfur dioxide:	
Annual arithmetic mean .....	40
24-hr maximum .....	182
3-hr maximum .....	700
Nitrogen dioxide:	
Annual arithmetic mean .....	50

(2) remains the same.

AUTH: 75-2-111, 75-2-203, MCA  
IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.818 REVIEW OF MAJOR STATIONARY SOURCES AND MAJOR MODIFICATIONS--SOURCE APPLICABILITY AND EXEMPTIONS (1) through (6) remain the same.

(7) The department may exempt a proposed major stationary source or major modification from the requirements of ARM 17.8.822, with respect to monitoring for a particular pollutant, if:

(a) the emissions increase of the pollutant from a new stationary source or the net emissions increase of the pollutant from a modification would cause, in any area, air quality impacts less than the following amounts:

- (i) carbon monoxide--: 575  $\mu\text{g}/\text{m}^3$ , eight-hour average;
- (ii) nitrogen dioxide--: 14  $\mu\text{g}/\text{m}^3$ , annual average;
- (iii) PM-2.5: 4  $\mu\text{g}/\text{m}^3$ , 24-hour average;
- ~~(iii)~~ (iv) ~~particulate matter--PM-10:~~ 10  $\mu\text{g}/\text{m}^3$  PM-10, 24-hour average;
- ~~(iv)~~ (v) sulfur dioxide--: 13  $\mu\text{g}/\text{m}^3$ , 24-hour average;
- ~~(v)~~ (vi) ozone--: no de minimus air quality level is provided for ozone.

However, any net increase of 100 tons per year or more of volatile organic compounds subject to this subchapter ~~would be required to perform~~ requires an ambient impact analysis, including the gathering of ambient air quality data;

- ~~(vi)~~ (vii) lead--: 0.1  $\mu\text{g}/\text{m}^3$ , three-month average;
  - ~~(vii)~~ (viii) fluorides--: 0.25  $\mu\text{g}/\text{m}^3$ , 24-hour average;
  - ~~(viii)~~ (ix) total reduced sulfur--: 10  $\mu\text{g}/\text{m}^3$ , one-hour average;
  - ~~(ix)~~ (x) hydrogen sulfide--: 0.2  $\mu\text{g}/\text{m}^3$ , one-hour average;
  - ~~(x)~~ (xi) reduced sulfur compounds--: 10  $\mu\text{g}/\text{m}^3$ , one-hour average; or
- (b) and (c) remain the same.

AUTH: 75-2-111, 75-2-203, MCA  
IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.820 SOURCE IMPACT ANALYSIS (1) remains the same.

(2) For purposes of PM-2.5, the demonstration required in (1) is made if the emissions increase from the new stationary source alone or from the modification alone would cause in all areas, air quality impacts less than the following amounts:

<u>Pollutant</u>	<u>Averaging time</u>	<u>Class I area</u>	<u>Class II area</u>	<u>Class III area</u>
<u>PM-2.5</u>	<u>Annual</u>	<u>0.06 <math>\mu\text{g}/\text{m}^3</math></u>	<u>0.3 <math>\mu\text{g}/\text{m}^3</math></u>	<u>0.3 <math>\mu\text{g}/\text{m}^3</math></u>
	<u>24-hour</u>	<u>0.07 <math>\mu\text{g}/\text{m}^3</math></u>	<u>1.2 <math>\mu\text{g}/\text{m}^3</math></u>	<u>1.2 <math>\mu\text{g}/\text{m}^3</math></u>

AUTH: 75-2-111, 75-2-203, MCA  
IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.822 AIR QUALITY ANALYSIS (1) through (8) remain the same.

(9) Nitrogen oxides are presumed to be precursors to PM-2.5 in an area, unless the applicant demonstrates that emissions of nitrogen oxides from sources in the area are not a significant contributor to that area's ambient PM-2.5

concentrations.

(10) Volatile organic compounds and ammonia are presumed not to be precursors to PM-2.5 unless emissions of volatile organic compounds or ammonia from sources in the area are a significant contributor to that area's ambient PM-2.5 concentrations.

(11) PM-2.5 emissions and PM-10 emissions include gaseous emissions from a source or activity that condense to form particulate matter at ambient temperatures.

(12) Applicability determinations for PM-2.5 made prior to January 1, 2011, without accounting for condensable particulate matter, are not subject to (11).

AUTH: 75-2-111, 75-2-203, MCA

IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.825 SOURCES IMPACTING FEDERAL CLASS I AREAS--  
ADDITIONAL REQUIREMENTS (1) through (3) remain the same.

(4) The owner or operator of a proposed source or modification may demonstrate to the federal land manager that the emissions from such source would have no adverse impact on the air quality-related values of such lands (including visibility), notwithstanding that the change in air quality resulting from emissions from such source or modification would cause or contribute to concentrations which would exceed the maximum allowable increases for a Class I area. If the federal land manager concurs with such demonstration and so certifies to the department, the department may, provided that applicable requirements are otherwise met, issue the permit with such emission limitations as may be necessary to assure that emissions of sulfur dioxide, particulate matter, and nitrogen oxides would not exceed the following maximum allowable increases over the minor source baseline concentration for such pollutants:

Pollutant	Maximum allowable increase (micrograms per cubic meter)
<u>PM-2.5</u>	
<u>annual arithmetic mean</u> .....	<u>4</u>
<u>24-hr maximum</u> .....	<u>9</u>
Particulate matter:	
PM-10, annual arithmetic mean .....	17
PM-10, 24-hr maximum .....	30
Sulfur dioxide:	
annual arithmetic mean.....	20
24-hr maximum .....	91
3-hr maximum .....	325
Nitrogen dioxide:	
annual arithmetic mean.....	25

(5) through (6) remain the same.

AUTH: 75-2-111, 75-2-203, MCA

IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.901 DEFINITIONS (1) through (15) remain the same.

(16) "Precursor" means:

(a) volatile organic compounds and nitrogen oxides in ozone nonattainment areas; and

(b) sulfur dioxide in PM-2.5 nonattainment areas.

(16) and (17) remain the same, but are renumbered (17) and (18).

~~(18)~~ (19) "Significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

<u>Pollutant and Emission Rate</u>	
Carbon monoxide:	100 tons per year (tpy)
Nitrogen oxides:	40 tpy
Sulfur dioxide:	40 tpy
Particulate matter:	25 tpy of particulate matter emissions <u>or</u>
<u>PM-2.5</u>	15 tpy of PM-10 emissions <u>10 tpy of direct PM-2.5 emissions, 40 tpy of sulfur dioxide emissions, or 40 tpy of nitrogen oxide emissions unless demonstrated not to be a PM-2.5 precursor</u>
Lead:	0.6 tpy

(19) and (20) remain the same, but are renumbered (20) and (21).

AUTH: 75-2-111, 75-2-203, MCA

IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.904 WHEN MONTANA AIR QUALITY PERMIT REQUIRED (1) Any new major stationary source or major modification which would locate anywhere in an area designated as nonattainment for a national ambient air quality standard under 40 CFR 81.327 and which is major for the pollutant for which the area is designated nonattainment, shall, prior to construction, obtain from the department a Montana air quality permit in accordance with subchapter 7 and all requirements contained in this subchapter if applicable. A major stationary source or major modification exempted from the requirements of subchapter 7 under ARM 17.8.744 and 17.8.745 which would locate anywhere in an area designated as nonattainment for a national ambient air quality standard under 40 CFR 81.327 and which is major for the pollutant for which the area is designated nonattainment, shall, prior to construction, still be required to obtain a Montana air quality permit and comply with the requirements of ARM 17.8.748, 17.8.749, 17.8.756, 17.8.759, and 17.8.760 and with all applicable requirements of this subchapter.

(2) remains the same.

(3) Sulfur dioxide is a precursor to PM-2.5 in a PM-2.5 nonattainment area.

(4) Nitrogen oxides are presumed to be precursors to PM-2.5 in a PM-2.5 nonattainment area, unless the applicant demonstrates that emissions of nitrogen

oxides from sources in the PM-2.5 nonattainment area are not a significant contributor to that area's ambient PM-2.5 concentrations.

(5) Volatile organic compounds and ammonia are presumed not to be precursors to PM-2.5 in a PM-2.5 nonattainment area unless emissions of volatile organic compounds or ammonia from sources in the area are a significant contributor to that area's ambient PM-2.5 concentrations.

(6) PM-2.5 emissions and PM-10 emissions shall include gaseous emissions from a source or activity that condense to form particulate matter at ambient temperatures.

(7) Applicability determinations made prior to January 1, 2011, without accounting for condensable particulate matter, are not subject to (5).

AUTH: 75-2-111, 75-2-203, MCA

IMP: 75-2-202, 75-2-203, 75-2-204, MCA

17.8.1007 BASELINE FOR DETERMINING CREDIT FOR EMISSIONS AND AIR QUALITY OFFSETS (1) For the purposes of this subchapter, the following requirements shall apply:

(a) ~~†~~The requirements of ARM 17.8.906, except that 17.8.906(7) through (9) are not applicable do not apply to offsets required under this subchapter;

(b) ~~e~~Emission offsets must be reductions in actual emissions for the same pollutant obtained from the same source or other sources which are located in the same general area of the proposed major stationary source or modification, and that contribute to or would contribute to the violation of the national ambient air quality standard;

(c) In meeting the emissions offset requirements in this subchapter, emissions offsets for direct PM-2.5 emissions or emissions of precursors of PM-2.5 may be satisfied by offsetting reductions in direct PM-2.5 emissions or emissions of any precursor;

~~(e)~~ (d) ~~i~~In the case of emission offsets involving volatile organic compounds and oxides of nitrogen, offsets will generally be acceptable if they are obtained from within the areas specified in (1)(b). If the proposed offsets would be from sources located at considerable distances from the new source, the department shall increase the ratio of the required offsets and require a showing by the applicant that nearby offsets were investigated and reasonable alternatives were not available;

~~(d)~~ (e) ~~i~~In the case of emission offsets involving sulfur dioxide, particulates, and carbon monoxide, areawide mass emission offsets are not acceptable, and the applicant shall perform atmospheric simulation modeling to ensure that emission offsets provide a positive net air quality benefit. The department may exempt the applicant from the atmospheric simulation modeling requirement if the emission offsets provide a positive net air quality benefit, are obtained from an existing source on the same premises or in the immediate vicinity of the new source, and the pollutants disperse from substantially the same effective stack height; and

~~(e)~~ (f) ~~n~~No emissions credit shall be allowed for replacing one hydrocarbon compound with another of lesser reactivity, except for those compounds listed in Table 1 of EPA's "Recommended Policy on Control of Volatile Organic Compounds" (42 FR 35314, July 8, 1977).



AUTH: 75-2-111, 75-2-203, MCA  
IMP: 75-2-202, 75-2-203, 75-2-204, MCA

REASON: Pursuant to the federal Clean Air Act, areas within a state are designated as nonattainment, attainment, or unclassifiable for compliance with the National Ambient Air Quality Standards (NAAQS). Major stationary sources and major modifications that would be located in nonattainment areas are subject to nonattainment area major new source review (NSR) requirements, and major sources and major modifications that would be located in attainment or unclassifiable areas are subject to Prevention of Significant Deterioration (PSD) NSR requirements.

In 1997, the U.S. Environmental Protection Agency (EPA) promulgated NAAQS for fine particulate matter, known as PM-2.5, which includes particles with an aerodynamic diameter less than or equal to 2.5 micrometers. EPA revised the NAAQs in 2006.

On May 16, 2008, EPA promulgated nonattainment area and PSD NSR regulations establishing: PM-2.5 significant emission rates (SERs) that trigger NSR; requirements for consideration of precursors to PM-2.5 in determining the significance of PM-2.5 emissions; and nonattainment area offset ratios for PM-2.5 emissions. 73 Fed. Reg. 28321. On October 20, 2010, EPA promulgated additional PM-2.5 PSD regulations, including: maximum allowable increases in ambient concentrations (increments) applicable to PSD Class I, II, and III areas; requirements for determining baseline areas and baseline dates for applicability of PSD increments; PSD significant impact levels (SILs), used to determine whether the ambient impacts of a proposed new source or modification would be significant enough to require modeling of cumulative emissions from the source and existing sources; and PSD significant monitoring concentrations (SMCs), used to determine whether it is necessary for the applicant to conduct pre-application monitoring of background ambient concentrations. 75 Fed. Reg. 64864. The federal requirements for state nonattainment area NSR provisions related to PM-2.5 are codified at 40 CFR § 51.165(a)(1)(x)(A), (C) and (D) and 40 CFR § 51.165(a)(11), and the federal requirements for state PSD provisions are found at 40 CFR § 51.166(b)(14), (15) and (23), (k), and (p).

The board is proposing in this rulemaking to adopt these federal preconstruction review requirements. In order for Montana to retain its primacy to regulate construction of major air pollutant emission sources in the state, the state is required to adopt at least the minimum federal standards applicable to preconstruction review applicable to emissions of a NAAQS pollutant. Also, adding nonattainment area and PSD preconstruction review requirements for PM-2.5 is necessary in order for the department to ensure that PM-2.5 offsets are properly obtained for emissions from major stationary sources and major modifications that would be located in PM-2.5 nonattainment areas and that PM-2.5 emissions from any proposed new major stationary source or major modification would not cause or contribute to air pollution in excess of applicable requirements.

The board also is proposing minor editorial revisions that are not intended to have any substantive effect.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to [ejohnson@mt.gov](mailto:ejohnson@mt.gov), no later than 5:00 p.m., July 8, 2011. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

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

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

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

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

/s/ David Rusoff  
DAVID RUSOFF  
Rule Reviewer

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

Certified to the Secretary of State, May 16, 2011.

BEFORE THE DEPARTMENT OF CORRECTIONS  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 20.9.302, 20.9.306, 20.9.308, ) PROPOSED AMENDMENT  
20.9.311, 20.9.315, and 20.9.320 )  
pertaining to youth who have been )  
paroled from youth correctional )  
facilities )

TO: All Concerned Persons

1. On June 28, 2011, at 10:30 a.m., the Department of Corrections will hold a public hearing in Room 4-65 of 5 South Last Chance Gulch, at Helena, Montana, 59620, to consider the proposed amendment 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 5:00 p.m. on June 22, 2011, to advise us of the nature of the accommodation that you need. Please contact Serenity Osborn, Department of Corrections, 5 South Last Chance Gulch, at Helena, Montana, 59620; telephone (406) 444-9609; fax (406) 444-0522; or e-mail [SOsborn@mt.gov](mailto:SOsborn@mt.gov).

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

20.9.302 PAROLE AGREEMENT VIOLATION, INITIAL INVESTIGATION, AND DETAINER (1) remains the same.

(2) The parole officer must immediately investigate to determine whether the allegations constitute a violation of the written parole agreement. If, on the basis of the investigation, the parole officer concludes that the allegations do not constitute a violation of the written parole agreement ~~or do not warrant return of the youth to a secure placement facility~~, the officer shall dismiss the allegations and immediately cause the youth to be released from detention.

(a) through (5) remain the same.

AUTH: 52-5-102, 52-5-129, MCA

IMP: 52-5-102, 52-5-126, 52-5-127, 52-5-128, 52-5-129, MCA

STATEMENT OF REASONABLE NECESSITY: The department proposes to amend ARM 20.9.302 to clarify that if the parole officer determines that the youth did not violate the written parole agreement the parole officer must dismiss the allegations and release the youth from detention.

20.9.306 SCHEDULING AND NOTICE OF HEARING (1) remains the same.

(2) As soon as possible after the alleged violation, and at least ~~72~~ 24 hours prior to the hearing, the parole officer shall serve the youth with the forms approved by the ~~juvenile corrections~~ Youth Services ~~d~~Division which include written notice of the time, date, location of the hearing, and the alleged violation of the parole agreement.

AUTH: 52-5-102, 52-5-129, MCA

IMP: 52-5-102, 52-5-126, 52-5-127, 52-5-128, 52-5-129, MCA

STATEMENT OF REASONABLE NECESSITY: The department proposes to amend ARM 20.9.306 to reduce the amount of time a youth must stay in detention before the youth has a hearing and to reflect change in name of the division.

20.9.308 HEARING PROCEDURES (1) through (4) remain the same.

(5) The hearing shall be conducted informally. The hearings officer must ~~tape~~ record the hearing and establish for the record the identity of persons present and that the youth received prior written notice of:

(a) through (6) remain the same.

(7) The hearings officer must review the evidence submitted by both parties and if, by a preponderance of the evidence, the hearings officer finds that the youth committed the alleged violation, the hearings officer must decide if the youth's placement is to be returned to a youth correctional facility or if the hearings officer recommends the youth be placed in a community placement. The hearings officer may consider mitigating or aggravating circumstances in reaching the decision.

(8) remains the same.

(9) The hearings officer shall attach to the final decision, an appeal form approved by the ~~juvenile corrections~~ Youth Services ~~d~~Division containing information regarding the appeal process of the hearings officer's decision.

AUTH: 52-5-102, 52-5-129, MCA

IMP: 52-5-102, 52-5-126, 52-5-127, 52-5-128, 52-5-129, MCA

STATEMENT OF REASONABLE NECESSITY: Changes are necessary to allow the hearings officer flexibility relative to recording the hearing. The amendments also reflect that a hearings officer does not have all the resources at hand to decide a youth's placement in the community. The hearings officer can recommend a community placement, but the actual placement involves a process of application, funding approval, and acceptance by a facility. The process must include juvenile parole officers, bureau chief approval, and acceptance by the community facility in question. The name of the division was changed from juvenile corrections to Youth Services.

20.9.311 APPEAL (1) The youth may appeal the hearings officer's decision to the department director by submitting a notice of appeal and any additional information within five days of the hearing. Upon request of the youth to the department, the youth may receive a ~~written transcript~~ copy of the recording of the

hearing. The director or director's designee shall review the record and grant or deny the appeal within five days of receipt of the appeal.

(2) ~~Within one business day of~~ As soon as possible following receipt of request for a copy of the recording of the hearing transcript, the hearings officer shall ~~cause a transcription~~ provide copies of the hearing tape recording to be made and submitted to the youth and to the department director.

(3) and (4) remain the same.

AUTH: 52-5-102, 52-5-129, MCA

IMP: 52-5-102, 52-5-126, 52-5-127, 52-5-128, 52-5-129, MCA

STATEMENT OF REASONABLE NECESSITY: The department proposes to amend ARM 20.9.311 to delete the necessity to provide a written transcript of the hearing and to lengthen the amount of time in which the department must provide a recording to the youth and department director. The department does not have the resources to provide written transcription of the hearing, and cannot provide a recording within one business day of the hearing.

20.9.315 WAIVER OF RIGHT TO HEARING (1) At any time prior to the hearing, the youth may, upon the advice of an attorney, waive his/her right to the hearing on a form provided by the ~~juvenile corrections~~ Youth Services ~~Division~~ for that purpose. A waiver of the hearing constitutes an admission by the youth of the alleged violations and authorizes the ~~youth's parole~~ hearings officer to render a decision on the youth's placement in a youth correctional facility or in the community. A youth not represented by an attorney may not waive the right to a hearing.

AUTH: 52-5-102, 52-5-129, MCA

IMP: 52-5-102, 52-5-126, 52-5-127, 52-5-128, 52-5-129, MCA

STATEMENT OF REASONABLE NECESSITY: Changes are necessary to reflect change in name of the division, to clarify that the hearings officer makes the decision about placement even if the youth waives the hearing, and to make the rule gender neutral.

20.9.320 FAILURE TO APPEAR FOR HEARING (1) If a youth released pending hearing fails to appear for the hearing, the parole office shall issue a ~~warrant for the youth's arrest~~ certificate to detain the youth. The department shall schedule and hold a hearing within 72 hours of the youth's arrest.

AUTH: 52-5-102, 52-5-129, MCA

IMP: 52-5-102, 52-5-126, 52-5-127, 52-5-128, 52-5-129, MCA

STATEMENT OF REASONABLE NECESSITY: The department proposes to amend ARM 20.9.320 to clarify that youth parole officers issue a certificate to detain a youth; they do not issue arrest warrants for youth.

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: Serenity Osborn, Department of Corrections, 5 South Last Chance Gulch, at Helena, Montana, 59620; telephone (406) 444-9609; fax (406) 444-0522; or e-mail [SOsborn@mt.gov](mailto:SOsborn@mt.gov), and must be received no later than 5:00 p.m., July 5, 2011.

5. Diana L. 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, do not apply.

/s/ Diana L. Koch  
Diana L. Koch  
Rule Reviewer

/s/ Mike Ferriter  
Mike Ferriter  
Director  
Department of Corrections

Certified to the Secretary of State May 16, 2011.

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

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 24.101.413 renewal dates and ) PROPOSED AMENDMENT  
requirements and 24.121.401 fees )

TO: All Concerned Persons

1. On June 16, 2011, at 1:00 p.m., a public hearing will be held in room 439, 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 Board of Barbers and Cosmetologists (board) no later than 5:00 p.m., on June 10, 2011, to advise us of the nature of the accommodation that you need. Please contact Shane Younger, Board of Barbers and Cosmetologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2335; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2309; e-mail dlibsdcos@mt.gov.

3. The department is proposing to amend the following rule. The rule proposed to be amended provides as follows, stricken matter interlined, new matter underlined:

24.101.413 RENEWAL DATES AND REQUIREMENTS (1) through (5)(d) remain the same.

(e)	Barbers and Cosmetologists	Barber	Biennially	<del>December 31</del> <u>March 1</u>
		Barber Shop	Annually	July 1
		Barber School or College	Annually	<del>December 31</del> <u>March 1</u>
		Barbering Instructor	Biennially	<del>December 31</del> <u>March 1</u>
		Booth Rental	Annually	July 1
		Cosmetologist	Biennially	<del>December 31</del> <u>March 1</u>
		Electrologist	Biennially	<del>December 31</del> <u>March 1</u>
		Esthetician	Biennially	<del>December 31</del> <u>March 1</u>
		Instructor	Biennially	<del>December 31</del> <u>March 1</u>
		Manicurist	Biennially	<del>December 31</del> <u>March 1</u>
		Salon	Annually	July 1
		School or Course	Annually	<del>December 31</del> <u>March 1</u>

(f) through (7) remain the same.

AUTH: 37-1-101, 37-1-141, MCA

IMP: 37-1-101, 37-1-141, MCA

REASON: The department is amending this rule to change the renewal dates for all personal operator licenses, instructor licenses, and school licenses to March 1. Licensees have historically expressed concern that they have to renew these licenses during the holiday season. Additionally, shifting these renewals will ease the demand on equipment and administrative staff as a majority of the large licensing boards currently renew at the end of the year.

4. The board is proposing to amend the following rule. The rule proposed to be amended provides as follows, stricken matter interlined, new matter underlined:

<u>24.121.401 FEES</u> (1) Original and renewal license to practice	\$ <del>60</del> <u>80</u>
(2) Original and renewal active instructor license	<del>75</del> <u>95</u>
(3) Original and renewal inactive instructor license	<del>65</del> <u>85</u>
(4) Original and renewal school license	<del>200</del> <u>220</u>
(5) Additional courses within a cosmetology school	<del>50</del> <u>70</u>
(6) remains the same.	
(7) Original and renewal salon or shop license	<del>65</del> <u>85</u>
(8) remains the same.	
(9) Original and renewal booth rental license	<del>55</del> <u>75</u>
(10) through (19) remain the same.	

AUTH: 37-1-131, 37-1-134, 37-31-203, MCA

IMP: 37-1-134, 37-1-141, 37-31-302, 37-31-304, 37-31-305, 37-31-311, 37-31-312, 37-31-323, MCA

REASON: The board has determined it is reasonably necessary to increase original and renewal licensure fees to comply with the provisions of 37-1-134, MCA, and keep the board's fees commensurate with program costs. In providing administrative services to the board, the department has determined that unless licensure fees are increased as proposed, the board will have a shortage of operating funds by fiscal year 2012. The board estimates that the proposed fee increases will affect approximately 9,137 applicants and licensees and will result in \$182,740 in additional annual revenue.

Both the department and the board continually seek and implement ways to reduce costs associated with board functions, including a shift to using electronic board books and holding some board meetings by telephone conference.

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 Barbers and Cosmetologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2309, or by e-mail to [dlibsdcos@mt.gov](mailto:dlibsdcos@mt.gov), and must be received no later than 5:00 p.m., June 24, 2011.



6. An electronic copy of this Notice of Public Hearing is available through the department and board's site on the World Wide Web at [www.cosmetology.mt.gov](http://www.cosmetology.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 Barbers and Cosmetologists, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; faxed to the office at (406) 841-2309; e-mailed to [dlibsdcos@mt.gov](mailto:dlibsdcos@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 BARBERS AND  
COSMETOLOGISTS  
WENDELL PETERSEN, CHAIRPERSON

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

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

Certified to the Secretary of State May 16, 2011

BEFORE THE BOARD OF REALTY REGULATION  
DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 24.210.667 continuing real ) PROPOSED AMENDMENT  
estate education and 24.210.835 )  
continuing property management )  
education )

TO: All Concerned Persons

1. On June 16, 2011, at 9:00 a.m., a public hearing will be held in room 439, 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 Board of Realty Regulation (board) no later than 5:00 p.m., on June 10, 2011, to advise us of the nature of the accommodation that you need. Please contact Barb McAlmond, Board of Realty Regulation, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2325; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2323; e-mail dlibsdrre@mt.gov.

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

24.210.667 CONTINUING REAL ESTATE EDUCATION (1) Each active licensee is required to annually complete a minimum of 12 hours of continuing real estate education every year ~~board-mandated core education course of a length established by the board every year. The board-mandated core education does not apply to meeting the continuing education requirement provided for in (2), except as provided in (18) and (19).~~

(2) In addition to the board-mandated core education course, each active licensee is required to complete a minimum of 12 hours of continuing real estate education every year.

(3) A licensee must complete the board-mandated core education course that contributes to the professional competency of the licensee in their real estate practice.

(2) through (16) remain the same, but are renumbered (4) through (18).

(19) A licensee completing board-mandated core education courses beyond the core course completed for professional competency required in (3), may apply one course toward meeting current continuing education requirements. The core course completion certificate(s) must be provided to the board office in order to receive continuing education credit.

(20) A licensee with both a real estate and property management license must complete both board-mandated core education courses, but may apply one course toward meeting the current continuing education requirement by providing the core course completion certificate(s) to the board office.

AUTH: 37-1-131, 37-1-136, 37-1-319, 37-51-203, MCA

IMP: 37-1-131, 37-1-141, 37-1-306, 37-1-319, 37-51-202, 37-51-204, MCA

REASON: The board determined it is reasonably necessary to amend ARM 24.210.667 and 24.210.835 and require each licensee to annually complete a mandatory core update course. The amendment specifies that licensees will be required to complete the core update course in addition to the 12 hours required in (2), and completion of the core course will not fulfill the mandatory or elective requirements for continuing education (CE). The board anticipates that two different core courses will be developed and offered, one emphasizing property management issues and one emphasizing real estate issues.

Licensees will be responsible to select the course that best contributes to professionalism in their area of practice. Since real estate licensees may also perform property management duties, their scope of work may require them to complete the property management core course if the licensee believes it is the core course that best contributes to the licensee's professionalism. The board is also amending these rules to clarify that a licensee who completes both mandatory core courses could use one course to meet their 12-hour CE requirement.

The core course requirement is being proposed at the recommendation of a board-created task force following a determination that licensees were not receiving updated or "hot topic" information in a timely manner, and that licensees did not understand the ramifications of recent court decisions. The task force recommended that the board require completion of a core course that would timely provide such information and education to all active licensees and that will change annually to provide current updates on new issues year after year.

Authority and implementation cites are being amended to accurately reflect all statutes implemented through the rules and provide the complete sources of the board's rulemaking authority.

#### 24.210.835 CONTINUING PROPERTY MANAGEMENT EDUCATION

(1) Each active licensee is required to annually complete a minimum of 12 hours of board-approved continuing property management education every year board-mandated core education course of the length established by the board every year. The board-mandated core education does not apply to meeting the continuing education requirement provided for in (2), except as provided in (17) and (18).

(2) In addition to the board-mandated core education course, each active licensee is required to complete a minimum of 12 hours of board-approved continuing property management education every year.

(3) A licensee must complete the board-mandated core education course that contributes to the professional competency of the licensee in their property management practice.

(2) through (14) remain the same, but are renumbered (4) through (16).

(17) A licensee completing board-mandated core education courses beyond the core course completed for professional competency required in (3), may apply one course toward meeting current continuing education requirements. The core course completion certificate(s) must be provided to the board office in order to receive continuing education credit.

(18) A licensee with both a real estate and property management license must complete both board-mandated core education courses, but may apply one course toward meeting the current continuing education requirement by providing the core course completion certificate(s) to the board office.

AUTH: 37-1-131, 37-1-136, 37-1-319, 37-51-203, MCA

IMP: 37-1-131, 37-1-141, 37-1-306, 37-1-319, 37-51-202, 37-51-204, 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 Board of Realty Regulation, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2323, or by e-mail to [dlibsdrre@mt.gov](mailto:dlibsdrre@mt.gov), and must be received no later than 5:00 p.m., June 24, 2011.

5. An electronic copy of this Notice of Public Hearing is available through the department and board's site on the World Wide Web at [www.realestate.mt.gov](http://www.realestate.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 Realty Regulation, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; faxed to the office at (406) 841-2323; e-mailed to [dlibsdrre@mt.gov](mailto:dlibsdrre@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. Barb McAlmond, program manager, has been designated to preside over and conduct this hearing.

BOARD OF REALTY REGULATION  
CINDY WILLIS, 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 May 16, 2011

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

In the matter of the adoption of New                     )  
Rules I through V regarding oil and gas                )  
well stimulation    )

NOTICE OF PUBLIC HEARING  
ON PROPOSED ADOPTION

To: All Concerned Persons

1. On June 15, 2011, at 10:00 a.m., the Department of Natural Resources and Conservation will hold a public hearing in the Richland County Fairgrounds Commercial Building, 2118 West Holly Street, Sidney, Montana, to consider the proposed 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 June 8, 2011, to advise us of the nature of the accommodation that you need. Please contact Tom Richmond, Board of Oil and Gas Conservation, 2535 St. Johns Avenue, Billings, MT 59102; telephone (406) 656-0040; fax (406) 655-6015; e-mail [FracComments@mt.gov](mailto:FracComments@mt.gov).

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

NEW RULE I WELL STIMULATION ACTIVITIES COVERED BY DRILLING PERMIT (1) Well completions which include hydraulic fracturing, acidizing, or other chemical stimulation done to complete a well are considered permitted activities under the drilling permit for that well only if the processes, anticipated volumes, and types of materials planned for use are expressly described in the permit application for that well.

(2) For wildcat or exploratory wells or when the operator is unable to determine that hydraulic fracturing, acidizing, or other chemical treatment will be done to complete the well, the operator must obtain prior written approval of such activities from the board's staff at any time prior to commencing such activities provided that:

(a) the written information describing the fracturing, acidizing, or other chemical treatment must be provided to the board's staff at least 24 hours before commencement of well stimulation activities.

(3) For the purpose of this section, an adequate description of the proposed well stimulation includes:

- (a) the estimated total volume of treatment to be used;
- (b) the trade name or generic name;
- (c) amount or volume of the principle components such as viscosifiers, acids, or gelling agents;

(d) the weight or volume of inert substances such as proppants and other substances injected to aid in well cleanup, either for each stage of a multistage job or for the total job; and

(e) the anticipated surface treating pressure and the maximum anticipated treating pressure. The owner, operator, or service company may provide:

(i) a copy of a final design of well treatment actually used for similar wells and which reflects the likely design for the well to be permitted; or

(ii) a prefiled generic design submitted for specific geologic formations, geographic areas, or well types likely to be used in a particular well.

AUTH: 82-11-111, MCA

IMP: 82-11-111, 82-11-122, MCA

#### NEW RULE II DISCLOSURE OF WELL STIMULATION FLUIDS

(1) The owner or operator of a well shall provide the board, on its Form No. 4 for a new well or Form No. 2 for an existing well:

(a) a description of the interval(s) or formation treated;

(b) the type of treatment pumped (acid, chemical, fracture stimulation); and

(c) the amount and type(s) of material pumped and the rates and maximum pressure during treatment.

(2) For hydraulic fracturing treatments the amount and type of material used must include:

(a) a description of the stimulation fluid identified by additive type (e.g. acid, biocide, breaker, brine, corrosion inhibitor, crosslinker, demulsifier, friction reducer, gel, iron control, oxygen scavenger, pH adjusting agent, proppant, scale inhibitor, surfactant); and

(b) the chemical compound name and the Chemical Abstracts Service (CAS) Registry number, as published by the Chemical Abstracts Service, a division of the American Chemical Society ([www.cas.org](http://www.cas.org)), for each constituent of the additive used. The rate or concentration for each additive shall be provided in appropriate measurement units (pounds per gallon, gallons per thousand gallons, percent by weight or percent by volume, or parts per million).

(3) The owner or operator may submit the service contractor's job log, final treatment report (without any cost/pricing data), or an owner or operator representative's well treatment job log or other report providing the above required information.

(4) The administrator may waive all or a portion of (2) or (3) of this rule if:

(a) the owner or operator demonstrates that it has provided information to the Interstate Oil and Gas Compact Commission/Groundwater Protection Council hydraulic fracturing web site; or

(b) other Internet information repositories that can be accessed by the public.

AUTH: 82-11-111, MCA

IMP: 82-11-111, MCA

#### NEW RULE III PROPRIETARY CHEMICALS AND TRADE SECRETS

(1) As provided in 82-11-117, MCA, where the use or composition of a chemical product is unique to the owner or operator or service contractor and would, if disclosed, reveal methods or processes entitled to protection as trade secrets such a chemical need not be disclosed to the board or staff. The owner, operator, or service contractor may identify the trade secret chemical or product by trade name, inventory name, or other unique name and the quantity of such constituent(s) used.

(2) If necessary to respond to a spill or release of a trade secret product the owner, operator, or service contractor must provide to the board or staff, upon request, a list of the chemical constituents contained in a trade secret product. The administrator may request information be provided orally or be provided directly to a laboratory or other third party performing analysis for the board.

(3) The owner, operator, or service contractor must also provide the chemical constituents of a trade secret product to a health professional who provides a written statement that knowledge of the chemical constituents of such product is needed for purposes of diagnosis or treatment of an individual and the individual being diagnosed or treated may have been exposed to the chemical concerned. The health professional may not use the information for purposes other than the health needs asserted in the statement of need, and may be required to execute a nondisclosure agreement.

(4) Where a health professional determines that a medical emergency exists and the chemical constituents of a trade secret product are necessary for emergency treatment, the owner, operator, or service contractor shall immediately disclose the chemical constituents of a product to that health professional upon a verbal acknowledgement by the health professional that such information shall not be used for purposes other than the health needs asserted and that the health professional shall otherwise maintain the information as confidential. The owner or operator or service contractor may request a written statement of need, and a confidentiality agreement from a health professional as soon as circumstances permit.

AUTH: 82-11-111, MCA

IMP: 82-11-111, MCA

#### NEW RULE IV SAFETY AND WELL CONTROL REQUIREMENTS –

HYDRAULIC FRACTURING (1) New and existing wells which will be stimulated by hydraulic fracturing must demonstrate mechanical integrity.

(2) Prior to initiation of fracture stimulation, production casing or intermediate casing must be tested to the maximum anticipated treating pressure in the unsupported (uncemented) portion of the casing exposed to treating pressure. If the casing fails the pressure test it must be repaired or the operator must use a temporary casing string (fracturing string).

(a) A fracturing string must be stung into a liner or run on a packer set not less than 100 feet below the cement top of the production or intermediate casing and must be tested to not less than maximum anticipated treating pressure minus the annulus pressure applied between the fracturing string and the production or immediate casing.



(3) A casing pressure test will be considered successful if the pressure applied has been held for 15 minutes with no more than five percent pressure loss.

(4) A pressure relief valve(s) must be installed on the treating lines between pumps and wellhead to limit the line pressure to the test pressure determined above.

(5) The surface casing valve must remain open while hydraulic fracturing operations are in progress; the annular space between the fracturing string and the intermediate or production casing must be monitored and may be pressurized to a pressure not to exceed the pressure rating of the lowest rated component that would be exposed to pressure should the fracturing string fail.

AUTH: 82-11-111, MCA

IMP: 82-11-111, MCA

NEW RULE V WORK-OVER, RECOMPLETION, WELL STIMULATION – NOTICE AND APPROVAL (1) No well may be reperforated, recompleted, reworked, chemically stimulated, or hydraulically fractured without first notifying the board on Form No. 2 and receiving approval from the administrator or other authorized representative of the board. Within 30 days following completion of the well work, a subsequent report of the actual work performed must be submitted on Form No. 2.

(2) Well repairs, including tubing, pump, sucker rod replacement or repair, repairs and reconfiguration of well equipment which do not substantially change the mechanical configuration of the well bore or casing do not require prior approval or a subsequent report. Acid and chemical treatments of less than 5000 gallons, hot oil treatments, and similar treatments intended to clean perforations, remove scale or paraffin, or remedy near-well bore damage do not require prior approval.

AUTH: 82-11-111, MCA

IMP: 82-11-111, MCA

REASONABLE NECESSITY: New Rules I through V are reasonably necessary in order to address safety issues associated with techniques used for oil and gas well completions. These techniques include hydraulic fracturing, which has become more prevalent throughout the United States in recent years. The implementation of these rules will allow the Board of Oil and Gas Conservation to specifically address reporting regulations that will be applied to well completion methods in conjunction with other oil and gas rules.

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 Tom Richmond, Department of Natural Resources and Conservation, 2535 St. Johns Avenue, Billings, MT 59102; telephone (406) 656-0040; fax (406) 655-6015; e-mail [FracComments@mt.gov](mailto:FracComments@mt.gov), and must be received no later than 5:00 p.m. on June 23, 2011.

5. Norman Peterson, Department of Justice Agency Legal Services, has been designated to preside over and conduct the public hearing.

6. An electronic copy of this Notice of Public Hearing on Proposed 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 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.

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 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 sent 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. 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/ Tommy Butler

TOMMY BUTLER

Rule Reviewer

/s/ Terri Perrigo

TERRI PERRIGO

Executive Secretary

Board of Oil and Gas Conservation

Certified to the Secretary of State on May 16, 2011.

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 XIII pertaining to the ) PROPOSED ADOPTION  
Montana Medicaid Provider Incentive )  
Program for electronic healthcare )  
records )

TO: All Concerned Persons

1. On June 15, 2011, at 10:00 a.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 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 June 6, 2011, 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 provides as follows:

NEW RULE I PURPOSE (1) The rules in this chapter implement the Montana Medicaid Provider Incentive Program (MMPIP). The purpose of the program is to provide incentive payments to eligible health care and hospital providers to adopt, implement, or upgrade certified electronic health record (EHR) technology and demonstrate the meaningful use of such technology. This incentive program is designed to encourage eligible health care providers to improve health information technology capabilities and accelerate the use of EHRs in meaningful ways to help Montana improve the quality, safety, and efficiency of patient health care.

AUTH: 53-6-113, MCA

IMP: 53-6-111, MCA

NEW RULE II DEFINITIONS For purposes of the Montana Medicaid Provider Incentive Program (MMPIP), the following definitions apply:

(1) "Act" means the Health Information Technology for Economic and Clinical Health Act or "HITECH" Title XIII of Division A and Title IV of Division B of the

American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5 (2009).

(2) "Electronic Health Records" (EHR) means a systematic collection of electronic health information about individual patients or populations. For the purposes of these rules, the term "EHR" will refer to an electronic health record information system that is certified by the Certification Commission for Health Information Technology and therefore qualifies for the Montana Medicaid Provider Incentive Program.

(3) "Eligible hospital" (EH) means an acute care hospital (including critical access hospitals and cancer hospitals) with at least 10% Medicaid patient volume and a children's hospital with no Medicaid patient volume requirements. An EH must have a Centers for Medicare and Medicaid (CMS) Certification Number with the last four digits in the series 0001-0879 as defined in 42 CFR 495.302 (2011).

(4) "Eligible hospital patient volume encounter" means the services rendered during one day by an eligible hospital to individuals, per inpatient discharges, or in an emergency department, for which Medicaid, or a Medicaid demonstration projection under 42 USC 1315 (2011), paid all or part of the fee or paid all or part of the individual's premiums, copayments, and/or cost-sharing.

(5) "Eligible provider" (EP) means a physician, dentist, nurse practitioner, certified nurse midwife, physician assistant practicing at a federally qualified health center (FQHC) or rural health clinic (RHC) so led by a physician assistant, critical access hospital, or acute care hospital.

(6) "Eligible provider patient volume encounter" means services rendered during one day by an eligible provider to individuals for which Medicaid, or a Medicaid demonstration project under 42 USC 1315 (2011), paid part or all of the fee or paid all or part of the individual's premiums, copayments, and/or cost-sharing.

(7) "Encounter" means a face-to-face meeting between a patient and health care provider taking place on any one day and at a single location.

(8) "Federally qualifying health clinics" (FQHC) means an entity defined at 42 USC 1395x(aa)(3) and 42 USC 1395y(aa)(3). This includes an outpatient health program or facility operated by a tribe or tribal organization receiving funds under Title V of the Indian Health Care Improvement Act for the provision of primary health services. In considering this definition, it should be noted that programs meeting FQHC requirements commonly include the following (but must be certified and meet all requirements stated above):

- (a) Community Health Centers;
- (b) Migrant Health Centers;
- (c) Healthcare for the Homeless Programs;
- (d) Public Housing Primary Care Programs;
- (e) Federally Qualified Health Center Look-Alikes; and
- (f) Tribal Health Centers.

(9) "Meaningful use" means the use of a certified EHR in a meaningful manner. Examples of meaningful use include: e-Prescribing, the use of certified EHR technology for electronic exchange of health information to improve quality of health care, and the use of certified EHR technology to submit clinical quality or other measures.

(10) "Montana Medicaid fiscal agent" means a contractor hired by the Department of Public Health and Human Services to provide a variety of services associated with the operation of the state Medicaid Program including claims processing, provider services, and other functionality.

(11) "Montana Medicaid Management Information System" (MMIS) means an automated system used by the department to administer various aspects of the Montana Medicaid Program, including claims processing and payment.

(12) "National Level Repository" (NLR) means a new record system authorized by provisions of the American Recovery and Reinvestment Act of 2009 (ARRA) (P.L. 111-5) and designed to collect, maintain, and process information that is required for the Medicaid EHR Incentive Program.

(13) "Needy individual patient volume encounter" means:

(a) a patient for whom Medicaid, Healthy Montana Kids (HMK) Plan, or a demonstration project under 42 USC 1315(2011), paid for part or all of the services or paid all or part of the individual's premiums, copayments, and/or cost sharing; or

(b) services rendered to an individual on any one day on a sliding scale or that were uncompensated.

(14) "Program" means the Montana Medicaid Provider Incentive Program (MMIP).

(15) "Rural Health Clinic (RHC) means a clinic that is certified under 42 USC 1935x(aa)(2) to provide care in underserved areas, and therefore, to receive cost-based Medicare and Medicaid reimbursements.

AUTH: 53-6-113, MCA

IMP: 53-6-111, MCA

#### NEW RULE III ELIGIBLE PROVIDER REGISTRATION WITH CENTERS FOR MEDICARE AND MEDICAID (CMS) NATIONAL LEVEL REPOSITORY (NLR)

(1) Medicaid Eligible Providers (EPs) and Eligible Hospitals (EHs) that choose to participate in the MMIP, will register through the Centers for Medicare and Medicaid (CMS) National Level Repository (NLR) indicating the program (Medicare or Medicaid) and the state selected. EPs may choose to participate in either the Medicare incentive program or a state Medicaid Incentive Program, but not both. EHs may participate in both the Medicare and Medicaid Incentive Programs. The department will use the NLR system to confirm provider eligibility and prevent duplication of payments. CMS will notify the department electronically of EPs and EHs who are electing to participate in MMIP.

AUTH: 53-6-113, MCA

IMP: 53-6-111, MCA

NEW RULE IV ELIGIBLE PROVIDER AND ELIGIBLE HOSPITAL ELIGIBILITY VERIFICATION BY DPHHS (1) The following information will be verified by the department upon receipt of notification from the CMS that a Montana EP enrolled:

(a) the EP has no sanctions preventing participation;

(b) the EP is alive;

- (c) the EP is not hospital-based;
- (d) the EP is an eligible provider type (e.g., physician, dentist, nurse practitioner, certified nurse midwife, physician assistant practicing in a FQHC or RHC led by a physician assistant, critical access hospital, or acute care hospital);
- (e) the EP is appropriately licensed by the state of Montana; and
- (f) the EP is listed on the NLR correctly.

(2) Montana Medicaid will verify eligibility through the Montana Medicaid Management Information System (MMIS). If the provider is listed in the MMIS in an active status, the Montana Medicaid Fiscal Agent has already completed the verification for licensure, sanctions, and death.

(3) An EP must be actively enrolled in Medicaid in order to apply for the MMPIP program. If the provider is not listed as active in the MMIS, the provider must enroll, or clarify enrollment status with the Montana Medicaid Fiscal Agent prior to continuing registration in the MMPIP program.

(4) For an EP to qualify as "not hospital-based" at least 10% of his or her services must be performed somewhere other than a hospital. To verify that the EP is not hospital-based, Montana Medicaid will use Medicaid claims information from the MMIS and apply the formula in (a).

(a) (Paid Claims with Place Of Service (POS) codes 21 and 23) divided by (Total Paid Claims for all Services). A resulting value less than 90% qualifies.

(b) Prior to remittance of any incentive payment by the department, the EP must attest his or her hospital-based services are less than 90%.

AUTH: 53-6-113, MCA

IMP: 53-6-111, MCA

NEW RULE V ELIGIBLE HOSPITAL ELIGIBILITY VERIFICATION BY DPHHS

(1) The following information will be verified by the department upon receipt of notification from the CMS NLR that a Montana EH enrolled:

- (a) the EH has no sanctions preventing participation;
- (b) the EH is appropriately licensed by the state of Montana;
- (c) the provider is listed on the NLR correctly;
- (d) the EH has a 10% Medicaid patient volume; and
- (e) the EH is an eligible provider type (e.g., acute care hospital including critical access hospitals, cancer hospital, or children's hospital).

(2) Montana Medicaid will verify eligibility through the Montana Medicaid Management Information System (MMIS). If the EH is listed in the MMIS in an "active" status, the Montana Medicaid fiscal agent has already completed the verification for licensure and sanctions.

(3) An EH must be actively enrolled in Medicaid in order to apply for the MMPIP program. If an EH wants to participate in MMPIP but is not listed as active in the MMIS, the provider must enroll, or clarify enrollment status with the Montana Medicaid fiscal agent, prior to continuing registration in the MMPIP program.

AUTH: 53-6-113, MCA

IMP: 53-6-111, MCA

NEW RULE VI REGISTRATION, ATTESTATIONS AND CERTIFICATION

(1) Upon receipt of notification from the CMS NLR of a Montana EP or EH registration, the department will accept the provider's request to register for the department's MMPIP program via secure web portal application.

(2) An EP must attest to qualifying patient volume threshold calculation as specified by 42 CFR 495.306 (2011), calculated as follows: (Total Medicaid (or needy individuals) Patient Encounters in any 90-day period in the review calendar Year) divided by (All Patient Encounters over the Same Period). Provider will submit the timeframe for the 90-day time period selected for the patient encounters measure, identify the source the information was obtained from, and submit the numerator and denominator with the resulting percentage for the Medicaid and/or needy patient volume.

(a) For all EPs except pediatricians, the minimum patient volume threshold is 30%. For pediatrician EPs, the minimum patient volume threshold is 20%.

(b) Group practices or clinics (GP/C) will be permitted to calculate patient volume at the GP/C level if all the following requirements are met:

(i) The GP/C patient volume is appropriate as a measure of patient volume for each EP;

(ii) Each EP working in the GP/C accepts Medicaid and/or needy individuals as patients;

(iii) There is an auditable data source to support the GP/C patient volume determination;

(iv) All EPs in GP/C use the same methodology for the payment year;

(v) The GP/C uses the entire practice or clinic's patient volume and does not limit patient volume in any way; and

(vi) If an EP works inside and outside of the GP/C practice, the patient volume calculation only includes patient encounters associated with the clinic or group practice, and not the EP's outside encounters.

(c) EPs practicing at FQHC or RHC must demonstrate that more than 50% of their clinical encounters occurred at an FQHC/RHC over a six-month period and that a minimum of 30% of their patient volume consists of needy individuals. EPs practicing predominantly at FQHC/RHC must provide the clinic location, the needy patient encounters for the location, the EP's total patient encounters, and the resulting percentage. This information must be for an identified six-month period.

(3) An EP or EH will report the amount of nonstate or local funds for an EHR system received that coincides with the payment year being requested, or certify that it has not received nonstate or local funds for EHRs.

AUTH: 53-6-113, MCA

IMP: 53-6-111, MCA

NEW RULE VII REPORTING REQUIREMENTS IN FIRST AND SUBSEQUENT YEARS

(1) For the first year of participation the EP or EH must provide proof of EHR certification as described in [New Rule VIII], identify the system and date and attest to the adoption, implementation, or upgrade of a certified EHR.

(2) During the second and subsequent years of participation an EP must meet 20 of 25 meaningful use objectives as defined in 42 CFR 495.6 (2011) and 42 CFR 495.8.

(3) During the second and subsequent years of participation an EH must meet 19 of 24 meaningful use objectives as defined in 42 CFR 495.6 (2011) and 42 CFR 295.8.

AUTH: 53-6-113, MCA

IMP: 53-6-111, MCA

#### NEW RULE VIII PROOF OF ELECTRONIC HEALTH RECORDS

CERTIFICATION (1) Proof of EHR certification must be filed simultaneously with the provider's or hospital's attestation and certification. The attestation and certification will be verified prior to any payments being made. If a provider omits information necessary to determine eligibility or payment, the provider will be notified that participation in the MMPIP program is denied based on the omission of required information.

AUTH: 53-6-113, MCA

IMP: 53-6-111, MCA

NEW RULE IX COMMUNICATION WITH PROVIDERS (1) Upon notification by the CMS NLR that an EP or EH has applied for the MMPIP, and after initial verification of eligibility, the department will notify the provider of approval or denial of eligibility in the MMPIP program. All notifications regarding continued eligibility, payment, or other notifications will be done electronically.

AUTH: 53-6-113, MCA

IMP: 53-6-111, MCA

NEW RULE X APPLICATION FOR PAYMENTS BY AN ELIGIBLE PROVIDER OR ELIGIBLE HOSPITAL (1) An EP qualifying to receive payment must submit the following provider identification information:

- (a) name;
- (b) National Provider Identification Number (NPI);
- (c) business address and phone number; and
- (d) Taxpayer Identification Number (TIN).

(2) In addition to the information in (1), an EP practicing outside of a FQHC or RHC must certify or attest that:

- (a) the EP is using a certified electronic health record;
- (b) the EP meets the meaningful use requirement;
- (c) the EP meets applicable patient volume thresholds and identifies the 90-day continuous reporting period of the previous calendar year;
- (d) the EP furnished less than 90% of covered services in "place of service" codes 21 Inpatient, and 23 Emergency Room;



(e) in the first payment year, the EP must adopt, implement, upgrade, or demonstrate meaningful use over any continuous 90-day period in a calendar year; and

(f) during the second and subsequent years the EP must attest through submission of defined objectives and clinical quality measures use of the certified EHR.

(3) In addition to (1) an EP practicing in a FQHC or RHC must certify or attest that:

(a) the EP practices predominantly at an FQHC or RHC and that more than 50% of total patient encounters during a six-month period in the most recent calendar year occurred at the FQHC/RHC;

(b) the EP is using a certified EHR;

(c) the EP meets the meaningful use requirements; and

(d) the EP meets the needy patient volume threshold.

(4) An EH qualifying to receive payment must submit the following provider identification information:

(a) name;

(b) CMS Certification Number (CNN);

(c) National Provider Identifier (NPI); and

(d) Hospital Tax Identification Number.

(5) In addition to the information in (4), the EH must attest or certify that:

(a) the hospital is using a certified electronic health record;

(b) the average length of stay for patients at the facility is 25 days or fewer;

and

(c) the hospital meets the 10% Medicaid Patient Volume threshold and identifies the associated 90-day continuous period for the federal fiscal year.

(6) In the first payment year, the EH must adopt, implement, upgrade, or demonstrate meaningful use over any continuous 90-day period in a calendar year.

(7) During the second and subsequent years the EH must attest through submission of defined objectives and clinical qualifying measures use of the certified EHR.

AUTH: 53-6-113, MCA

IMP: 53-6-111, MCA

#### NEW RULE XI ELIGIBLE PROVIDER INCENTIVE PAYMENT SCHEDULE

(1) The department adopts and incorporates by reference the EP incentive payment schedule specified in 42 CFR 495.310 (2011), a copy of which is posted at [www.medicaidprovider.hhs.mt.gov/providerpages/ehrincentives.shtml](http://www.medicaidprovider.hhs.mt.gov/providerpages/ehrincentives.shtml) and may also be obtained by writing DPHHS Director's Office, PO Box 4210, Helena, MT 59604.

(2) Pediatricians who do not meet the 30% threshold, but meet the 20% threshold will receive reduced payments as specified in 42 CFR 495.310 (2011). Also, an EP's payment may be adjusted downward depending on net average allowable costs.

(3) Each year the EP will attest to the receipt of funds from sources other than state or local government to offset the cost of the certified electronic health record. If the EP received funds from other sources, the EP must identify the

calendar year of receipt, the amount, and the source. For the first year, any amount over \$29,000 will reduce the payment by a like amount. For years two through six any amount over \$10,610 will reduce the payment by a like amount.

(4) Assignment of payment - EPs must choose either direct payment or may assign payment to the provider's group practice or clinic. If the EP is a member of a group and chooses to assign the incentive payment to the group, payment will be made to a group consistent with existing MMIS capabilities. If a member of a group chooses to retain the incentive payment, the payment will be made directly to the EP through an existing process in the MMIS. Due to existing MMIS limitations, Montana Medicaid will not make direct incentive payments to any entity (individual, group, or clinic) that is not recognized as a Montana Medicaid provider. For example, EHR system vendors are not recognized as Montana Medicaid providers, and as such cannot be assigned payment.

AUTH: 53-6-113, MCA

IMP: 53-6-111, MCA

#### NEW RULE XII ELIGIBLE HOSPITAL INCENTIVE PAYMENT

CALCULATION (1) Payment of the EH's incentive payment will be made over a four year period with 50% of the amount paid in year one, 30% in year two, 20% in year three, and 10% in year four.

(2) The department adopts and incorporates by reference the formula to calculate an EH's incentive payment amount found in 42 CFR Part 495.310 (2011).

(3) Assignment of payment - a multisite hospital with one CMS certification number is considered one hospital for purposes of calculating payment. Payments will be made to EHS consistent with existing MMIS capabilities. Due to existing MMIS limitations, Montana Medicaid will not make direct incentive payments to any entity that is not recognized as a Montana Medicaid provider.

AUTH: 53-6-113, MCA

IMP: 53-6-111, MCA

NEW RULE XIII DENIALS AND APPEALS (1) A provider participating in the MMPIP and aggrieved by the department's denial of eligibility, incentive payments, demonstration of efforts to adopt, implement, upgrade, or meaningful use of certified EHR technology, may request a fair hearing in accordance with ARM 37.5.310.

AUTH: 53-6-113, MCA

IMP: 53-6-111, MCA

4. Statement of Reasonable Necessity. The Department of Public Health and Human Services (department) is proposing to adopt new rules to implement the Montana Medicaid Provider Incentive Program (MMPIP) to provide incentive payments to eligible health care and hospital providers who adopt, implement, or upgrade certified electronic health record (EHR) technology and demonstrate the meaningful use of such technology.

The Montana Medicaid program is administered by the department to provide health care to Montana's qualified low income and disabled residents. The nation's healthcare system is undergoing a transformation in an effort to improve quality, safety, and efficiency of care through advancements in the adoption, implementation, and upgrade of Electronic Health Record (EHR) technology and the creation of a statewide Healthcare Information Exchange (HIE). To help facilitate this, Congress passed the Health Information Technology for Economic and Clinical Health Act, or the "HITECH Act" that establishes programs under the direction of State Medicaid Agencies to provide incentive payments to qualifying healthcare providers for the "meaningful use" of certified EHR technology.

The Montana Medicaid EHR incentive program will provide incentive payments to eligible professional and hospital providers as they adopt, implement, or upgrade to certified EHR technology, and demonstrate the meaningful use of such technology. This incentive program is designed to encourage providers to improve health information technology capabilities and accelerate the use of EHRs in meaningful ways to help Montana improve the quality, safety, and efficiency of patient health care. The programs begin in 2011 and continue until 2021.

#### New Rule I

This rule is necessary to state the purpose of the MMPIP and assist the reader in understanding this subchapter.

#### New Rule II

This rule is necessary to define the technical terms used in the HITECH and the MMPIP.

#### New Rule III

This rule is necessary to state the requirement for participating providers to enroll in the CMS National Level Repository.

#### New Rule IV

This rule is necessary to state the criteria by which the department will verify that Eligible Provider (EPs) may participate in MMPIP.

#### New Rule V

This new rule is necessary to define the criteria by which the department will verify that Eligible Hospitals (EHs) may participate in MMPIP.

#### New Rule VI

This new rule is necessary to state the registration, attestation, and certification process required for EPs and EHs.

#### New Rule VII

This new rule is necessary to state the reporting requirements for EPs and EHs in the first and subsequent years of participation in the MMPIP.

#### New Rule VIII

This rule is necessary to state the requirement that participating providers must provide proof that the EHR implemented is federally certified.

#### New Rule IX

This rule is necessary to state that the department will notify participating providers regarding the status of their eligibility for the MMPIP.

#### New Rule X

This new rule is necessary to state the process by which participating providers will apply for incentive payments upon receipt of notification of eligibility in the MMPIP.

#### New Rule XI

This new rule is necessary to state the EP incentive payment schedule.

#### New Rule XII

This rule is necessary to state the EH incentive payment schedule.

#### New Rule XIII

This rule is necessary to state the appeal process used by participating providers with respect to the MMPIP.

#### Fiscal Impact

The payments to eligible providers and hospitals under MMPIP will be paid from \$35 million federal funds only that do not require a state match. The state share of the administrative costs over the biennium is \$120,000. Approximately 1,000 eligible providers and hospitals qualify for participation.

5. The department intends the proposed new rules to be applied retroactively to July 1, 2011. There is no negative impact to the enrollee or applicant affected by applying the new rules retroactively.

6. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Kenneth Mordan, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-4094; or e-mail [dphhslegal@mt.gov](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., June 23, 2011.

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

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

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

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

/s/ Geralyn Driscoll  
Rule Reviewer

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

Certified to the Secretary of State May 16, 2011

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

In the matter of the amendment of        ) NOTICE OF PUBLIC HEARING ON  
ARM 37.40.307, 37.40.325,                ) PROPOSED AMENDMENT  
37.40.330, and 37.40.361 pertaining     )  
to nursing facility reimbursement       )

TO: All Concerned Persons

1. On June 15, 2011, at 1:00 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 amendment of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on June 6, 2011 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 amended provide as follows, new matter underlined, deleted matter interlined:

37.40.307 NURSING FACILITY REIMBURSEMENT (1) through (2)(c) remain the same.

(d) The total payment rate available for the period July 1, ~~2010~~ 2011 through June 30, ~~2011~~ 2012 will be the rate as computed in (2), plus any additional amount computed in ARM 37.40.311 and 37.40.361.

(3) Providers who, as of July 1 of the rate year, have not filed with the department a cost report covering a period of at least six months participation in the Medicaid program in a newly constructed facility shall have a rate set at the statewide median price as computed on July 1, ~~2010~~ 2011. Following a change in provider as defined in ARM 37.40.325, the per diem rate for the new provider shall be set at the previous provider's rate, as if no change in provider had occurred.

(4) through (12) remain the same.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-6-101, 53-6-111, 53-6-113, MCA

37.40.325 CHANGE IN PROVIDER DEFINED (1) through (5) remain the same.

(6) Any change in provider, corporate or other business ownership structure, or operation of the facility that results in a change in the National Provider Identifier (NPI) federal tax identification number will require a provider to seek a new Medicaid provider enrollment. If the NPI is transferred with the facility, then only a provider file update is required to change the federal tax identification number and ownership information. A written request must be made to the department if the NPI is transferred with the facility.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, MCA

37.40.330 SEPARATELY BILLABLE ITEMS (1) through (3) remain the same.

(a) If the items listed in (1)(a) through (1)(~~de~~)(ax) are also covered by the Medicare program and provided to a Medicaid recipient who is also a Medicare recipient, reimbursement will be limited to the lower of the Medicare prevailing charge or the amount allowed under (3). Such items may not be billed to the Medicaid program for days of service for which Medicare Part A coverage is in effect.

(b) through (10) remain the same.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, MCA

37.40.361 DIRECT CARE AND ANCILLARY SERVICES WORKERS' WAGE REPORTING/ADDITIONAL PAYMENTS INCLUDING LUMP SUM PAYMENTS FOR DIRECT CARE AND ANCILLARY SERVICES WORKERS' WAGE AND BENEFIT INCREASES (1) Effective for the period July 1, ~~2010~~ 2011 and for the six months thereafter, nursing facilities must report to the department actual hourly wage and benefit rates paid for all direct care and ancillary services workers or the lump sum payment amounts for all direct care and ancillary services workers that will receive the benefit of the increased funds. The reported data shall be used by the department for the purpose of comparing types and rates of payment for comparable services and tracking distribution of direct care wage funds to designated workers.

(2) remains the same.

(a) The department will determine the lump sum payments, twice a year commencing July 1, ~~2010~~ 2011, and again in six months from that date as a pro rata share of appropriated funds allocated for increases in direct care and ancillary services workers' wages and benefits or lump sum payments to direct care and ancillary services workers.

(b) through (3) remain the same.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, MCA

#### 4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (the department) is proposing amendments to ARM 37.40.307, 37.40.325, 37.40.330, and 37.40.361 pertaining to reimbursement for Medicaid nursing facility services. The purpose of the proposed rule amendments is to update and set provider rates to take into consideration the expiration of one-time-only (OTO) funding, direct care wage incentive funding, price-based reimbursement methodology, and intergovernmental fund transfers for State Fiscal Year (SFY) 2012, July 1, 2011 through June 30, 2012.

The department does not have available, at this time, all of the information that will be necessary to establish final payment rates for nursing facility providers effective August 1, 2011. The final rates that will be set will be dependent on the funding levels authorized by the 62nd Legislature, as well as other factors.

The department will provide rate sheets to all providers in advance of the rule hearing for verification purposes and in order to facilitate comments, when final case mix information (CMI) and Medicaid utilization data and other details necessary to compute accurate reimbursement rates become available. These sheets will distribute the funding available in order to meet the department goals for a price-based system of reimbursement and will incorporate legislatively appropriated funding levels.

Reductions to provider rates are expected to occur due to the following reasons:

Provider rates will be reduced due to the expiration of a OTO 2% provider rate increase that was provided in Fiscal Year (FY) 2010 and sustained in 2011 that has not been restored for FY 2012 under House Bill 2 (HB 2) passed by the 62nd Montana Legislature. This reduction is approximately \$2,981,100 of total funding.

#### Changes for Direct Care Wages

Funding provided in FYs 2010 and 2011 for direct care worker wages was funded with OTO money. Consequently, these dollars will no longer be available in FY 2012 to fund direct care worker wages. This will result in a reduction of funding for direct care wages of approximately \$5,729,330 in FY 2012.

A new appropriation of direct care wage funding has been included in HB 2 to provide for a new distribution of funds for direct care/ancillary worker wage or lump sum payment increase for nursing facility providers in FY 2012. This additional funding is estimated at \$3,862,986 and will be distributed in the same manner as the FY 2011 wage funding was distributed.

#### Intergovernmental Transfer Program

The Legislature continued approval for the use of local county matching funds as a source of additional revenue for nursing facility providers through the intergovernmental fund transfer (IGT) program in order to maintain access to, and



the quality of, nursing facility services for FY 2012. This funding will again be available for FY 2012.

#### Specific Changes Being Proposed

For Rate Year 2012, the nursing facility per diem rate will be computed as follows:

1. The Medicaid per diem rates will include two components. The operating component (includes both operating and capital combined), and is the same rate for all nursing facilities and represents 80% of the overall price. The nursing component will be adjusted for individual nursing facility acuity and is 20% of the overall price.
2. Medicaid per diem rates will be established annually each July 1st.
3. The minimum data set (MDS) case mix assessment data will be used in the computation of each facility's resident acuity. Each nursing facility's case mix index (CMI) will be calculated quarterly based upon a set point in time, using the most recent annual or quarterly MDS information. Nonclassifiable MDS assessment will be excluded from the computation of case mix indexes during the transition period. Medicaid case mix for annual rate setting will be based on the most recent four quarter average of Medicaid CMIs for each nursing facility.
4. The new nursing facility rates will be effective August 1, 2011.

#### Provider Rate

Provider rates will be adjusted to remove the 2% OTO provider rate increases from SFY 2010. Funding to sustain this 2010 rate increase was not appropriated by the 2011 Legislature. Updates will be made to incorporate more current CMI using updated MDS data and updated Medicaid utilization information for all nursing facilities.

The department considered whether a rate decrease could cause a cost shift to a more expensive service. The department considered the impact of the rate changes on efficiency, economy, quality of care, and access to Medicaid services and concluded that the rates are still sufficient to meet the requirements of 42 USC 1396a (a) (30(A)).

In evaluating the reductions needed to live within the legislative appropriation, the department considered the alternatives of eliminating covered services and/or decreasing Medicaid eligibility. The department is unable to decrease eligibility for services after March 23, 2010 and be in compliance with the Medicaid maintenance-of-effort (MOE) requirements of the Patient Protection and Affordable Care Act, PL 111-148, Title II, Sections 2001, et seq. Eliminating optional services was considered and rejected because of the impact on vulnerable Medicaid clients who would lose coverage for services. For these reasons, the department is proposing the following provider rate decreases:

### Direct Care Wages

Total funding of approximately \$3,862,986 will be available to provide for a one-time only direct care/ancillary worker wage or lump sum payment increase. This direct care wage increase is for direct care and ancillary staff for the 2012 and 2013 biennium only. This funding will be paid to nursing facilities as a lump sum payment twice a year using the methodology that was adopted in 2010 and 2011. Direct care wage funds can only be used to provide for worker wage or lump sum payment increases. The department will provide the reporting form that will be used by providers in order to receive this additional funding for wages. This form will identify which workers will receive these funds, if these funds will be distributed in the form of a stipend or a bonus, or in the form of a wage increase. These funds are OTO and as such will not be an ongoing reimbursement source after 2013. Providers will need to be aware that any funds put into their wage structure may not be available in future years after this biennium.

### Estimated Financial/Budget Impacts

The total state and federal funding available for FY 2012 for rate calculation purposes is currently projected at \$138,989,286 which is comprised of \$15,667,871 in state special revenue, \$31,324,407 in State General Funds and \$91,997,008 in federal funds. The additional funding of lump sum payments to nursing facilities to support wages for direct care workers and ancillary staff includes \$1,306,076 of state special revenue and \$2,556,910 in federal funds for a total appropriation of \$3,862,986.

The estimated total funding available for FY 2012 for nursing facility reimbursement is estimated at approximately \$171,106,187 of combined state and federal funds, including \$32,116,901 inpatient contributions. These numbers do not include at-risk provider funds or direct care wage incentive funding. Anticipated patient bed days for SFY 2012 are estimated at 1,056,477 using estimates of caseload adopted by the Legislature.

The estimated total funding impact of the one-time payments to "at risk" nonstate governmental providers and other nursing facilities not determined to be "at risk" has been appropriated at \$7,600,089 in total funds of which \$2,569,590 comes from state special revenue funds and approximately \$5,030,499 comes from federal funding sources.

### Persons and Entities Affected

Eighty-one nursing facility providers participated in the Medicaid nursing facility payment program and approximately 4,800 recipients received services in FY 2010 in nursing facilities under Medicaid. These rate reductions will affect all providers.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: 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](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., June 23, 2011.

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

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 5 above or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this proposal notice is available through the 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.

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

/s/ John Koch  
Rule Reviewer

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

Certified to the Secretary of State May 16, 2011.

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

In the matter of the amendment of	)	NOTICE OF PUBLIC HEARING ON
ARM 37.87.1303, 37.87.1305,	)	PROPOSED AMENDMENT AND
37.87.1307, 37.87.1321, and	)	REPEAL
37.87.1333, and the repeal of ARM	)	
37.87.1323, 37.87.1338, 37.87.1339,	)	
37.87.1340, 37.87.1341, 37.87.1342,	)	
37.87.1343, 37.87.1344, 37.87.1345,	)	
and 37.87.1346 pertaining to home	)	
and community-based services for	)	
youth with serious emotional	)	
disturbance (waiver)	)	

TO: All Concerned Persons

1. On June 15, 2011, at 10:00 a.m., the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed 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 June 6, 2011, 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](mailto:dphhslegal@mt.gov).

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

37.87.1303 HOME AND COMMUNITY-BASED SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE: FEDERAL AUTHORIZATION AND AUTHORITY OF STATE TO ADMINISTER PROGRAM (1) through (4) remain the same.

(a) Yellowstone County core site, implementation date of October 1, 2007.

(i) Service areas of Carbon, Stillwater, Musselshell, and Big Horn Counties added to the Yellowstone County core site, implementation date of October 1, 2010.

(b) Missoula and Ravalli Counties core site, implementation date of August 1, 2009.

(c) Cascade County core site, implementation date of October 1, 2010.

(d) Lewis and Clark County core site, with service areas of Jefferson and Broadwater Counties, implementation date of October 1, 2010.

(e) Flathead County core site, implementation date of July 1, 2011.

(5) In the service areas specified in (4)(a) of this rule, no more than 20 a total of 100 youth per waiver year for all core sites service opportunities may be made available enrolled at any given time. In the service area specified in (4)(b) of this rule, no more than 30 service opportunities may be made available at any time. A waiver year begins on October 1st and ends on September 30th.

(a) When a waiting list is established in any of the core sites, the protocol defined in the Psychiatric Residential Treatment Facility Home and Community Based Services Waiver for Youth with Serious Emotional Disturbance Provider Policy Manual dated October 2010 will be used by the department to reallocate unused service opportunities.

(6) remains the same.

AUTH: 53-2-201, 53-6-113, 53-6-402, MCA

IMP: 53-6-402, MCA

37.87.1305 HOME AND COMMUNITY-BASED SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE: ELIGIBILITY FOR PROGRAM

(1) and (2) remain the same.

(3) A youth is eligible to be considered for enrollment in the program if:

(a) the youth is age six through 46 ~~17~~, up to the 47th ~~18th~~ birthday;

(b) the youth is Medicaid eligible;

(c) the youth requires the level of care, as determined through the certificate of need process, for a psychiatric residential treatment facility in accordance with ~~ARM 37.87.1216~~ the Children's Mental Health Bureau Provider Manual and Clinical Guidelines for Utilization Management referenced in ARM 37.87.903;

(d) through (j) remain the same.

AUTH: 53-2-201, 53-6-113, 53-6-402, MCA

IMP: 53-6-402, MCA

37.87.1307 HOME AND COMMUNITY-BASED SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE: LOSS OF A SERVICE AND DISENROLLMENT (1) A service available through the program may be denied to a youth for the following reasons:

(a) the service is not appropriate for the youth;

(b) a service that is a necessary ancillary to the provision of the service is unavailable;

(c) access to the service, even with reasonable accommodation, is precluded by the youth's physical or mental health; or

(d) the financial costs and other impacts on the program due to the delivery of the service to the youth do not conform with the plan of care requirements in ~~proposed ARM 37.87.1323~~ accordance with the Psychiatric Residential Treatment Facility Home and Community Based Services Waiver for Youth with Serious Emotional Disturbance Provider Policy Manual dated October 2010.

(2) A youth enrolled in the program may be terminated from the program by the department for the following reasons:

(a) through (h) remain the same.

(i) the youth no longer requires the level of care of a psychiatric residential treatment facility, as specified in ARM 37.88.1116, in accordance with the Children's Mental Health Bureau Provider Manual and Clinical Guidelines for Utilization Management referenced in ARM 37.87.903 ~~the level of care of a psychiatric residential treatment facility;~~

(j) through (m) remain the same.

AUTH: 53-2-201, 53-6-113, 53-6-402, MCA

IMP: 53-6-402, MCA

37.87.1321 HOME AND COMMUNITY-BASED SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE: THE PROVISION OF SERVICES

(1) and (2) remain the same.

(3) The following services, ~~as defined in these rules~~, defined and incorporated by reference in the Psychiatric Residential Treatment Facility Home and Community Based Services Waiver for Youth with Serious Emotional Disturbance Provider Policy Manual dated October 2010, may be provided through the program:

(a) through (5) remain the same.

AUTH: 53-2-201, 53-6-113, 53-6-402, MCA

IMP: 53-6-402, MCA

37.87.1333 HOME AND COMMUNITY-BASED SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE: REIMBURSEMENT (1) remains the same.

(2) Program services are reimbursed at the lower of the following:

(a) the provider's usual and customary charge for the services; or

(b) the fees stated in Appendix A with an effective date of August 1, 2011 contained in the program's Psychiatric Residential Treatment Facility Home and Community-Based Services Waiver for Youth with Serious Emotional Disturbance Provider Policy Manual dated August 2009 ~~October 2010~~. The department adopts and incorporates by reference the provider policy manual which may be obtained through the Department of Public Health and Human Services, ~~Health Resources Developmental Services Division~~, Children's Mental Health Bureau, ~~1400 Broadway~~ 111 North Sanders, P.O. Box 202954 4210, Helena, MT 59620-2954 59604-4210.

(3) and (4) remain the same.

(5) A geographical factor of \$.50 per mile may be available to a family support specialist, wraparound facilitator, caregiver peer-to-peer specialist, or a home-based therapist when the following circumstances are met:

(a) the provider is traveling out of the location where the provider has its regular office, excluding satellite offices;

(b) the provider is traveling a distance greater than 35 miles one way from the office to the youth's home;

(c) the geographical factor will include the initial 35 miles and return trip;  
(d) the geographical factor is prior authorized by the plan manager; and  
(e) the geographical factor and those providers authorized to receive it are  
included in the youth's plan of care.

AUTH: 53-2-201, 53-6-113, 53-6-402, MCA

IMP: 53-6-402, MCA

4. The department proposes to repeal the following rules:

37.87.1323 HOME AND COMMUNITY-BASED SERVICES FOR YOUTH  
WITH SERIOUS EMOTIONAL DISTURBANCE AND PLANS OF CARE: PLAN  
MANAGEMENT, is found on page 37-21403 of the Administrative Rules of Montana.

AUTH: 53-2-201, 53-6-113, 53-6-402, MCA

IMP: 53-6-402, MCA

37.87.1338 HOME AND COMMUNITY-BASED SERVICES FOR YOUTH  
WITH SERIOUS EMOTIONAL DISTURBANCE: CONSULTATIVE CLINICAL AND  
THERAPEUTIC SERVICES, REQUIREMENTS, is found on page 37-21415 of the  
Administrative Rules of Montana.

AUTH: 53-2-201, 53-6-113, 53-6-402, MCA

IMP: 53-6-402, MCA

37.87.1339 HOME AND COMMUNITY-BASED SERVICES FOR YOUTH  
WITH SERIOUS EMOTIONAL DISTURBANCE: CUSTOMIZED GOODS AND  
SERVICES, REQUIREMENTS, is found on page 37-21415 of the Administrative  
Rules of Montana.

AUTH: 53-2-201, 53-6-113, 53-6-402, MCA

IMP: 53-6-402, MCA

37.87.1340 HOME AND COMMUNITY-BASED SERVICES FOR YOUTH  
WITH SERIOUS EMOTIONAL DISTURBANCE: EDUCATION AND SUPPORT  
SERVICES, is found on page 37-21416 of the Administrative Rules of Montana.

AUTH: 53-2-201, 53-6-113, 53-6-402, MCA

IMP: 53-6-402, MCA

37.87.1341 HOME AND COMMUNITY-BASED SERVICES FOR YOUTH  
WITH SERIOUS EMOTIONAL DISTURBANCE: HOME-BASED THERAPY  
SERVICES, REQUIREMENTS, is found on page 37-21416 of the Administrative  
Rules of Montana.

AUTH: 53-2-201, 53-6-113, 53-6-402, MCA

IMP: 53-6-402, MCA

37.87.1342 HOME AND COMMUNITY-BASED SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE: NONMEDICAL TRANSPORTATION, is found on page 37-21417 of the Administrative Rules of Montana.

AUTH: 53-2-201, 53-6-113, 53-6-402, MCA  
IMP: 53-6-402, MCA

37.87.1343 HOME AND COMMUNITY-BASED SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE: RESPITE CARE SERVICES, is found on page 37-21417 of the Administrative Rules of Montana.

AUTH: 53-2-201, 53-6-113, 53-6-402, MCA  
IMP: 53-6-402, MCA

37.87.1344 HOME AND COMMUNITY-BASED SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE: FAMILY SUPPORT SPECIALIST SERVICES, is found on page 37-21418 of the Administrative Rules of Montana.

AUTH: 53-2-201, 53-6-113, 53-6-402, MCA  
IMP: 53-6-402, MCA

37.87.1345 HOME AND COMMUNITY-BASED SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE: CAREGIVER PEER-TO-PEER SUPPORT SPECIALIST, is found on page 37-21419 of the Administrative Rules of Montana.

AUTH: 53-2-201, 53-6-113, 53-6-402, MCA  
IMP: 53-6-402, MCA

37.87.1346 HOME AND COMMUNITY-BASED SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE: WRAPAROUND FACILITATION SERVICES, is found on page 37-21420 of the Administrative Rules of Montana.

AUTH: 53-2-201, 53-6-113, 53-6-402, MCA  
IMP: 53-6-402, MCA

##### 5. Statement of Reasonable Necessity:

The Department of Public Health and Human Services (the department) is proposing to amend the above-stated administrative rules pertaining to Home and Community-Based Services for Youth with Serious Emotional Disturbance. Following is a detailed description of each proposed rule amendment.

ARM 37.87.1303



The department is proposing to amend ARM 37.87.1303 as follows: Yellowstone County is now listed as a core site and adds the service areas of Carbon, Stillwater, Musselshell, and Big Horn Counties, with an implementation date of October 1, 2010; Missoula and Ravalli Counties are now listed as core sites; Cascade County is now listed as a core site, with an implementation date of October 1, 2010; Lewis and Clark County is now listed as a core site and adds the service areas of Jefferson and Broadwater Counties with an implementation date of October 1, 2010; and Flathead County as a core site with an implementation date of July 1, 2011. Proposed changes to this rule also include: stating when a waiver year begins and ends; and clarifying that accumulatively in all service areas no more than a total of 100 youth may be enrolled at any given time; and adds that the Psychiatric Residential Treatment Facility Home and Community Based Services Waiver for Youth with Serious Emotional Disturbance Provider Policy Manual dated October 2010 will be used by the department to reallocate unused service opportunities when a waiting list has been established in any of the sites.

The proposed amendments are necessary to reflect the amendment to the Psychiatric Residential Treatment Facility Home and Community Based Services Waiver for Youth with Serious Emotional Disturbance (Waiver) that was approved by the Centers for Medicare and Medicaid Services.

The department chose to add the counties and the waiting list reference in the administrative rules in order for youth, advocates, families, and providers to know what counties in Montana have this particular waiver available as well as the potential for reallocation of service opportunities once a waiting list is established. The department opted for this approach rather than leaving the defined counties and potential reallocation of service opportunities out of the rule as it seemed unreasonable to not include the newly added counties when the other counties are already listed in the rule. The waiting list and potential reallocation of service opportunities are outlined in the federally approved waiver.

#### ARM 37.87.1305

The department proposes to amend ARM 37.87.1305 by updating the age that a youth is eligible to be considered for enrollment in the program from age "six through 16" to age "six through 17", and from the 17th to the 18th birthday. Another amendment to this rule adds the Children's Mental Health Bureau Provider Manual and Clinical Guidelines for Utilization Management, included in ARM 37.87.903, as the cite for the determination of level of care for a psychiatric residential treatment facility for the youth to be considered for enrollment in the program.

The proposed amendments are necessary to reflect the accurate upper age limit for youth as well as accurately reflect the manual regarding level of care criteria.

The department updated the age of the youth through 17 up to the 18th birthday because this was overlooked in a previous rule amendment. The language in the rules for the youth's age is now consistent. The department made this change to

avoid any confusion within the rules regarding the upper age limit criteria. The department chose to reference the Children's Mental Health Bureau Provider Manual and Clinical Guidelines for Utilization Management included in ARM 37.87.903 to avoid misleading information for providers, youth, families, and staff regarding the level of care criteria.

#### ARM 37.87.1307

The department proposes to amend ARM 37.87.1307(1)(d) which references the plan of care requirements in accordance with the Psychiatric Residential Treatment Facility Home and Community Based Services Waiver for Youth with Serious Emotional Disturbance Provider Policy Manual dated October 2010. ARM 37.87.1307(2)(i) is also being amended which references the Children's Mental Health Bureau Provider Manual and Clinical Guidelines for Utilization Management, included in ARM 37.87.903 regarding the level of care criteria for a psychiatric residential treatment facility.

The proposed changes are necessary for an accurate reflection of the most up-to-date manuals. The plan of care criteria is being proposed to be part of the Psychiatric Residential Treatment Facility Home and Community Based Services Waiver for Youth with Serious Emotional Disturbance Provider Policy Manual dated October 2010. By having the criteria in the manual, providers will be more familiar with the plan of care requirements. The department incorporates by reference the Children's Mental Health Bureau Provider Manual and Clinical Guideline for Utilization Management included in ARM 37.87.903. The proposed amendment references this manual's location in ARM.

The department decided to move the plan of care criteria to the Psychiatric Residential Treatment Facility Home and Community Based Services Waiver for Youth with Serious Emotional Disturbance Provider Policy Manual dated October 2010 so providers (for example, wraparound facilitators) are more familiar with the plan of care requirements. The department could have left the plan of care requirements in the rules, but proposes to move them to the provider policy manual in order for providers to be more compliant. The department is incorporating by reference the Children's Mental Health Bureau Provider Manual and Clinical Guideline for Utilization Management included in ARM 37.87.903. The department is proposing this action to alleviate any confusion by providers, consumers, advocates, staff, or public.

#### ARM 37.87.1321

The department proposes to amend ARM 37.87.1321(3) by adding language for the "following services" as defined and incorporated by reference in the Psychiatric Residential Treatment Facility Home and Community Based Services Waiver for Youth with Serious Emotional Disturbance Provider Policy Manual dated October 2010.

At this time, the department is proposing to make the Administrative Rules of Montana (ARM) for this waiver program more user-friendly by striking the language in the ARM and moving it to the Psychiatric Residential Treatment Facility Home and Community Based Services Waiver for Youth with Serious Emotional Disturbance Provider Policy Manual dated October 2010.

The department proposes this option to make the provider policy manual a more useful document for providers, consumers, advocates, and the public.

ARM 37.87.1333

The department proposes to amend ARM 37.87.1333(2)(b) by updating the Psychiatric Residential Treatment Facility Home and Community Based Services Waiver for Youth with Serious Emotional Disturbance Provider Policy Manual dated October 2010; states the Developmental Services Division is the division where the Children's Mental Health Bureau is located; and updates the physical and mailing address to 111 North Sanders and P.O. Box 4210, Helena, MT 59604-4210.

The department proposes to amend ARM 37.87.1333(5) by adding new language which states a geographical factor of \$.50 per mile may be available to a family support specialist, wraparound facilitator, caregiver peer-to-peer specialist, or a home-based therapist under certain circumstances as outlined in the rule.

The proposed amendments are necessary to reflect the current version of the Psychiatric Residential Treatment Facility Home and Community Based Services Waiver for Youth with Serious Emotional Disturbance Provider Policy Manual dated October 2010, update the division name and location of the Children's Mental Health Bureau, and describe the geographical factor of \$.50 per mile for defined waiver providers as well as the eligibility criteria for its availability.

The department is proposing to update the current version of the provider manual, update the division name and address, to avoid any confusion for providers, consumers, families, advocates, or general public. The department is proposing the geographical factor in the rule so those providers affected by the geographical factor are familiar of this means to build capacity for said waiver providers who must travel to outlying areas. Without describing and defining the geographical factor, waiver providers may be reluctant to serve youth and their families in outlying areas.

ARM 37.87.1323, 37.87.1338, 37.87.1339, 37.87.1340, 37.87.1341, 37.87.1342, 37.87.1343, 37.87.1344, 37.87.1345, and 37.87.1346

In order to make the administrative rules for this waiver program more user-friendly the department is proposing repealing these rules and moving the information to the Psychiatric Residential Treatment Facility Home and Community Based Services Waiver for Youth with Serious Emotional Disturbance Provider Policy Manual dated October 2010.

The department is proposing repeal of these rules and incorporation of the provider policy manual to provide a one-stop source of information for providers, consumers, advocates, and the public. Consumers are more attuned to viewing the information in the manual. The department believes it may be easier and less confusing to organize this information in a manual instead of referring to the nine separate administrative rules.

#### Persons and Entities Affected, Fiscal Effects

At capacity, 100 youth may be enrolled in the waiver at any given time; the cost of the waiver must be less than or equal to the cost of serving the youth in a PRTF facility. The number of persons affected: 100 youth at any given time in the waiver in the counties where the waiver is available. There are approximately 61 enrolled waiver providers in Montana. There is no anticipated fiscal impact from these rules. Use of any particular waiver service is governed by the need of the individual youth being served

6. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: 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](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., June 23, 2011.

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

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

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

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

/s/ John Koch  
Rule Reviewer

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

Certified to the Secretary of State May 16, 2011.

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

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 37.86.805, 37.86.1004, ) PROPOSED AMENDMENT  
37.86.1105, 37.86.1506, 37.86.2207, )  
37.86.2405, and 37.86.2605 )  
pertaining to Medicaid acute services )  
reimbursement and early and periodic )  
screening, diagnostic and treatment )  
(EPSDT) )

TO: All Concerned Persons

1. On June 15, 2011, at 1:00 p.m., the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on June 6, 2011, 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](mailto:dphhslegal@mt.gov).

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

37.86.805 HEARING AID SERVICES, REIMBURSEMENT (1) The department will pay the lowest of the following for covered hearing aid services and items:

(a) remains the same.

(b) the amount specified for the particular service or item in the department's fee schedule. The department adopts and incorporates by reference the department's Hearing Aid Fee Schedule dated ~~July 2010~~ August 2011. A copy of the department's fee schedule is posted at <http://medicaidprovider.hhs.mt.gov> and may be obtained from the Department of Public Health and Human Services, Health Resources Division, 1401 East Lockey, P.O. Box 202951, Helena, MT 59620-2951; or

(c) and (2) remain the same.

AUTH: 53-2-201, 53-6-113, MCA

10-5/26/11

MAR Notice No. 37-539

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-141, MCA

37.86.1004 REIMBURSEMENT METHODOLOGY FOR SOURCE RESOURCE BASED RELATIVE VALUE FOR DENTISTS (RVD) (1) For

procedures listed in the relative values for dentists scale, reimbursement rates shall be determined using the following methodology:

(a) The fee for a covered service shall be the amount determined by multiplying the relative value unit specified in the relative values for dentists scale by the conversion factor specified in (1)(c). The department adopts and incorporates by reference the Relative Values for Dentists (RVDs) published in ~~2009~~ 2011. The RVDs scale is available for inspection at the Department of Public Health and Human Services, Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(b) remains the same.

(c) The conversion factor used to determine the Medicaid payment amount for services provided to eligible individuals is ~~\$32.75~~ \$31.27.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-6-101, 53-6-111, 53-6-113, MCA

37.86.1105 OUTPATIENT DRUGS, REIMBURSEMENT (1) through (2)(a) remain the same.

(b) The dispensing fees assigned shall range between a minimum of \$2.00 and a maximum of ~~\$5.04~~ \$4.94.

(c) and (d) remain the same.

(3) In-state pharmacy providers that are new to the Montana Medicaid program will be assigned an interim ~~\$5.04~~ \$4.94 dispensing fee until a dispensing fee questionnaire, as provided in (2), can be completed for six months of operation. At that time, a new dispensing fee will be assigned which will be the lower of the dispensing fee calculated in accordance with (2) for the pharmacy or the ~~\$5.04~~ \$4.94 dispensing fee. Failure to comply with the six months dispensing fee questionnaire requirement will result in assignment of a dispensing fee of \$2.00.

(4) through (7) remain the same.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-6-101, 53-6-111, 53-6-113, MCA

37.86.1506 HOME INFUSION THERAPY SERVICES, REIMBURSEMENT

(1) Subject to the requirements of these rules, the Montana Medicaid program will pay for home infusion therapy services on a fee basis, as specified in the department's home infusion therapy services fee schedule. The department adopts and incorporates by reference the Home Infusion Therapy Services Fee Schedule dated ~~July 2010~~ August 2011. A copy of the department's fee schedule is posted at the Montana Medicaid provider web site at <http://medicaidprovider.hhs.mt.gov>. A copy of the Home Infusion Therapy Services Fee Schedule may also be obtained from the Department of Public Health and Human Services, Health Resources Division, 1400 Broadway, P.O. Box 202951,

Helena, MT 59620-2951. The specified fees are on a per day or a per dose basis as specified in the fee schedule. The fees are bundled fees which cover all home infusion therapy services as defined in ARM 37.86.1501.

(2) through (4) remain the same.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-6-101, 53-6-111, 53-6-113, MCA

37.86.2207 EARLY AND PERIODIC SCREENING, DIAGNOSTIC AND TREATMENT (EPSDT) SERVICES, REIMBURSEMENT (1) remains the same.

(2) Reimbursement for nutrition and private duty nursing services is specified in the department's fee schedule. The department adopts and incorporates by reference the department's private duty nursing services EPSDT Fee Schedule dated ~~July 2010~~ August 2011 and the nutrition EPSDT Fee Schedule dated ~~July 2010~~ August 2011. The fee schedules are posted at <http://medicaidprovider.hhs.mt.gov>. Reimbursement for outpatient chemical dependency treatment is outlined in ARM 37.27.912. A copy of the Nutrition and Private Duty Nursing Services Fee Schedules may be obtained from the Department of Public Health and Human Services, Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(3) remains the same.

(4) Reimbursements for school-based health related services are specified in the School-Based Health Service Fee Schedule dated ~~January~~ August 2011, which is adopted and incorporated by reference. A copy of the School-Based Health Service Fee Schedule is posted at <http://medicaidprovider.hhs.mt.gov>. Rates are adjusted to reimburse these services at the federal matching assistance percentage (FMAP) rate.

(5) remains the same.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-6-101, 53-6-111, 53-6-113, MCA

37.86.2405 TRANSPORTATION AND PER DIEM, REIMBURSEMENT

(1) remains the same.

(2) The department adopts and incorporates by reference the department's Montana Medicaid Fee Schedule, Personal and Commercial Transportation dated ~~July 2010~~ August 2011 that sets forth the reimbursement rates for transportation, per diem, and other Medicaid services. A copy of the department's fee schedule is posted at the Montana Medicaid provider web site at <http://medicaidprovider.hhs.mt.gov>. A copy of the fee schedule may also be obtained from the Department of Public Health and Human Services, Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(3) through (5) remain the same.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-6-101, 53-6-111, 53-6-113, MCA



37.86.2605 AMBULANCE SERVICES, REIMBURSEMENT (1) remains the same.

(2) The department adopts and incorporates by reference the Montana Medicaid Fee Schedule, Ambulance dated ~~July 2010~~ August 2011. A copy of the fee schedule is posted at the Montana Medicaid provider web site at <http://medicaidprovider.hhs.mt.gov>. A copy of the department's fee schedule may be obtained from the Department of Public Health and Human Services, Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(3) and (4) remain the same.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-6-101, 53-6-111, 53-6-113, MCA

#### 4. Statement of Reasonable Necessity:

The Montana Medicaid program is administered by the Department of Public Health and Human Services (department) to provide health care to Montana's qualified low income and disabled residents. The program uses state and federal appropriations to pay health care providers for the covered medical services they deliver to their Medicaid patients and clients. The Montana Legislature appropriates the state funds and Montana receives federal funds in proportion to appropriated state funds. The Legislature delegates authority to the department to set the provider reimbursement rates based on the funds appropriated. See 53-6-106(8) and 53-5-113, MCA.

The department is proposing amendments to: ARM 37.86.805 - Hearing Aid Services; ARM 37.86.1004 - Dental Services; ARM 37.86.1105 - Outpatient Drug Services; ARM 37.86.1506 - Home Infusion Therapy; ARM 37.86.2207 - EPSDT Services, Reimbursement; ARM 37.86.2405 - Transportation and Per Diem, Reimbursement; and ARM 37.86.2605 - Air and Ground Licensed Ambulance Services. These proposed amendments establish new Montana Medicaid provider fees as of August 1, 2011, for the listed services.

The proposed amendments give notice that the department will be reducing the reimbursement rates to the identified Medicaid providers by up to 2% beginning on August 1, 2011. These provider rate changes are based on a provider rate increase that went into effect in Fiscal Year (FY) 2010, and was held constant in FY 2011. The 2010 provider rate increase was paid for with one-time-only funding appropriated by the 61st Legislative session meeting in 2009. This one-time-only funding was not included in the budget base for FY 2012 and the funds were not appropriated by the current 62nd Legislative session.

The department considered whether a rate decrease could cause a cost shift to a more expensive service. The department considered the impact of the rate changes on efficiency, economy, quality of care, and access to Medicaid services and concluded that the rates are still sufficient to meet the requirements of 42 USC 1396a (a) (30(A)).

In evaluating the reductions needed to live within the legislative appropriation, the department considered the alternatives of eliminating covered services and/or decreasing Medicaid eligibility. The department is unable to decrease eligibility for services after March 23, 2010 and be in compliance with the Medicaid maintenance-of-effort (MOE) requirements of the Patient Protection and Affordable Care Act, PL 111-148, Title II, Sections 2001, et seq. Eliminating optional services was considered and rejected because of the impact on vulnerable Medicaid clients who would lose coverage for services. For these reasons, the department is proposing the following provider rate decreases

ARM 37.86.805

ARM 37.86.805 states the reimbursement rate for providers of hearing aid services.

ARM 37.86.1004

ARM 37.86.1004 states the reimbursement rate for dental services.

ARM 37.86.1105

ARM 37.86.1105 states the state's maximum dispensing fee for outpatient drug services.

ARM 37.86.1506

ARM 37.86.1506 states the reimbursement rate for home infusion therapy.

ARM 37.86.2207

ARM 37.86.2207 changes the fee schedule date in (2) from July 2010 to August 2011 for private duty nursing services and nutrition, and changes the fee schedule date in (4) from January 2011 to August 2011 for school-based services.

ARM 37.86.2405

ARM 37.86.2405 changes the fee schedule date in (2) from July 2010 to August 2011.

ARM 37.86.2605

ARM 37.86.2605 states the reimbursement rate for air and ground licensed ambulance services.

Fiscal Impact

The estimated federal and state general fund and total cost to the department for the following rule changes are listed below based on the blended Federal Medical

Assistance Percentage (FMAP) method of 66.19% Federal Funds, 33.81% State Funds:

<u>SFY 2012</u>	<u>PROGRAM</u>	<u>FED</u>	<u>STATE</u>	<u>TOTAL</u>
37.86.805	Hearing Aid Services	(\$2,626)	(\$1,342)	(\$3,968)
37.86.1004	Dental	(\$255,773)	(\$130,649)	(\$386,422)
37.86.1105	Outpatient Drugs	(\$70,494)	(\$36,009)	(\$106,503)
37.86.1506	Home Infusion Therapy Services	(\$17,515)	(\$8,946)	(\$26,461)
37.86.2207	EPSDT: Private Duty Nursing	(\$49,198)	(\$25,130)	(\$74,328)
37.86.2207	EPSDT: Nutrition	(\$116)	(\$59)	(\$175)
37.86.2405	Transportation and Per Diem	(\$28,684)	(\$14,652)	(\$43,336)
37.86.2605	Ambulance Services	(\$42,870)	(\$21,898)	(\$64,768)

Number of persons / providers effected:

The proposed rule changes could effect an estimated 81,920 Medicaid recipients and the following number of providers listed by program: 48 hearing aid providers; 265 pharmacy providers; 11 home infusion therapy providers; 169 optometric providers; 12 private duty nursing providers; 7 nutrition providers; 229 school-based services providers; 17 transportation providers; 107 ambulance providers.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: 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](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., June 23, 2011.

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

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 5 above or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this proposal notice is available through the 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.

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

/s/ Geralyn Driscoll  
Rule Reviewer

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

Certified to the Secretary of State May 16, 2011

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  
Rule I and the amendment of ARM     ) PROPOSED ADOPTION AND  
37.40.705, 37.40.1105, and     ) AMENDMENT  
37.40.1302 pertaining to home health     )  
care and personal assistance service     )

TO: All Concerned Persons

1. On June 15, 2011, at 2:00 p.m. the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, at Helena, Montana, to consider the proposed adoption and amendment of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on June 6, 2011, 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 rule as proposed to be adopted provides as follows:

NEW RULE I SELF-DIRECTED PERSONAL ASSISTANCE SERVICES, REIMBURSEMENT (1) Self-directed personal assistance services may be provided up to but not more than 40 hours of attendant service per week per recipient as defined by the plan of care. The department may, within its discretion, authorize additional hours in excess of this limit. Any services exceeding this limit must be prior authorized by the department. Prior authorization for excess hours may be authorized if additional assistance is required for:

(a) a period of time not to exceed three months and as the result of an acute medical episode;

(b) a period of time not to exceed three months and to prevent institutionalization during the absence of the normal caregiver; or

(c) a period of time not to exceed three months and during a post-hospitalization period.

(2) The base reimbursement for self-directed personal assistance services is \$3.68 per 15-minute unit of service. Reimbursement above this amount is conditional and negotiated with the department. The rate is for units of attendant and nurse supervision service.

(a) A unit of attendant service is 15 minutes and means an on-site visit specific to a recipient.

(b) A unit of nurse supervision service is 15 minutes and means an on-site recipient visit and related activity specific to that recipient.

(3) A person retained personally by a recipient to deliver self-directed personal assistance services is not a provider of self-directed personal assistance services for the purpose of this rule and therefore may not be reimbursed for self-directed personal assistance services by the department.

(4) Reimbursement is not available for self-directed personal assistance provided by immediate family members.

AUTH: 53-6-113, MCA

IMP: 53-6-101, 53-6-145 MCA

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

37.40.705 HOME HEALTH SERVICES, REIMBURSEMENT

(1) Reimbursement fees for home health services are as provided for in this rule.

~~(2) The interim reimbursement for a category of service submitted for reimbursement as provided in (4) or (5) is the most current medicare percent of billed charges for each provider.~~

~~(3) The provider's final reimbursement as provided for in (4) and (5) is calculated when the actual reimbursement fees based on the medicare cost settlements are determined for the period. The medicare cost settlements are derived from an audit of allowable costs conducted for medicare purposes.~~

~~(4) For home health agencies located within the borders of the state that began providing services before July 1, 1989, the reimbursement fee for a category of service after January 1, 1990 and prior to July 1, 1995 is the lowest of:~~

~~(a) the provider's billed charges;~~

~~(b) the average medicare cost for the category of service;~~

~~(c) the upper medicare limit for the category of service; or~~

~~(d) the adjusted indexed fee for the category of service for state fiscal year ending June 30, 1990.~~

~~(i) The state fiscal year 1990 adjusted indexed fee for a category of service is the sum of:~~

~~(A) the lowest fee for the category of service reported in the provider's medicare cost settlement report ending calendar year 1989, indexed to a common fiscal year ending December 30, 1989 by the most recent home health DRI market basket index percentage of the health care financing administration of the department of health and human services (HCFA); and~~

~~(B) 2% of the indexed lowest fee. The department hereby adopts and incorporates by reference the HCFA home health DRI market basket rate which is a forecast model of market basket increase factors. The rate and a description of the general methodology and variables used in formulating this model is available from HCFA, Office of the Actuary, 6325 Security Blvd., Baltimore, MD 21209.~~

~~(ii) The state fiscal year 1991 indexed fee for a category of service is the 1990 indexed fee for a category of service increased by 2%.~~

~~(5) For home health agencies which are located within the borders of the state that began providing services on or after July 1, 1989, the Medicaid reimbursement fee for a category of service delivered prior to July 1, 1995 is the lowest of:~~

- ~~(a) the provider's billed charges;~~
- ~~(b) the average medicare cost for the category of service;~~
- ~~(c) the upper medicare cost limit for the category of service; or~~
- ~~(d) the adjusted averaged medicaid fee for the category of service for that state fiscal year.~~

~~(i) The adjusted averaged Medicaid fee for a category of service is the sum of:~~

~~(A) costs for the category derived from the most recent Medicaid cost settlements finalized before June 30, of that state fiscal year from all participating in state home health providers divided by the total number of delivered services; and~~

~~(B) 2% of the averaged Medicaid fee.~~

~~(6) For home health agencies located within the borders of the state for services provided on or after July 1, 1995 and prior to July 1, 1997, the reimbursement fee for a home health service, except for a home health aide service, is 60% of the average of the provider's medicare cost limits for skilled nursing, physical therapy, speech therapy and occupational therapy services.~~

~~(a) The reimbursement fee for home health aide services is 60% of the provider's medicare cost limit for that service.~~

~~(7) (2)~~ For home health services provided on or after July 1, 1997 2011, the reimbursement is the following for:

- ~~(a) for a nursing or therapy service - \$59.54~~ \$70.40 per visit;
- ~~(b) for a home health aide visit - \$26.60~~ \$31.43;
- ~~(c) for medical supplies and equipment suitable for use in the home - 90% of the amount allowable for the specific item under Medicare.~~

AUTH: 53-6-101, 53-6-113, MCA

IMP: 53-6-101, MCA

37.40.1105 PERSONAL CARE SERVICES AGENCY-BASED, REIMBURSEMENT (1) Personal care services may be provided up to but not more than 40 hours of attendant service per week per recipient as defined by the plan of care. The department may, within its discretion, authorize additional hours in excess of this limit. Any services exceeding this limit must be prior authorized by the department. Prior authorization for excess hours may be authorized if additional assistance is required for:

- ~~(a) for a period of time not to exceed three months and as the result of an acute medical episode;~~
- ~~(b) for a period of time not to exceed three months and to prevent institutionalization during the absence of the normal caregiver; or~~
- ~~(c) for a period of time not to exceed three months and during a post-hospitalization period.~~

(2) The base Reimbursement for personal care services is \$2.64 \$4.45 per 15-minute unit of service. Reimbursement above this amount is conditional and negotiated with the department. The rate is for units of attendant and nurse supervision service.

(a) through (4) remain the same.

AUTH: 53-6-101, 53-6-113, MCA

IMP: 53-6-101, 53-6-144, MCA

37.40.1302 SELF-DIRECTED PERSONAL ASSISTANCE SERVICES, APPLICATION OF GENERAL PERSONAL CARE RULES (1) The following ARM cites apply to the self-directed personal assistance services program:

(a) and (b) remain the same.

~~(c) ARM 37.40.1105 pertaining to reimbursement; and~~

~~(c) [New Rule I]; and~~

(d) ARM 37.40.1106(1), (6), and (9), pertaining to compliance reviews.

AUTH: 53-6-113, 53-6-145, MCA

IMP: 53-6-101, 53-6-145, MCA

## 5. STATEMENT OF REASONABLE NECESSITY

The proposed amendments give notice that the department will be reducing the reimbursement rates to the identified Medicaid providers by up to 2% beginning on August 1, 2011. These provider rate changes are based on a provider rate increase that went into effect in Fiscal Year (FY) 2010, and was held constant in FY 2011. The 2010 provider rate increase was paid for with one-time-only funding appropriated by the 61st Legislative Session in 2009. This one-time-only funding was not included in the budget base for FY 2012, and the funds were not appropriated by the current 62nd Legislative Session.

The department considered whether a rate decrease could cause a cost shift to a more expensive service. The department considered the impact of the rate changes on efficiency, economy, quality of care, and access to Medicaid services. The department concluded that the rates are still sufficient to meet the requirements of 42 USC 1396a (a) (30(A)).

This reduction is approximately \$750,000 in total funding for the personal assistance and the home health programs combined.

In evaluating the reductions needed to live within the legislative appropriation, the department considered the alternatives of eliminating covered services and/or decreasing Medicaid eligibility. The department is unable to decrease eligibility for services after March 23, 2010, and it must be in compliance with the Medicaid maintenance-of-effort (MOE) requirements of the Patient Protection and Affordable Care Act, PL 111-148, Title II, Sections 2001, et seq. Eliminating optional services was considered and rejected because of the impact on vulnerable Medicaid clients



who would lose coverage for services. For these reasons, the department is proposing the following provider rate decreases:

### Home Health

The home health budget must be reduced by \$12,000 beginning Fiscal Year 2012 to be maintained within the funding levels currently appropriated. In Fiscal Year 2010, 428 Medicaid recipients received home health services. Providers will be directly impacted by the rate reduction.

The current rates for home health are:

Physical therapy, occupational therapy, speech therapy, and skilled nursing care	\$71.81 per visit
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Home health aide	\$32.06 per visit
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The proposed rates for home health with the 2% reduction will be:

Physical therapy, occupational therapy, speech therapy, and skilled nursing care	\$70.40 per visit
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Home health aide	\$31.43 per visit
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The rate reduction will not affect medical and surgical supplies.

### Personal Assistance

The total reimbursement rate reduction for one-time-only provider rates by 2% will result in savings of \$738,000.

The proposed rule changes will have a fiscal impact on the personal assistance program. In fiscal year 2010, 3,173 Medicaid beneficiaries received personal assistance. Providers will be impacted by the rate reductions.

To achieve the \$738,000 reduction, personal assistance service rates will decrease by .09 cents. The agency-based personal assistance rate would be decreased by the current base rate of \$4.54 to the rate of \$4.45. The self-direct personal assistance rate would be decreased from the current base rate of \$3.77 to the rate of \$3.68 per unit.

### Rule I

This proposed rule allows for the differentiation of agency-based and self-directed personal assistance services. It contains most of the language seen in ARM 37.40.1105, which will apply to agency-based services. The new rule provides the same 15-minute units of service, limitations on hours, reasons for granting excess

hours, the exclusion of personally obtained services, and exclusion of family members providing the services. The reduced reimbursement rate for services is included.

The rule specifies that reimbursement above the rate is conditional and negotiated with the department. This refers to a rate previously negotiated with the department based on direct care wage funding allocated during the 2007 Legislative Session. New negotiations cannot be made for a higher rate.

#### ARM 37.40.705

The department proposes to eliminate much of the language in this rule for home health services. The language discussed how home health rates were calculated and it is no longer used. The rule provides the rate changes as explained above.

#### ARM 37.40.1105

Changes to this rule include the new proposed rates for agency-provided personal assistance as described above. Additionally, the rule specifies that reimbursement above the rate is conditional and negotiated with the department. This refers to a rate previously negotiated with the department based on direct care wage funding allocated during the 2007 Legislative Session. New negotiations cannot be made for a higher rate.

6. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: 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](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., June 23, 2011.

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

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

9. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all

concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

/s/ Michelle Maltese  
Rule Reviewer

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

Certified to the Secretary of State May 16, 2011.

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

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 37.85.212 and 37.86.105 ) PROPOSED AMENDMENT  
pertaining to the resource based )  
relative value scale (RBRVS) and the )  
reimbursement for physician )  
administered drugs )

TO: All Concerned Persons

1. On June 15, 2011, at 11:00 a.m., the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on June 6, 2011, 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](mailto:dphhslegal@mt.gov).

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

37.85.212 RESOURCE BASED RELATIVE VALUE SCALE (RBRVS)  
REIMBURSEMENT FOR SPECIFIED PROVIDER TYPES (1) and (1)(a) remain the same.

(b) "Conversion factor" means a dollar amount by which the relative value units, or the anesthesia units for anesthesia services, are multiplied in order to establish the RBRVS fee for a service. ~~Effective July 1, 2008~~ There are four conversion factor categories. ~~They are:~~

(i) physician services, which applies to the following health care professionals listed in (2): physicians, mid-level practitioners, podiatrists, public health clinics, independent diagnostic testing facilities (IDTF), qualified Medicare beneficiary (QMB) and early and periodic screening, diagnostic and treatment (EPSDT) chiropractors, laboratory and x-ray services, family planning clinics, and dentists providing medical services. The conversion factor for physician services for state fiscal year ~~2011~~ 2012 is ~~\$40.09~~ \$32.84;

(ii) allied services, which applies to the following health care professionals listed in (2): physical therapists, occupational therapists, speech therapists,

optometrists, opticians, audiologists, and school-based services. The conversion factor for allied services for state fiscal year ~~2011~~ 2012 is ~~\$30.39~~ \$23.24;

(iii) mental health services, which applies to the following health care professionals listed in (2): licensed psychologists, licensed clinical social workers, and licensed professional counselors. The conversion factor for mental health services for state fiscal year ~~2011~~ 2012 is ~~\$25.45~~ \$22.19; and

(iv) anesthesia services, which applies to anesthesia services. The conversion factor for anesthesia services for state fiscal year ~~2011~~ 2012 is \$27.55.

(c) through (h) remain the same.

(i) "Resource based relative value scale (RBRVS)" means the most current version of the Medicare resource based relative value scale contained in the Medicare Physician Fee Schedule adopted by the Centers for Medicare and Medicaid Services (CMS) of the U.S. Department of Health and Human Services and published at ~~74~~ 75 Federal Register ~~226~~ 228, ~~61738~~ 73504 (November ~~25~~ 29, ~~2009~~ 2010) and corrected at 76 Federal Register 7, 1670 (January 11, 2011), effective January 1, ~~2010~~ 2011 which is adopted and incorporated by reference. A copy of the Medicare Physician Fee Schedule may be obtained from the Department of Public Health and Human Services, Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951. The RBRVS reflects RVUs for estimates of the actual effort and expense involved in providing different health care services.

(j) through (3) remain the same.

(4) The conversion factor for physician services is calculated as stated in 53-6-124 ~~through and~~ and ~~426~~ 125, MCA. The conversion factor for allied services, mental health services, and anesthesia services is calculated as follows:

(a) through (d) remain the same.

(5) For state fiscal year ~~2011~~ 2012, policy adjustors will be used to accomplish the targeted funding allocations. The department's list of services affected by policy adjustors through ~~July 1, 2010~~ August 1, 2012, is adopted and incorporated by reference. The list is available from the Department of Public Health and Human Services, Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(6) through (7) remain the same.

(8) Except for physician administered drugs and vaccine administration as provided in ARM 37.86.105(4), clinical, laboratory services, and anesthesia services, if neither Medicare nor Medicaid sets RVUs or anesthesia units, then reimbursement is by report.

(a) remains the same.

(b) For state fiscal year ~~2011~~ 2012, the by report rate is ~~48~~ 47% of the provider's usual and customary charges.

(9) through (12)(a)(ii) remain the same.

(iii) The department's list of the specific percents for the modifiers used by Medicaid as amended through ~~July 1, 2010~~ August 1, 2012, is adopted and incorporated by reference. A copy of the list is available on request from the Department of Public Health and Human Services, Health Resources Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(iv) through (14) remain the same.

AUTH: 53-2-201, 53-6-113, MCA,  
IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-125, MCA

37.86.105 PHYSICIAN SERVICES, REIMBURSEMENT/GENERAL REQUIREMENTS AND MODIFIERS (1) through (3) remain the same.

(4) Reimbursement to physicians for physician-administered drugs which are billed under HCPCS "J" and "Q" codes is made according to the department's fee schedule or the provider's usual and customary charge, whichever is lower. The department's fee schedule is updated at least annually based upon:

(a) the Medicare Average Sale Price (ASP) ~~Fee Schedule~~ set at 42 CFR 414.904 (2009) (2011) if there is an ASP fee;

(b) the RBRVS fee as defined in ARM 37.85.212 if there is an RBRVS fee;

(c) the estimated acquisition cost (EAC) as defined in ARM 37.86.1101 if there is an EAC; or

(d) the by-report amount as defined in ARM 37.85.212.

(5) and (6) remain the same.

AUTH: 53-6-101, 53-6-113, MCA  
IMP: 53-6-101, 53-6-113, MCA

4. STATEMENT OF REASONABLE NECESSITY:

The Department of Public Health and Human Services (the department) is proposing amendments to ARM 37.85.212. This rule implements Montana Medicaid's resource based relative value scale (RBRVS) reimbursement method for specified provider types. Montana Medicaid uses the RBRVS rate system to calculate the fee Montana Medicaid pays to 20 types of health care professionals.

The Montana Medicaid program is administered by the department to provide health care to Montana's qualified low income and disabled residents (hereinafter "Medicaid clients"). It is a public assistance program paid for with state and federal funds appropriated to pay health care providers (hereinafter "Medicaid providers") for the covered medical services they deliver to Medicaid clients. The Legislature delegates authority to the department to set the reimbursement rates Montana pays Medicaid providers for Medicaid clients' covered services. See 53-6-106(8) and 53-5-113, MCA.

ARM 37.85.212

The RBRVS system is used nationwide by most health plans, including Medicare and Medicaid. The relative value unit component of the RBRVS system is revised annually by the Centers for Medicare and Medicaid Services (CMS) and the American Medical Association. The department annually proposes to amend ARM 37.85.212(1)(i) to adopt current relative value units (RVUs). An RVU is a numerical value assigned to each medical procedure. RVUs are added for new procedures and the RVUs of particular procedures may increase or decrease from year to year.

The department annually calculates conversion factors for allied services, mental health services, and anesthesia services. These conversion factors are calculated by dividing the Montana Legislature's appropriation for Medicaid clients' health care during the upcoming State Fiscal Year (SFY) by the estimated total units of health care, expressed as total RVUs paid, to be provided during the upcoming SFY. The resulting quotient is the conversion factor. The RVU for a procedure multiplied by the conversion factor is the fee paid for the procedure. The conversion factor for licensed physicians is set by 53-6-124 and 53-6-125, MCA.

The fee paid for a procedure by a health plan is calculated by multiplying that procedure's RVU by the health plan's conversion factor. Montana Medicaid's conversion factors for physicians' services, allied service, mental health services, and anesthesia services are published in ARM 37.85.212(b)(i) through (iv).

There is a dramatic increase in the RVUs for services for SFY 2012. To maintain present fee levels requires an offsetting decrease to conversion factors. Not making this adjustment would increase provider fees dramatically and would not comply with the Legislature's appropriation for SFY 2012. No adjustment is needed for anesthesia services because the value of anesthesia units is unchanged for SFY 2012.

By statute, the physician conversion factor may be adjusted by the department in order to maintain reimbursement, at a minimum, at the fiscal year 2010 reimbursement rate. The department is proposing to set the other service's conversion factors to legislative appropriation levels.

Provider rate increases that went into effect in fiscal year 2010, and were held constant in fiscal year 2011, were paid for with one-time-only funding appropriated by the 61st legislative session meeting in 2009. This one-time-only funding was not included in the base budget for fiscal year 2012 and the funds were not appropriated by the current 62nd legislative session. The net result is a funding decrease of approximately 2%. Given legislative appropriations and the requirements of 53-6-124 and 53-6-125, MCA the proposed conversion factor amounts are: physician services (\$32.84), allied services (\$23.24), mental health services (\$22.19), and anesthesia services (\$27.55).

The department also considered the impact the rate changes will have on efficiency, economy, quality of care, and access and concluded that the rates are still sufficient to meet the requirements of 42 USC 1396a(a)(30)(A).

ARM 37.85.212(7) through (14) address rates for services without RVUs. The amendment to ARM 37.85.212(8) sets the "by report" rate for SFY 2012 that applies if no RVU is specified in the Medicare Physician Fee Schedule or if an alternative rate does not exist.

ARM 37.86.105

The department is proposing the amendment to ARM 37.86.105 to implement current drug pricing for physician administered drugs that are priced using "J" or "Q" codes. Current pricing is implemented by updating the reference to the federal regulation regarding the Medicare Average Sale Price (ASP). The overall fiscal impact of this rule change is expected to be negligible. The impact to an individual provider will depend on the drug administered because each drug is priced separately. The department does not establish a Montana ASP. It adopts by rule a regulation of the Centers for Medicare and Medicaid Services (CMS) that is used in the Medicare program for pricing physician administered drugs.

Fiscal Impact

The estimated cumulative fiscal impact of these rules is:

	<u>Total Cost</u>	<u>State General Fund</u>	<u>Federal Match</u>
SFY 2012	(\$392,942)	(\$132,854)	(\$260,088)

This rule amendment is estimated to impact 13,400 Medicaid providers and 108,000 Medicaid clients.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: 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](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., June 23, 2011.

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

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 5 above or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this proposal notice is available through the 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.

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted by mail, e-mail, and telephone on May 16, 2011.

/s/ Geralyn Driscoll  
Rule Reviewer

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

Certified to the Secretary of State May 16, 2011

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

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 37.79.102 pertaining to Healthy ) PROPOSED AMENDMENT  
Montana Kids definition of federal )  
poverty level )

TO: All Concerned Persons

1. On June 15, 2011, at 9:00 a.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 amendment of the above-stated rule.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on June 6, 2011, 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 rule as proposed to be amended provides as follows, new matter underlined, deleted matter interlined:

37.79.102 DEFINITIONS ~~Definitions~~ As used in this subchapter, unless expressly provided otherwise, the following definitions apply:

(1) through (13) remain the same.

(14) "Federal poverty level (FPL)" means the poverty guidelines for ~~2009~~ 2011 for the 48 contiguous states and the District of Columbia as published under the "Annual Update on the HHS Poverty Guidelines" ~~in the Federal Register each year on or about February 15~~ 76 Federal Register 13, pp 3637 – 3638, January 20, 2011.

(15) through (38) remain the same.

AUTH: 53-4-1004, 53-4-1009, 53-4-1105, MCA

IMP: 53-4-1003, 53-4-1004, 53-4-1009, 53-4-1103, 53-4-1104, 53-4-1105, 53-4-1108, MCA

4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (the department) administers the Healthy Montana Kids (HMK) Plan, which is funded by the state and federal

government to provide covered health care services to children through age 18. The HMK plan includes the HMK Plus coverage group for children who live in a household with a combined family income up to 133% of the federal poverty level (FPL) and the HMK coverage group plan for children who live in a household with a combined family income up to 250% of FPL.

The department is proposing an amendment to ARM 37.79.102 to adopt the 2011 FPL.

#### ARM 37.79.102

The Federal Department of Health and Human Services annually sets a federal measure of poverty – the FPL. This rule change is necessary for the department to adopt the FPL for 2011. There is a slight increase in the poverty threshold in the 2011 FPLs.

#### Fiscal Impact.

There is no fiscal impact.

5. The department intends the proposed rule amendments to be applied retroactively to April 1, 2011. There is no negative impact to the enrollee or applicant affected by applying the rule amendment retroactively.

6. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: 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](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m. on June 23, 2011.

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

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

9. An electronic copy of this proposal notice is available through the Secretary of State's web site at <http://sos.mt.gov/ARM/Register>. The Secretary of State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all

concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

/s/ Geralyn Driscoll  
Rule Reviewer

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

Certified to the Secretary of State May 16, 2011.

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

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 37.86.2224, 37.87.808, ) PROPOSED AMENDMENT  
37.87.901, and 37.87.903 pertaining )  
to Children's Mental Health Bureau )  
rate reduction )

TO: All Concerned Persons

1. On June 15, 2011, at 2:00 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 amendment of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services, no later than 5:00 p.m. on June 6, 2011, 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 amended provide as follows, new matter underlined, deleted matter interlined:

37.86.2224 EARLY AND PERIODIC SCREENING, DIAGNOSTIC, AND TREATMENT SERVICE (EPSDT), COMPREHENSIVE SCHOOL AND COMMUNITY TREATMENT (1) Comprehensive school and community treatment (CSCT) means a comprehensive, planned course of outpatient treatment provided in the school and community to a child or adolescent with a serious emotional disturbance (SED), as defined in ARM 37.87.303. A CSCT program ~~may~~ must be operated by a licensed mental health center with a CSCT endorsement. The criteria for a mental health center's CSCT endorsement are found in ARM 37.106.1955.

(2) remains the same.

~~(3) Prior authorization pursuant to ARM 37.88.101 is required for outpatient therapy services that are provided to a child or adolescent concurrently with CSCT services.~~

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, MCA

37.87.808 TARGETED CASE MANAGEMENT SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE, AUTHORIZATION REQUIREMENTS

~~(1) To be reimbursed, targeted case management services for youth with SED must be authorized by the department or its designee via an authorization process as outlined below.~~

~~(2) A case manager may request up to 120 units in an initial request for authorization.~~

~~(a) A unit of targeted case management services is equal to 15 minutes.~~

~~(3) An initial request for authorization must also include:~~

~~(a) demographic information about the youth;~~

~~(b) the name and mailing address of a responsible party, if any;~~

~~(c) the name of the provider and other provider information; and~~

~~(d) the youth's DSM-IV diagnosis code.~~

~~(4) A case manager may submit an unscheduled revision (continued stay) requesting authorization for continued services of up to 120 units more than the initial number of authorized units. The department or its designee will determine if further targeted case management services are medically necessary. The unscheduled revision request must include:~~

~~(a) documentation of an SED diagnosis and functional impairment;~~

~~(b) documentation of the need for continued targeted case management services;~~

~~(c) a case formulation that includes measurable case management goals and objectives;~~

~~(d) a complete list of other services currently in place; and~~

~~(e) a discharge plan.~~

~~(5) Targeted case management services requested in excess of 240 units in a single state fiscal year (July 1 – June 30) must be reviewed by the department or its designee to determine medical necessity. All the requirements of (4) also apply.~~

(1) Targeted case management services for youth with SED do not require prior authorization to be reimbursed.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-1-601, 53-1-602, 53-1-603, 53-2-201, MCA

37.87.901 MEDICAID MENTAL HEALTH SERVICES FOR YOUTH, REIMBURSEMENT

(1) Medicaid reimbursement for mental health services shall be the lowest of:

(a) remains the same.

(b) the rate established in the department's fee schedule. The department adopts and incorporates by reference the department's Medicaid Mental Health and Mental Health Services Plan, Individuals Under 18 Years of Age Fee Schedule dated ~~January 15, 2011~~ August 1, 2011. A copy of the fee schedule may be obtained from the Department of Public Health and Human Services, Developmental Services Division, Children's Mental Health Bureau, 111 Sanders, P.O. Box 4210, Helena, MT 59604 or at [www.mt.medicaid.org](http://www.mt.medicaid.org).

~~(2) The department will not reimburse providers for Medicaid services unless the prior authorization and continued authorization requirements in ARM 37.87.903 are met.~~

~~(3) The department will not reimburse providers for two services that duplicate one another on the same day. The department adopts and incorporates by reference the Medicaid Mental Health Plan and Mental Health Services Plan for Youth Services Excluded from Simultaneous Reimbursement (Service Matrix) effective January 15, 2011. A copy of the service matrix may be obtained from the department or at [www.mt.medicaid.org](http://www.mt.medicaid.org).~~

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, MCA

37.87.903 MEDICAID MENTAL HEALTH SERVICES FOR YOUTH.  
AUTHORIZATION REQUIREMENTS ~~(1) Mental health services for a Medicaid youth under the Montana Medicaid program will be reimbursed only if the following requirements are met:~~

~~(a) the youth, defined in ARM 37.87.102, has been determined to have a serious emotional disturbance as defined in ARM 37.87.303;~~

~~(b) the department or its designee has determined on a case by case basis, that treatment is medically necessary for early intervention and prevention of a more serious emotional disturbance:~~

~~(i) prior to treatment, (prior authorization); and~~

~~(ii) when required, (continued authorization).~~

~~(c) for prior authorized services, the serious emotional disturbance has been verified by the department or its designee.~~

~~(2) If a youth has a mental health diagnosis designated by the department, the youth is not required to have a serious emotional disturbance to receive the following services:~~

~~(a) group outpatient therapy; and~~

~~(b) the first 24 sessions per state fiscal year of individual and family outpatient therapy.~~

(1) The department will not reimburse providers for some Medicaid services unless the prior authorization and continued authorization requirements are met.

(2) The department will not reimburse providers for two services that duplicate one another on the same day. The department adopts and incorporates by reference the Medicaid Mental Health Plan and Mental Health Services Plan for Youth Services Excluded from Simultaneous Reimbursement (Service Matrix) effective August 1, 2011. A copy of the service matrix may be obtained from the department or at [www.mt.medicaid.org](http://www.mt.medicaid.org).

~~(3) Prior authorization and when required continued authorization by the department or its designee is required for the following services:~~

~~(a) remains the same.~~

~~(b) targeted case management in excess of 120 units of service per state fiscal year and in accordance with ARM 37.87.808;~~

~~(c) all outpatient therapy services provided on the same day as comprehensive school and community treatment (CSCT) described at ARM~~

~~37.86.2224, 37.86.2225, 37.106.1955, 37.106.1956, 37.106.1960, 37.106.1961, and 37.106.1965;~~

(d) through (h) remain the same but are renumbered (b) through (f).

(4) Medicaid mental health services for youth requiring prior authorization or continued authorization will be reimbursed only if the following requirements are met:

(a) the youth, defined in ARM 37.87.102, has been determined to have a serious emotional disturbance defined in ARM 37.87.303, which has been verified by the department or designee; or

(b) the department or designee has determined on a case-by-case basis, that treatment is medically necessary for early intervention and prevention of a more serious emotional disturbance:

(i) prior to treatment, (prior authorization); and

(ii) when required, (continued authorization).

(5) Prior authorization and continued authorization by the department or its designee is not required for targeted case management.

(6) Youth are not required to have a serious emotional disturbance to receive the following outpatient therapy services:

(a) the first 24 sessions of individual and/or family outpatient therapy per state fiscal year. Group outpatient therapy is not included in the 24-session limit; and

(b) group outpatient therapy.

(4) and (5) remain the same but are renumbered (7) and (8).

~~(6)~~ (9) Review of authorization requests by the department or its designee will be made with consideration of the department's clinical management guidelines. The department adopts and incorporates by reference the Children's Mental Health Bureau's Provider Manual and Clinical Guidelines for Utilization Management dated ~~January 15, 2011~~ August 1, 2011. A copy of the manual can be obtained from the department by a request in writing to the Department of Public Health and Human Services, Developmental Services Division, Children's Mental Health Bureau, 111 N. Sanders, P.O. Box 4210, Helena, MT 59604-4210 or at [www.dphhs.mt.gov/mentalhealth/children/index.shtml](http://www.dphhs.mt.gov/mentalhealth/children/index.shtml).

(7) and (8) remain the same but are renumbered (10) and (11).

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, MCA

#### 4. STATEMENT OF REASONABLE NECESSITY

The proposed amendments will be reducing the reimbursement rates to the identified Medicaid providers by up to 2% beginning on August 1, 2011. These provider rate changes are based on a provider rate increase that went into effect in Fiscal Year (FY) 2010, and was held constant in FY 2011. The 2010 provider rate increase was paid for with one-time-only funding appropriated by the 61st legislative session meeting in 2009. This one-time-only funding was not included in the budget base for FY 2012 and the funds were not appropriated by the 62nd legislative session.



The department considered whether a rate decrease could cause a cost shift to a more expensive service. The department considered the impact of the rate changes on efficiency, economy, quality of care, and access to Medicaid services and concluded that the rates are still sufficient to meet the requirements of 42 USC 1396a (a) (30(A)).

In evaluating the reductions needed to live within the legislative appropriation, the department considered the alternatives of eliminating covered services and/or decreasing Medicaid eligibility. The department is unable to decrease eligibility for services after March 23, 2010 and be in compliance with the Medicaid maintenance-of-effort (MOE) requirements of the Patient Protection and Affordable Care Act, PL 111-148, Title II, Sections 2001, et seq. Eliminating optional services was considered and rejected because of the impact on vulnerable Medicaid clients who would lose coverage for services. For these reasons, the department is proposing the following proposed amendments:

ARM 37.86.2224

The department is proposing changes in this rule to eliminate the prior authorization requirement for outpatient therapy services provided to a child or adolescent concurrently with CSCT services. The department reviewed the cost savings from prior authorizing outpatient therapy services and determined the cost savings was not significant enough to continue utilization review of outpatient therapy services. It is the intent of the department to manage outpatient therapy services that appear to be duplicative with CSCT services. All Medicaid services are subject to retrospective audit and recovery if applicable state and federal rules are not followed.

ARM 37.87.808

The department is proposing to amend Targeted Case Management (TCM) rules by eliminating the prior authorization and unscheduled revision requirements and unit limits on TCM in (1) through (5). The department reviewed the cost savings of utilization review of TCM services and determined the cost savings is not significant enough to continue utilization review of TCM services. It is the intent of the department to effectively manage TCM services within the projected budget and appropriation.

ARM 37.87.901

The department is proposing to move (2) and (3) of this rule to ARM 37.87.903 to clearly separate out reimbursement requirements from prior authorization requirements. In (2) the date of the Medicaid Mental Health Plan and Mental Health Services Plan for Youth Services Excluded from Simultaneous Reimbursement (Service Matrix) will be changed to August 1, 2011, in the replacement language.

ARM 37.87.903

The department is proposing to clarify which services require prior authorization and the determination of a Severe Emotional Disturbance (SED) for reimbursement. The proposed changes eliminate prior authorization of TCM and outpatient therapy services concurrent with CSCT. The department reviewed the cost savings from prior authorizing TCM and outpatient therapy services. The department determined the cost savings is not significant enough to continue utilization review of TCM and outpatient therapy services concurrent with CSCT. It is the intent of the department to manage outpatient therapy and TCM services within the projected budget and appropriation.

The Service Matrix will be updated to August 1, 2011 and the prior authorization for outpatient services concurrent with CSCT will be eliminated.

The Children's Mental Health Bureau's Provider Manual and Clinical Guidelines for Utilization Management date will not change until all the language related to utilization review requirements is changed after August 1, 2011.

This section will be reorganized for better readability, but no other substantive changes are intended. The department is clarifying that youth do not need an SED diagnosis for group outpatient therapy or the first 24 sessions of individual and family outpatient therapy services.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: 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](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., June 23, 2011.

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

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 5 above or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this proposal notice is available through the 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.

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

/s/ John Koch  
Rule Reviewer

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

Certified to the Secretary of State May 16, 2011.

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

In the matter of the amendment of	)	NOTICE OF PUBLIC HEARING ON
ARM 37.86.3607 pertaining to the	)	PROPOSED AMENDMENT
rates of reimbursement for the	)	
provision by provider entities of	)	
Medicaid funded targeted case	)	
management services to persons with	)	
developmental disabilities	)	

TO: All Concerned Persons

1. On June 15, 2011, at 3:00 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 amendment of the above-stated rule.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on June 6, 2011, 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 amended provide as follows, new matter underlined, deleted matter interlined:

37.86.3607 CASE MANAGEMENT SERVICES FOR PERSONS WITH DEVELOPMENTAL DISABILITIES, REIMBURSEMENT (1) Reimbursement for the delivery by provider entities of Medicaid funded targeted case management services for to persons with developmental disabilities ~~16 years of age or older~~ is provided as specified in Section One, Rates of Reimbursement for the Provision of Developmental Disabilities Case Management Services for Persons with Developmental Disabilities ~~16 Years of Age or Older and for Children with Developmental Disabilities Residing in a Children's Community Home, effective August 1, 2011,~~ of the Developmental Disabilities Program Manual of Service Reimbursement Rates and Procedures.

(2) The department adopts and incorporates by this reference Section One, Rates of Reimbursement for the Provision of Developmental Disabilities Case Management Services for Persons with Developmental Disabilities ~~16 Years of Age or Older and for Children with Developmental Disabilities Residing in a Children's Community Home, in effect July 1, 2007~~ August 1, 2011, of the Developmental

Disabilities Program Manual of Service Reimbursement Rates and Procedures, and published by the department as the Developmental Disabilities Program Manual of Service Reimbursement Rates and Procedures, Section One, Rates of Reimbursement for the Provision of Developmental Disabilities Case Management Services for Persons with Developmental Disabilities 16 Years of Age or Older or Who Reside in a DD Children's Group Home. A copy of Section One of the manual may be obtained through the Department of Public Health and Human Services, Disability Developmental Services Division, Developmental Disabilities Program, 111 N. Sanders, P.O. Box 4210, Helena, MT 59604-4210.

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

#### 4. STATEMENT OF REASONABLE NECESSITY

The Developmental Disabilities Program (DDP) of the Department of Public Health and Human Services (the department) is proposing the amendment of ARM 37.86.3607. This rule establishes the rates of reimbursement for the delivery by qualified provider entities of Medicaid funded targeted case management services. The rates of reimbursement for Medicaid funded targeted case management services for persons with developmental disabilities are established in "Section One" of the Developmental Disabilities Program's "Developmental Disabilities Program Manual of Service Reimbursement Rates and Procedures". Section One, currently titled "Rates of Reimbursement for the Provision of Developmental Disabilities Case Management for Persons 16 Years of Age or Older", is effectuated in rule by incorporation by reference in ARM 37.86.3607. This proposed rule amendment for ARM 37.86.3607 is for the purpose of incorporating by reference a yet-to-be-published new edition of Section One. The department is proposing to modify Section One of the Developmental Disabilities Program Manual to establish new case management rates. The manual specifies the requirements for those services and specifies billable units for those services.

The proposed changes to the developmental disabilities targeted case management reimbursement rates are necessary as part of the effort to align Developmental Disabilities Program expenditures with the appropriated budget for the program for the 2012/2013 state biennium.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: 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](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., June 23, 2011.

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

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 5 above or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this proposal notice is available through the 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.

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

/s/ Cary B. Lund  
Rule Reviewer

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

Certified to the Secretary of State May 16, 2011

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
Rule I and amendment of ARM	)	PROPOSED ADOPTION AND
37.86.2801, 37.86.2901, and	)	AMENDMENT
37.86.2907 pertaining to Medicaid	)	
inpatient hospital services	)	

TO: All Concerned Persons

1. On June 15, 2011, at 9:00 a.m., the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed adoption and amendment of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on June 6, 2011, 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](mailto:dphhslegal@mt.gov).

3. The rule as proposed to be adopted provides as follows:

NEW RULE I GRADUATE MEDICAL EDUCATION PAYMENT PROGRAM

(1) Subject to the availability of funding, restrictions imposed by federal law, and the approval of the state plan by the Centers for Medicare and Medicaid Services (CMS), the department will pay, in addition to the Medicaid payments provided for in ARM 37.86.2806, 37.86.2905, 37.86.2907, 37.86.2912, 37.86.2916, 37.86.2918, 37.86.2920, 37.86.2924, 37.86.2925, 37.86.2928, 37.86.2943, and 37.86.2947, a Graduate Medical Education (GME) payment for the purpose of partially funding a primary care residency program for eligible hospitals located in Montana.

(2) Revenue for the GME payment will be generated through a transfer of funds from the Montana University System to the Department of Public Health and Human Services through an Intergovernmental Transfer contract agreement. The transfer of funds from the University System will occur prior to July 31 of each year.

(3) The department will make an annual payment to each eligible hospital on or before August 31 of each year.

(a) The payment will be calculated based upon the eligible hospital's inpatient Medicaid utilization per year.

(b) If an eligible hospital reports no full time equivalents (FTE) participating in the GME program for any given program year or portion thereof, the eligible hospital will not receive payment for those time periods of nonparticipation.

(4) The GME payment regarding the primary care residency program must be computed, in order, as follows:

(a) divide the total Graduate Medical Education Full Time Equivalent (GMEFTE) count for each eligible facility based upon the most recently filed cost report by the Total Graduate Medical Education Full Time Equivalent (TGMEFTE) for all eligible facilities to determine the Hospital Percentage of Graduate Medical Education (HPGME);

$$\frac{\text{GMEFTE}}{\text{TGMEFTE}} = \text{HPGME}$$

(b) divide the Hospital Specific Medicaid Inpatient Days (HSMID) by the total Hospital Specific Inpatient Days (HSID) for eligible hospitals to compute the Facility Specific Medicaid Hospital Day Rate (FSMHDR);

$$\frac{\text{HSMID}}{\text{HSID}} = \text{FSMHDR}$$

(c) add together the Facility Specific Medicaid Hospital Day Rate (FSMHDR) for all eligible hospitals to determine a Total Medicaid Hospital Day Rate (TMHDR);

$$\text{FSMHDR} + \text{FSMHDR} + \text{FSMHDR} + \text{FSMHDR} = \text{TMHDR}$$

(d) divide each hospital's Facility Specific Medicaid Hospital Day Rate (FSMHDR) by the Total Medicaid Hospital Day Rate (TMHDR) to determine the Facility Specific Medicaid Utilization Rate (FSMUR);

$$\frac{\text{FSMHDR}}{\text{TMHDR}} = \text{FSMUR}$$

(e) divide the Hospital Specific Medicaid Inpatient Days (HSMID) by the Total Medicaid Inpatient Days (TMID) of all eligible hospitals to compute the Facility Share of Medicaid Utilization (FSMU);

$$\frac{\text{HSMID}}{\text{TMID}} = \text{FSMU}$$

(f) add the percentage of the Facility Share of Medicaid Utilization (FSMU) plus the Hospital Percentage of Graduate Medical Education (HPGME) divided by three to acquire the Average Medicaid Utilization (AMU) specific to each eligible hospital; and

$$\frac{\text{FSMUR} + \text{FSMU} + \text{HPGME}}{3} = \text{AMU}$$



(g) allocate funds to each eligible hospital based on the facility specific percentage of Average Medicaid Utilization (AMU) as described in (4)(f).

(5) The GME payment must comply with the following criteria:

(a) if the eligible hospital's cost of inpatient hospital services do not exceed the total Montana Medicaid allowed payments for inpatient care, the eligible hospital will receive a GME payment as calculated in (4);

(b) as-filed cost reports from eligible hospitals and information from the Medicaid paid claims database will be used for calculations;

(c) the GME payment must be for services derived from Medicaid paid claims. The dates of these services must occur within the eligible hospital's fiscal year end, and the hospital's fiscal year must be the year immediately prior to the payment date; and

(d) at the end of the contract period, the department will reconcile the total Medicaid payments including the Medicaid GME payments to ensure that the total of these payments do not exceed the Medicaid Upper Payment Limit (UPL) for the fiscal year.

AUTH: 2-4-201, 53-2-201, 53-6-113, MCA

IMP: 2-4-201, 53-2-201, 53-6-101, 53-6-111, 53-6-113, MCA

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

37.86.2801 ALL HOSPITAL REIMBURSEMENT, GENERAL

(1) through (5) remain the same.

(6) The department or its designated review organization may approve a request for prior authorization when the service is medically necessary under any of the following conditions:

(a) the client travels to another state because the department finds the required inpatient services are not available in Montana, or it is determined by the department that it is general practice for clients in a particular locality to use inpatient resources in a border hospital, or an in-state qualified provider who could normally render the inpatient service but does not think they can adequately treat the client;

(b) there is a medical emergency and the recipient's health would be endangered if the client were required to travel to Montana to obtain the medical services;

(c) the client, or the client's representative, can demonstrate to the satisfaction of the department that medical services represent the least costly service and all other viable alternatives have been exhausted per medical standards of care; or

(d) the client is a child residing in another state for whom Montana makes adoption assistance or foster care maintenance payments.

AUTH: 2-4-201, 53-2-201, 53-6-113, MCA

IMP: 2-4-201, 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-141, MCA

37.86.2901 INPATIENT HOSPITAL SERVICES, DEFINITIONS (1) through (20) remain the same.

(21) "Graduate medical education" (GME) means a postgraduate primary care residency program offered by an eligible in-state hospital for the purpose of providing formal hospital-based training and education under the supervision of a licensed medical physician.

(21) through (42) remain the same but are renumbered (22) through (43).

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-141, 53-6-149, MCA

37.86.2907 INPATIENT HOSPITAL PROSPECTIVE REIMBURSEMENT, APR-DRG PAYMENT RATE DETERMINATION (1) The department's APR-DRG prospective payment rate for inpatient hospital services is based on the classification of inpatient hospital discharges to APR-DRGs. The procedure for determining the APR-DRG prospective payment rate is as follows:

(a) Effective July 1st of each year, the department will assign an APR-DRG to each Medicaid client discharge in accordance with the current APR-grouper program version, as developed by 3M Health Information Systems. The assignment and reimbursement of each APR-DRG is based on:

(i) and (ii) remain the same.

(iii) all ICD-9-CM medical procedures performed during the ~~recipient's~~ client's hospital stay;

(iv) the ~~recipient's~~ client's age;

(v) the ~~recipient's~~ client's sex; and

(vi) the ~~recipient's~~ client's discharge status; and

(vii) diagnosis codes related to hospital-acquired conditions that are not present or undetermined to be present on admission.

(b) remains the same.

(c) The department computes a Montana average base price per case. This base price includes in-state and out-of-state distinct part rehabilitation units and long term care (LTC) facilities. Effective ~~July August 1, 2010~~ August 1, 2011 the average base price, including capital expenses, is ~~\$4,235~~ \$4,000. Disproportionate share payments are not included in this price.

(i) The average base price for Center of Excellence hospitals, including capital expenses, is ~~\$7,024~~ \$6,884. Disproportionate share payments are not included in this price.

(d) remains the same.

(e) For claims with dates of payment on or after August 1, 2011, when a hospital-acquired condition occurs during hospitalization and the condition was not present or undetermined to be present on admission, claims will be paid as though the diagnosis is not present or undetermined to be present. Hospital-acquired conditions refers to the Centers for Medicare and Medicaid Services (CMS) definition as provided in Section 1886(d)(4) of the Social Security Act.

(2) remains the same.

AUTH: 2-4-201, 53-2-201, 53-6-113, MCA

IMP: 2-4-201, 53-2-201, 53-6-101, 53-6-111, 53-6-113, MCA

##### 5. STATEMENT OF REASONABLE NECESSITY:

The Department of Public Health and Human Services (the department) is proposing New Rule I and amendments to ARM 37.86.2801, 37.86.2901, and 37.86.2907 regarding Medicaid inpatient hospital services.

The purpose of the proposed rule amendments is to update the current administrative rules governing inpatient hospital services with 42 CFR 447.272, and to interface these rules with the inpatient hospital state plan.

The proposed amendments give notice that the department will be reducing the reimbursement rates to the identified Medicaid providers by up to 2% beginning on August 1, 2011. These provider rate changes are based on a provider rate increase that went into effect in Fiscal Year (FY) 2010, and was held constant in FY 2011. The 2010 provider rate increase was paid for with one-time-only funding appropriated by the 61st Legislative session meeting in 2009. This one-time-only funding was not included in the budget base for FY 2012 and the funds were not appropriated by the current 62nd Legislative session.

The department considered whether a rate decrease could cause a cost shift to a more expensive service. The department considered the impact of the rate changes on efficiency, economy, quality of care, and access to Medicaid services and concluded that the rates are still sufficient to meet the requirements of 42 USC 1396a (a) (30(A)).

In evaluating the reductions needed to live within the legislative appropriation, the department considered the alternatives of eliminating covered services and/or decreasing Medicaid eligibility. The department is unable to decrease eligibility for services after March 23, 2010 and be in compliance with the Medicaid maintenance-of-effort (MOE) requirements of the Patient Protection and Affordable Care Act, PL 111-148, Title II, Sections 2001, et seq. Eliminating optional services was considered and rejected because of the impact on vulnerable Medicaid clients who would lose coverage for services.

##### New Rule I

The department proposes a general medical education program for the purpose of providing formal hospital-based training and education under the supervision of a licensed medical physician.

##### ARM 37.86.2801

The department is proposing language to ARM 37.86.2801 to clarify prior authorization requirements for medically necessary requests for hospital service.

ARM 37.86.2901

Under ARM 37.86.2901 (Inpatient Hospital Services, Definitions), for purposes of clarity, additional language was added to define the term "graduate medical education".

ARM 37.86.2907

ARM 37.86.2907 establishes two base rates which provide the basis for reimbursement regarding prospective payment system (PPS) hospitals. These two rates include a Montana average base rate and an average base rate for hospitals meeting the criteria for Centers of Excellence. The primary reason for amending this rule is to establish these base rates for the coming state fiscal year.

Budget Impact

The reduction in base rates will reduce the Medicaid budget for State Fiscal Year (SFY) 2012 by \$2,885,671. This reduction removes the one-time-only monies appropriated by the 2009 Legislature.

The proposed changes will affect approximately 372 inpatient hospital providers both in and out of state.

Even though Medicaid base rates have been reduced, the proposed changes will not affect or reduce services provided to Medicaid clients. Therefore, there is no impact to clients.

6. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: 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](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., June 23, 2011.

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

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

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

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

/s/ John Koch  
Rule Reviewer

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

Certified to the Secretary of State May 16, 2011.

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

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 37.86.3515, 37.88.907, ) PROPOSED AMENDMENT  
37.89.125, 37.89.523, and 37.90.408 )  
pertaining to mental health services )  
for adults )

TO: All Concerned Persons

1. On June 15, 2011, at 3:00 p.m., the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services, no later than 5:00 p.m. on June 6, 2011, 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](mailto:dphhslegal@mt.gov).

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

37.86.3515 CASE MANAGEMENT SERVICES FOR ADULTS WITH SEVERE DISABLING MENTAL ILLNESS, REIMBURSEMENT (1) and (2) remain the same.

(3) The department adopts and incorporates by reference the department's fee schedule dated ~~February~~ August 1, 2011 which sets forth the reimbursement rates for case management. A copy of the fee schedule is posted at the Montana Medicaid provider web site at <http://medicaidprovider.hhs.mt.gov> [www.dphhs.mt.gov/amdd/services/index.shtml](http://www.dphhs.mt.gov/amdd/services/index.shtml). A copy of the department's fee schedule may be obtained from the Department of Public Health and Human Services, Addictive and Mental Disorders Division, PO Box 202905, Helena, MT 59620-2905.

(4) remains the same.

AUTH: 53-2-201, 53-6-113, MCA  
IMP: 53-2-201, 53-6-101, 53-6-113, MCA

37.88.907 MENTAL HEALTH CENTER SERVICES FOR ADULTS,

REIMBURSEMENT (1) The department adopts and incorporates by reference the Medicaid Adult Mental Health and the Adult Mental Health Services Plan fee schedules dated August 1, 2011. A copy of the department's fee schedule is posted at the Montana Medicaid provider web site at [www.dphhs.mt.gov/amdd/sservices/index/shtml](http://www.dphhs.mt.gov/amdd/sservices/index/shtml). A copy may be obtained from the Department of Public Health and Human Services, Addictive and Mental Disorders Division, PO Box 202905, Helena, MT 59620-2905. Medicaid reimbursement for mental health center services shall be the lowest of:

(a) remains the same.

(b) ~~the department's fee for the service as specified in the department's Medicaid Mental Health or Mental Health Services Plan Fee Schedule for Individuals 18 Years of Age and Older fee schedules.~~

(2) through (6) remain the same.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-113, MCA

#### 37.89.125 MENTAL HEALTH SERVICES PLAN, PROVIDER

REIMBURSEMENT (1) Reimbursement of enrolled providers for mental health services covered under the plan and provided to plan members is as provided in ARM 37.40.307, 37.85.212, and Title 37, chapters 5, 40, 82, 85, 86, and 88 for the same service or category of service under the Montana Medicaid Program, except as otherwise provided in this subchapter.

(a) through (5) remain the same.

AUTH: 53-2-201, 53-6-113, 53-21-703, MCA

IMP: 53-1-601, 53-2-201, 53-6-101, 53-6-116, 53-6-701, 53-6-705, 53-21-202, 53-21-702, MCA

#### 37.89.523 72-HOUR PRESUMPTIVE ELIGIBILITY FOR ADULT CRISIS STABILIZATION SERVICES: REIMBURSEMENT FOR SERVICES

(1) The department adopts and incorporates by reference the Medicaid 72 Hour Presumptive Eligibility Crisis Stabilization Services fee schedule dated August 2011. A copy of the department's fee schedule is posted at the Montana Medicaid provider web site at [www.dphhs.mt.gov/amdd/services/index.shtml](http://www.dphhs.mt.gov/amdd/services/index.shtml). A copy may be obtained from the Department of Public Health and Human Services, Addictive and Mental Disorders Division, PO Box 202905, Helena, MT 59620-2951.

Reimbursement for services delivered under this subchapter will be the amounts listed in the ~~Crisis Stabilization Services~~ fee schedule ~~dated March 1, 2008~~.

(2) and (3) remain the same.

AUTH: 53-6-101, 53-6-113, MCA

IMP: 53-6-101, MCA

37.90.408 HOME AND COMMUNITY-BASED SERVICES FOR ADULTS WITH SEVERE DISABLING MENTAL ILLNESS: REIMBURSEMENT (1) The department adopts and incorporates by reference the Medicaid Home and

Community-Based Services for Adults With Severe Disabling Mental Illness fee schedule. A copy of the department's fee schedule is posted at the Montana Medicaid provider web site at [www.dphhs.mt.gov/amdd/services/index.shtml](http://www.dphhs.mt.gov/amdd/services/index.shtml). A copy may be obtained from the Department of Public Health and Human Services, Addictive and Mental Disorders Division, PO Box 202905, Helena, MT 59620-2905. Reimbursement for services delivered under this subchapter will be the amounts listed in the fee schedule unless Services available through the program are reimbursed as provided otherwise in this rule.

(2) through (10) remain the same.

AUTH: 53-2-201, 53-6-402, MCA

IMP: 53-2-401, 53-6-402, MCA

#### 4. STATEMENT OF REASONABLE NECESSITY:

The proposed amendments give notice that the department will be reducing the reimbursement rates to the identified Medicaid providers by up to 2% beginning on August 1, 2011. These provider rate changes are based on a provider rate increase that went into effect in Fiscal Year (FY) 2010, and was held constant in FY 2011. The 2010 provider rate increase was paid for with one-time-only funding appropriated by the 61st Legislative Session in 2009. This one-time-only funding was not included in the budget base for FY 2012 and the funds were not appropriated by the current 62nd Legislative session.

The department considered whether a rate decrease could cause a cost shift to a more expensive service. The department considered the impact of the rate changes on efficiency, economy, quality of care, and access to Medicaid services. The department concluded that the rates are still sufficient to meet the requirements of 42 USC 1396a(a)(30)(A).

The proposed reduction is \$2,981,100 of total funding.

In evaluating the reductions needed to live within the legislative appropriation, the department considered the alternatives of eliminating covered services and/or decreasing Medicaid eligibility. The department is unable to decrease eligibility for services after March 23, 2010 and be in compliance with the Medicaid maintenance-of-effort (MOE) requirements of the Patient Protection and Affordable Care Act, PL 111-148, Title II, Sections 2001, et seq. Eliminating optional services was considered and rejected because of the impact on vulnerable Medicaid clients who would lose coverage for services. For these reasons, the department is proposing the following provider rate decreases:

#### ARM 37.88.907

ARM 37.88.907 states the reimbursement rate for providers of mental health center services for adults. The department is incorporating by reference into the Medicaid Adult Mental Health and the Adult Mental Health Services Plan fee schedules that it



has previously established, and the new rates will be in effect August 1, 2011. Approximately 15,000 Medicaid clients receive mental health center services and there are approximately nine licensed mental health center providers in Montana. The total budget decrease for this program is \$560,468 for FY 2012 and the rates stated in the fee schedules are being reduced accordingly.

ARM 37.89.125

ARM 37.89.125 states the reimbursement rate for providers of services to individuals enrolled in the Mental Health Services Plan. Approximately 2800 clients receive mental health services through this program and there are approximately 70 providers in Montana. The total budget decrease for this program is \$147,748 for FY 2012 and the rates stated in the fee schedules will be reduced accordingly.

ARM 37.89.523

In ARM 37.89.523, the department incorporates in rule by reference the fee schedule for the 72-hour Presumptive Eligibility Services for Crisis Stabilization for adults. The department has previously established this fee schedule. Approximately 1,400 clients receive mental health services through this program and there are approximately 30 providers in Montana. The total budget decrease for this program is \$24,234 for FY 2012 and the rates stated in the fee schedules will be reduced accordingly.

ARM 37.90.408

ARM 37.90.408 incorporates by reference the department's previously established fee schedule for providers of Home and Community-Based Services for Adults with Severe Disabling Mental Illnesses. Approximately 155 clients receive mental health services through this program and there are approximately 4 providers in Montana. In addition, this reduction will impact another 24 agencies that provide services to the individual waiver sites. The total budget decrease for this program is \$35,492 for fiscal year 2012 and the rates stated in the fee schedules are being reduced accordingly.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: 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](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., June 23, 2011.

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

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 5 above or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this proposal notice is available through the 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.

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

/s/ Michelle Maltese  
Rule Reviewer

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

Certified to the Secretary of State May 16, 2011.

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
Rule I and amendment of ARM	)	PROPOSED ADOPTION AND
37.40.1421 pertaining to all Medicaid	)	AMENDMENT
provider fee schedules and home and	)	
community-based services (HCBS)	)	
for the elderly and people with	)	
physical disabilities	)	

TO: All Concerned Persons

1. On June 15, 2011, at 12:00 p.m., the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed adoption and amendment of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on June 6, 2011, 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](mailto:dphhslegal@mt.gov).

3. The rule as proposed to be adopted provides as follows:

NEW RULE I EFFECTIVE DATES OF MONTANA MEDICAID PROVIDER FEE SCHEDULES (1) The Montana Medicaid program establishes provider reimbursement rates for medically necessary, covered services based on the estimated demand for services and the legislative appropriation and federal matching funds. Provider reimbursement rates are stated in fee schedules for covered services applicable to the identified Medicaid program. New rates are established by revising the identified program's fee schedule and adopting the new fees as of the stated effective date of the schedule. Copies of the department's current fee schedules are posted at <http://medicaidprovider.hhs.mt.gov> and may be obtained from the Department of Public Health and Human Services, Health Resources Division, 1401 East Lockey, P.O. Box 202951, Helena, MT 59620-2951. A description of the method for setting the reimbursement rate and the administrative rules applicable to the covered service is published in the chapter or subchapter of this title regarding that service.

(2) The department adopts and incorporates by reference, the fee schedule for the following programs on the date stated:

(a) home and community-based services for elderly and physically disabled persons fee schedule, as provided in ARM 37.40.1421, is effective August 1, 2011.

AUTH: 53-2-201, 53-6-113, MCA

IMP: 53-2-201, 53-6-101, 53-6-402, MCA

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

37.40.1421 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: COST OF PLAN OF CARE SERVICE PLAN (1) In order to maintain the program cost within the appropriated monies, the cost of ~~plans of care service plans~~ for recipients may be limited by the department collectively and individually.

(2) remains the same.

(3) The total cost of services provided under a ~~plan of care service plan~~ to a recipient for an individual may exceed the maximum amount set by the department if authorized by the department based on the department's determination that one or more of the following circumstances is applicable:

(a) through (d) remain the same.

(4) The cost of services to be provided under a ~~plan of care service plan~~ is determined prior to implementation of the proposed plan of care and may be revised as necessary after implementation.

(5) A cost determination for the services provided under a ~~plan of care service plan~~ may be made at any time that there is a significant revision in the plan of care service plan.

(6) The provider reimbursement rate for a covered service for home and community-based services for elderly and physically disabled persons, except as otherwise provided in ARM 37.40.1415, is stated in the department's fee schedule adopted and effective at [New Rule I]. These fees are calculated based on:

(a) the biennial legislative appropriation; and

(b) the estimated demand for covered services during the biennium.

AUTH: 53-2-201, 53-6-101, 53-6-113, 53-6-402, MCA

IMP: 53-2-201, 53-6-101, 53-6-402, MCA

#### 5. Statement of Reasonable Necessity

The Department of Public Health and Human Services (the department) administers the Montana Medicaid program to provide health care to Montana's qualified low income and disabled residents. It is a public assistance program paid for with state and federal funds appropriated to pay health care providers for the covered medical services they deliver to Medicaid clients. The Legislature delegates authority to the department to set the reimbursement rates Montana pays Medicaid providers for Medicaid clients' covered services. See 53-6-106(8) and 53-5-113, MCA.

Title 19 of the Social Security Act (42 U.S.C. 1396a, et seq.), provides for waiver and demonstration authority to states to allow flexibility in the operation of state Medicaid programs. Section 1395(c) of the Act (42 U.S.C. 1396n (c)) gives the Secretary of the Department of Health and Human Service authority to waive certain provisions of Title 19 to allow long-term care services to be delivered in community settings as an alternative to providing comprehensive long-term services in institutional settings. This waiver authority is referred to as the Home and Community-Based Services (HCBS) waiver. Montana's HCBS waiver for the elderly and people with physical disabilities will be renewed July 1, 2011.

### New Rule I

The department is revising its process of changing provider reimbursement rates in administrative rule. It intends to adopt fee schedules effective as of a stated date in one rule. This is not a substantive change in the rate setting process. It is a procedural change to simplify notices of rate changes and to compile a centralized list of fees schedules that a reader can reference. This change is reasonably necessary to improve public access to provider rates, make the Medicaid rate setting process and the rates established by rule easier to understand, and reduce the costs associated with publication of revised provider rates. The department has considered the alternative of continuing the current process for publication of rate changes and intends to evaluate the efficacy of the current process and this change before applying this revision to all rate rules.

The department has determined these rates are consistent with efficiency, economy, and quality of care. These rates are sufficient to enlist enough providers so that care and services under the Montana Medicaid program are available to the extent that such care and services are available to the general population in the geographic area.

### ARM 37.40.1421

The department will be proposing future revisions to Title 37, chapter 40. One change will be to change the term "plan of care" to "service plan". This stylistic change is made in this rule for consistency.

This rule is also being amended to establish a published fee schedule for this program effective August 31, 2011.

### Fiscal Impact

Medicaid rates for home and community-based waiver services depend on the funding levels authorized by the Montana Legislature.

The one-time-only 2% provider rate increase that was provided in Fiscal Year (FY) 2010 and sustained in 2011, has not been restored for FY 2012 under House Bill 2

(HB 2) was passed by the 62nd Montana Legislature. The total fiscal impact for the 2% provider rate reduction is \$720,927 of total funding.

Additionally, there will be reductions in one-time-only funding that was appropriated for direct care worker wages of \$506,856 in total funds, as well as targeted assisted living facility rate increases provided in the 2010/2011 biennium with one time only funding of \$1,041,695 that were not restored in HB 2.

Expansion of services for 80 new waiver slots/clients that were funded with one-time-only money in the 2010/2011 biennium, was restored by the 62nd Legislature so these services can be continued in FY 2012. Total replacement funding to continue these services under the waiver budget was \$2,000,000.

The Montana Legislature has provided the following changes in funding for the Home and Community-Based Waiver Program.

Reductions in HB 2 related to a 2.2% reduction as part of 17-7-111, MCA (5%) reduction plan was adopted by the Legislature in HB 2. The total funding related to this reduction is \$704,088.

Additional funding of \$2,500,000 was included in HB 2 to fund 100 new waiver slots to fund Medicaid services in the following order of priority:

1. Plans of care for individuals moved from nursing homes into community settings under the HCBS program;
2. Maintaining individuals in assisted living facilities and others in the community who are at immediate risk of nursing home placement; and
3. Medicaid nursing home bed days in the event bed days are underfunded.

The Legislature in HB 2 also provided a new allotment of funding for direct care worker wages. The total funding available for FY 2012 will be \$276,665 and will be distributed in the same manner as previous wage distributions have been implemented.

All providers will be affected by rate reductions. There are 506 providers that participate in the HCBS waiver program and over 2,300 individuals that use Medicaid funded waiver services.

6. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: 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](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., June 23, 2011.

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

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

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

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

/s/ Cary B. Lund  
Rule Reviewer

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

Certified to the Secretary of State May 16, 2011

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

In the matter of the amendment of ) NOTICE OF AMENDMENT,  
ARM 12.11.805, 12.11.3205, the ) ADOPTION, AND REPEAL  
adoption of NEW RULES I through V, )  
and the repeal of ARM 12.11.3963, )  
regarding recreational use rules in )  
Montana )

TO: All Concerned Persons

1. On January 27, 2011, the Fish, Wildlife and Parks Commission (commission) published MAR Notice No. 12-365 pertaining to the public hearings on the proposed amendment, adoption, and repeal of the above-stated rules at page 83 of the 2011 Montana Administrative Register, Issue Number 2.

2. On February 22 and February 23, 2011 the commission held public hearings to consider the proposed amendment, adoption, and repeal of the above-stated rules.

3. The commission has amended ARM 12.11.805 and 12.11.3205 as proposed.

4. The commission has adopted New Rules II [12.11.3402], III [12.11.3423], IV [12.11.5303], and V [12.11.510] as proposed.

5. The commission has adopted New Rule I [12.11.2206] as follows, stricken matter interlined, new matter underlined:

NEW RULE I [12.11.2206] FLATHEAD RIVER (1) remains as proposed.  
(2) Church Slough is:  
~~(a) closed to boating March 1 to April 10; and~~  
~~(b) restricted to a controlled no wake speed, as defined in ARM 12.11.101(1)~~  
~~from April 11 to the last day of February.~~  
(3) through (6) remain as proposed.

6. The commission has repealed ARM 12.11.3963.

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

Comment 1: The commission received all favorable comments regarding the adoption of the rules on Alvord Lake, Kilbrennan Lake, and the portion of the Flathead River rule that would allow the Department of Fish, Wildlife and Parks (department) wardens to be able to enforce the United States Forest Service Rules.



Response 1: The commission appreciates the interest in this rulemaking process.

Comment 2: The commission received multiple comments in favor of the seasonal closure stating that seasonal closure is necessary to protect the migrating waterfowl. One comment stated the closure is two weeks too short to fully protect the waterfowl. The commission also received multiple comments opposed to the seasonal closure stating it wasn't necessary because use on the slough from March 1 to April 10 is minimal and when boats are present the birds either move or are not bothered by the boats. One person stated instead of adopting the closure, adopt the no wake speed rule to protect migrating waterfowl.

Response 2: Department personnel reported that even the current low boating use displaces large numbers of waterfowl and the closure protects the majority of migrating waterfowl. Department personnel also reported that no wake boating speed limits would not remove impacts to waterfowl. The commission adopted the seasonal boating closure to reduce disturbance to migratory waterfowl and determined that a no wake rule was not required to protect waterfowl the remainder of the year.

Comment 3: The commission received a couple of comments opposed to the adoption of a seasonal closure on Church Slough stating the seasonal closure would restrict anglers from a spring fishing opportunity to take pike that diminish native westslope cutthroat trout and bull trout populations. One person recommended allowing winter spear fishing of pike to help native trout.

Response 3: Pike fishing and harvest is open the entire year on Church Slough. Church Slough is open the entire year to hook and line fishing from shore. The closure will not significantly reduce annual pike harvest or opportunity and native trout populations. The commission addresses fishing regulations, including spear fishing, in a separate process.

Comment 4: The commission received multiple comments in support of adopting the no wake rule on Church Slough stating the rule will enhance water safety on Church Slough, large wakes almost capsize small fishing boats, use of boats designed to produce large wakes will increase in the future degrading natural resources, and the no wake rule will enhance recreational experiences for low impact sports including fishing and kayaking.

Response 4: Department personnel reported there is not a greater incidence of user conflicts or safety concerns than on other waters and that at current use levels safety concerns do not require adoption of the no wake boating rule. The commission strives to minimize restrictions while protecting resources. The commission is aware that some boats are designed to produce large wakes; however, the commission did not adopt the no wake restriction noting that there was neither survey data nor anecdotal evidence that described a rate of erosion or

accelerated erosion due to boating at a wake speed. The commission did not adopt the wake restriction. Existing statutes are still in effect to protect all water recreational sports including but not limited to vessels must be 75 feet from a fisherman or waterfowl hunter (23-2-525, MCA) and cannot make a reckless approach to, depart from, or passage by a dock, ramp, diving board, or float (23-2-523, MCA).

Comment 5: The commission received multiple comments opposing the no wake rule stating Church Slough is a safe place to teach kids to water ski and fish, is a safe alternative to the Flathead River in early summer due to debris in the river, and crowding is not an issue.

Response 5: The commission published the proposed rules in response to a petition submitted to address erosion concerns. The local department enforcement personnel reported that Church Slough does not have a greater incidence of user conflicts or safety concerns than on other waters.

Comment 6: The commission received multiple comments in favor of the no wake rule on Church Slough stating many forces cause erosion but boat wakes are the only force people can control, shoreline vegetation is being severely impacted, reducing bank erosion will help landowners by reducing costly bank repair and damage, boat wakes cause bank erosion on sloughs degrading resources, and high speed boats can use other water for high speed activities where bank erosion is not a problem.

Response 6: The commission did not adopt the no wake rule because multiple forces cause bank erosion including land management, dam operations, wind waves, river current, and boat wakes. The department has not conducted a study to evaluate the relative contribution of these factors to bank erosion or to assess the rate of erosion on Church Slough. The commission strives to minimize restrictions on recreation while protecting public resources.

Comment 7: The commission received multiple comments opposed to the no wake rule on Church Slough stating there is not significant erosion due to boating, there is no scientific data collected about bank erosion on Church Slough, bank erosion is inevitable and natural and a no wake rule will not stop bank erosion, and multiple factors contribute to bank erosion. Some stated that a no wake rule is too restrictive, reducing recreational opportunity for future generations, and infringes upon the rights of citizens and landowners.

Response 7: Please refer to Response 13. Department personnel reported that most landowners on Fennon Slough addressed bank erosion on the slough banks with stabilization projects permitted under the Montana Natural Stream Bed and Land Preservation Act. Landowners petitioned the department for the no wake rule to reduce erosion of property. Landowners and others provided anecdotal accounts and observations of excessive erosion due to boat wakes.

Comment 8: The commission received several comments in support of adopting the no wake rule on Fennon Slough for reasons including drastic increase in the rate of bank erosion due to increased boat use, the bank soils are defenseless to wake erosion because they lack rock, stones, or gravel, and boat wakes from large vessels exceed the two or three feet of riprap along the banks of the river.

Response 8: The commission adopted the no wake rule on Fennon Slough to address a petition submitted by landowners. The landowner petition and multiple public comments contend that boat wakes are causing excessive bank erosion and degradation of water quality. Fennon Slough receives a high level of boat use due to the close proximity of popular public access sites and a large private marina and the banks consist of highly erosive soils.

Comment 9: One person suggested the United States Fish and Wildlife Service revisit its restriction on the north end of Flathead Lake for waterfowl hunting.

Response 9: United States Fish and Wildlife Service (service) regulations are not within the scope of the commission's or department's authority and any recommendations to those rules need to be addressed to the service.

Comment 10: One person stated that boaters who push the limits and abuse the privilege to boat should be dealt with by law enforcement.

Response 10: Department enforcement personnel currently patrol these waters and are available to address complaints.

Comment 11: One person stated personal watercraft is the most offensive boating operation.

Response 11: The proposed amendments did not address any use of a specific type of watercraft.

Comment 12: One person stated that wake boarding is currently not a problem and nonmotorized use can coexist with motorized use.

Response 12: Boating at wake speeds can displace use by anglers and nonmotorized users and increase wake boarding in the future could increase the potential for bank erosion. The commission recognizes that the current level of conflict between nonmotorized and motorized boat use does not require restricting recreational use and therefore did not adopt the speed restriction.

Comment 13: One person stated at the hearing that wake boarding boats with loud stereos and personal watercraft are creating annoying noise levels, infringing on landowner civil rights and decreasing property value. One person responded that noise is not a problem and boating occurs during middle of the day.

Response 13: The commission published the proposed rules in response to a petition submitted to address erosion concerns and would have no effect on noise restrictions. Motorboats and personal watercraft may not exceed 86 decibels measured at a distance of 50 feet and not in excess of 90 decibels at 3 feet from the muffler.

Comment 14: Two people stated that they were in support of a no wake rule because turbidity from boat wake erosion is affecting fish reproduction and health and the quality of the fishery has declined due to erosion.

Response 14: The department is unaware of fish monitoring data validating an affect on fish reproduction and health or a decline in the fishery.

Comment 15: One comment stated that most of the boating use is by fisherman and not bird watchers and that more bank damage is due to fisherman wakes then by water skier wakes.

Response 15: The commission considers any amount of erosion in its decision to adopt recreational use rules regardless of the cause.

Comment 16: One person stated boat wakes cause bank erosion threatening habitat that conservation easements were meant to protect.

Response 16: Multiple forces cause bank erosion including land management, dam operations, wind waves, river, current, and boat wakes. The department has not conducted a study to assess the relative contribution of these to bank erosion in Church Slough. The department supports the conservation values protected by another organization's conservation easement in this area.

Comment 17: The commission received several comments stating the department should increase educational efforts to reduce boating impacts, including educating boaters on how to safely boat and respect other users and the land to minimize problems.

Response 17: The department wardens inform boaters of boating rules and safe boating practices and will continue to patrol these waters and be available to address complaints.

Comment 18: A few people suggest that other alternatives for boating restrictions should be considered.

Response 18: The commission published the proposed rules in response to language submitted in a petition to address erosion concerns.

Comment 19: One comment stated the department plays into the wishes of people who do not buy hunting or fishing licenses instead of enhancing opportunities for all.

Response 19: The commission and department adopt and enforce all rules equally to everyone and strive to minimize restrictions while protecting resources.

Comment 20: One comment stated that adoption of restrictions on Church Slough will create a need for more enforcement and signing will be needed and suggested money collected from fines to pay for enforcement.

Response 20: The seasonal closure will be published in the next publication of boating regulations and department personnel will provide public notice and education regarding boating regulations. By statute, the department does not receive money from fines levied for a violation of a no wake boating rule.

Comment 21: The commission received several comments stating that private property values will decline if boaters cannot navigate the slough at a wake speed.

Response 21: Church Slough is a public resource and a rule restricting recreational use on that public resource will not affect private property values.

Comment 22: One comment stated boating negatively impacts native birds, mammals, reptile, and amphibians forcing them into backwaters.

Response 22: The commission recognizes that boating can displace migrating waterfowl and adopted a seasonal closure to boating when large numbers of migratory birds use the slough.

Comment 23: One comment questioned how a group could propose restriction on landowners along the slough.

Response 23: Section 2-4-315, MCA, states that an interested person may petition an agency requesting the promulgation, amendment, or repeal of a rule. The commission and department adopt and enforce all rules equally to everyone.

Comment 24: One person stated the Church Slough and Fennon Slough should be controlled in the same manner so that use of one will not adversely affect the other.

Response 24: The commission considered two petitions individually. The commission adopted the seasonal closure on Church Slough to protect migratory waterfowl that use the slough but did not adopt the no wake rule. Church Slough is less accessible and a majority of landowners did not contend that boating was causing excessive bank erosion. Fennon Slough receives a high level of boat use due to the close proximity of public access sites and a large private marina. The petition submitted by landowners and comments stated that boat wakes are causing bank erosion. Restrictions on Fennon Slough may not lead to increased use on Church Slough.

Comment 25: The commission received several comments stating the Flathead County boat access has the number of large horsepower boats and water skiers creating a dangerous situation. One person stated there is a lack of enforcement of the county horsepower restriction and another person stated that the horsepower restriction will be unnecessary if the commission adopts the no wake rule.

Response 25: Department surveys have demonstrated the number of boats on the river and sloughs have doubled between the 2002 and 2008 surveys which are prior to Flathead County building the boat ramp. Department personnel reported that there is not a greater incidence of user conflicts or safety concerns than on other waters. Department personnel cannot enforce Flathead County's restrictions.

Comment 26: One comment suggested the department had a plan to restrict wake speed boating by allowing the county to build a boat ramp to increase boat use to justify speed boating on the sloughs.

Response 26: The department did grant Flathead County a 124 permit for construction of its boat ramp. The commission considered two petitions individually. The commission adopted the seasonal closure on Church Slough to protect migratory waterfowl that use the slough but did not adopt the no wake rule. Church Slough is less accessible and a majority of landowners did not contend that boating was causing excessive bank erosion. Fennon Slough receives a high level of boat use due to the close proximity of public access sites and a large private marina. The petition submitted by landowners and comments stated that boat wakes are causing bank erosion.

Comment 27: The commission received several comments suggesting the commission exempt landowners from a no wake restriction. Several comments stated that exempting landowners from rules was unfair. One person suggested that before limiting boating speed, the department should limit public access.

Response 27: The commission recognizes that the river and its sloughs are public waters and that boating rules apply to all boaters. The commission is not exempting landowners from the no wake restriction adopted on Fennon Slough. The commission only has the authority to regulate the recreational use of the water including whether to a speed restriction or a complete closure would apply to all boaters.

Comment 28: The commission received several comments stating a need for boating restrictions on the entire river system. The commission received several comments stating a concern that adopting restrictions would set a precedence leading to more unwanted restrictions on the entire river system.

Response 28: The commission considered the proposed rule changes contained in two individual petitions. The commission did not consider boating

regulations on the larger river system and is unaware of any petitions for restriction on the Flathead River.

Comment 29: The commission received multiple comments stating that boat use has increased on the sloughs in recent years.

Response 29: The department conducted boating surveys in 1992, 2002, and 2008 that show a large increase in boating on the Flathead River and sloughs.

Comment 30: The commission received a couple of comments stating that a study should be done on the river and slough to access the rate of erosion and causes of erosion, effects of boat wakes, and effectiveness of restrictions.

Response 30: The department does not generally engage in studies of this type and instead relies upon the best available information including data collected by other agencies. The department does not have any plans to study the rate and causes of soil erosion on the river and sloughs in question.

Comment 31: One person noted that it is a one and a half mile boat ride from his house on Fennon Slough to the Flathead River and it would take a significant time period when traveling at no wake speeds to reach the river.

Response 31: The commission adopted the no wake restriction on Fennon Slough to protect the resources from erosion. The commission recognizes that traveling at a no wake speed will be slower and require more time to travel.

/s/ Bob Ream  
Bob Ream, Chairman  
Fish, Wildlife and Parks Commission

/s/ Rebecca Jakes Dockter  
Rebecca Jakes Dockter  
Rule Reviewer

Certified to the Secretary of State May 16, 2011

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM )	NOTICE OF AMENDMENT
17.30.201 and 17.30.1341 pertaining to )	
permit application, degradation )	(WATER QUALITY)
authorization, and annual permit fees )	
and general permits )	

TO: All Concerned Persons

1. On December 23, 2010, the Board of Environmental Review published MAR Notice No. 17-309 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 2870, 2010 Montana Administrative Register, issue number 24.

2. The board has amended ARM 17.30.1341 exactly as proposed and has amended ARM 17.30.201 as proposed, but with the following changes, stricken matter interlined, new matter underlined:

17.30.201 PERMIT APPLICATION, DEGRADATION AUTHORIZATION,  
AND ANNUAL PERMIT FEES (1) through (1)(h) remain as proposed.

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

(a) through (e) remain as proposed.

(f) "multi-county," for pesticide permit fee purposes, means the general permit authorizing pesticide application within multiple contiguous counties, not to exceed 20, that are within the same Montana Department of Agriculture field office district as identified by the applicant;

(g) through (l) remain as proposed.

(m) "renewal permit" means a permit for an existing facility that has an effective discharge permit; ~~and~~

(n) "single county," for pesticide permit fee purposes, means the general permit authorizing pesticide application within one county ~~or within multiple counties that are not within the same Montana Department of Agriculture field office district;~~ and

(o) "threshold," for pesticide permit fee purposes, means the area of surface water that is impacted annually by pesticide treatment, as designated in the Pesticide General Permit for specific pattern uses.

(3) through (5) remain as proposed.

(6) The fee schedules for new or renewal applications for, or modifications of, a Montana pollutant discharge elimination system permit under ARM Title 17, chapter 30, subchapter 11 or 13, a Montana ground water pollution control system permit under ARM Title 17, chapter 30, subchapter 10, or any other authorization under 75-5-201, 75-5-301, or 75-5-401, MCA, or rules promulgated under these authorities, are set forth below as Schedules I.A, I.B, I.C, and I.D. Fees must be



paid in full at the time of submission of the application. For new applications under Schedule I.A, the annual fee from Schedule III.A for the first year must also be paid at the time of application. For new applications under Schedule I.B and I.C, the annual fee is included in the new permit amount and covers the annual fee for the calendar year in which the permit coverage becomes effective.

(a) and (b) remain as proposed.

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

(d) through (h) remain as proposed.

Schedule I.A remains as proposed.

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

Category	Renewal Fee	New Permit Fee (includes initial annual fee)
Concentrated animal feeding operation	\$ 600	\$ 1,200
Construction dewatering	400	900
Fish farms	600	1,200
Produced water	900	1,200
Suction dredge		
resident of Montana	25	50
nonresident of Montana	100	200
Sand and gravel	900	1,200
Domestic sewage treatment lagoon	800	1,200
Disinfected water	800	1,200
Petroleum cleanup	800	1,200
Pesticides		
<u>Single county - less than threshold</u>	<u>25</u>	<u>50</u>
<u>Multi-county - less than threshold</u>	<u>50</u>	<u>100</u>
<u>Single county - greater than threshold</u>	<u>450 250</u>	<u>900 500</u>
<u>Multi-county - greater than threshold</u>	<u>1,400 600</u>	<u>2,700 1,200</u>
Ground water remediation or dewatering	800	1,400
Ground water potable water treatment facilities	800	1,400
Other general permit, not listed above	600	1,200

(i) through (n) remain as proposed.

Schedule I.C remains as proposed.

(o) remains as proposed.

Schedule I.D remains as proposed.

(7) remains as proposed.  
 Schedule II remains as proposed.  
 (8) and (8)(a) remain as proposed.  
 Schedule III.A remains as proposed.

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

Category	Amount
Concentrated animal feeding operation	\$600
Construction dewatering	450
Fish farms	450
Produced water	750
Portable suction dredges	
resident of Montana	25
nonresident of Montana	100
Sand and gravel production	750
Domestic sewage treatment lagoon	850
Disinfected water	750
Petroleum cleanup	750
Pesticides	
Single county - less than threshold	25
Multi-county - less than threshold	50
Single county - greater than threshold	450 250
Multi-county - greater than threshold	1,400 600
Ground water remediation or dewatering	800
Potable water treatment facilities	800
Other general permit, not listed above	800

(b) through (d) remain as proposed.  
 Schedule III.C remains as proposed.  
 (e) through (11)(b) remain as proposed.

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

COMMENT NO. 1: The fees for coverage under the pesticide general permit are too high. Fees should be set at only what is necessary to cover administrative costs. It is hard to judge the scope of this administrative work, since the permitting process is not yet fully defined.

RESPONSE: The Department of Environmental Quality Water Protection Bureau (department) operates under a fee-based program. The Montana Water Quality Act requires the board to adopt fee rules that are sufficient to recover the costs of issuing permits, licenses, and other authorizations, as well as the administrative costs of operating the program. Section 75-5-516, MCA. It is hard to exactly predict program costs at this time, since the permitting process and the regulated community have not been fully defined. However, it will require

department time and resources to ensure that applicants submit a complete Notice of Intent (NOI) and comply with the pesticide general permit requirements.

The department estimated the proposed fees for the pesticide general permit based on consideration of the following factors: (a) comparison to general permits for construction dewatering and construction storm water; (b) comparison to other general permit fees, which are approximately 25% higher than the fee originally proposed for single-county pesticide applicators; (c) comparison to existing 308 authorization fees, which have historically been \$400 annually; (d) the types of chemicals that could potentially be discharged to state waters and the potential impacts of these chemicals on the environment, with a higher fee needed for higher potential impacts; (e) an assumption that the program will require 1.5 full time equivalent (FTE) staff to administer the program; and (f) an assumption that there will be approximately 100 permittees.

Based upon comments received, the proposed fees have been significantly reduced. In addition to reducing the multi-county and single-county fees, the revised rules will create a new category for smaller sources that discharge less than the pesticide permitting threshold designated in the general permit. The new category will have nominal application and annual fees. If it becomes apparent in the future that the program is not self-sufficient, the department may request a fee increase based on the shortfall at that time.

COMMENT NO. 2: The definitions of multi-county and single-county permits are not clear enough, and may be confusing to applicators conducting business in more than one county.

RESPONSE: Based upon comments received, the definition of "multi-county" has been changed. Rather than restricting operations to one of the five agriculture field office districts, the "multi-county" definition is changed to include up to 20 contiguous counties. The limit of 20 out of the 56 counties will allow each applicant to cover up to about one third of the state in any one authorization. This will ensure that the department has a manageable administrative burden, while allowing flexibility for owner/operators whose work crosses county boundaries. The definition of "single county" also has been changed, to eliminate the reference to multiple counties that are not in the same agriculture field office district.

Each owner/operator must determine the best permitting strategy for its own business. If pesticide application activities statewide could impact state waters, the owner/operator will need to determine if the activities will be located within one county or multiple counties. Based on that determination, the owner/operator would indicate the type of permit requested and submit the appropriate fee.

COMMENT NO. 3: There should be an exemption for local government, since fees will cut into the limited dollars available to control mosquitoes and aquatic noxious weeds at the local level.

RESPONSE: There is no difference in the cost to the department for permitting and compliance efforts, or in the environmental impacts of pesticide activity, between local government pesticide application and that of state, federal, or private activity. Based on the statutory requirement that fees be sufficient to cover

the costs of administering the program, it is not appropriate to create an exemption for local government.

A majority of local governments already have a budget set for mosquito and weed control, which should include permitting under the current 308 authorization process. See 75-5-308, MCA. 308 authorizations have been required since 1993, and the current annual fee is \$400, although that fee is reduced in this rulemaking to \$250. The new rules also introduce a streamlined NOI process, with nominal fees, for pesticide applications that are below the annual threshold, as defined under the pesticide general permit. Most local governments affected by the pesticide general permit should see a reduction in permitting costs because they will be able to take advantage of the new below-threshold permit coverage with substantially lower fees.

COMMENT NO. 4: The need for this permit may be temporary or become moot, because federal action may correct it, but we need to make sure this permit is not overly burdensome to applicators.

RESPONSE: The requirement to create a pesticide discharge permitting program originated in January of 2009 with a decision by the federal Court of Appeals for the Sixth Circuit. The court held that application of pesticides to water required a permit under the federal Clean Water Act. As a consequence of the federal court decision, the department was required to develop a Montana pesticide general permit. The Montana general permit was issued by the original court deadline, which was April 9, 2011. The court subsequently extended the deadline for permit coverage to October 31, 2011.

Congress is considering legislation to exempt pesticide application from Clean Water Act permitting. If that legislation is enacted, the department will not implement the Montana pesticide general permit. No fees will be collected under the new fee rule, and the permit will effectively sit idle until the board can take action to repeal the related rules. Pesticide applicators who would have been subject to the pesticide general permit would revert to the existing 308 authorization program, which allows temporary exemptions from water quality standards for the use of pesticides.

If there is no action by Congress to overturn the federal court decision, the department will implement the Montana pesticide general permit, and will require the submittal of an NOI and payment of fees by October 31, 2011. Until that date, pesticide applications to waters of the state will be required to have authorization under the 308 program. In an effort to reduce the burden to applicators, the department intends to provide education and outreach in conjunction with existing pesticide training courses, and will provide information and updates on the department webpage at <http://deq.mt.gov/Permits.mcp>.

COMMENT NO. 5: The fees for this permit should be absorbed by either EPA or the department. The pesticide discharge permit requirement is an unfunded mandate, and it will add to costs and will impact the well-being of citizens and visitors to our communities.

RESPONSE: Based upon comments received, the proposed fees have been reduced. See Responses to Comment Nos. 1 and 4.

COMMENT NO. 6: The board needs to determine if this is the correct permit fee. It may be too high; it may be too low.

RESPONSE: Based upon comments received, the proposed fees have been reduced. See Response to Comment No. 1.

COMMENT NO. 7: The proposed fees for the pesticide general permit will render our mosquito abatement program ineffective. For 2010 our budget was \$2,000 and the proposed permit fee of \$900 does not kill a single mosquito. With \$1,100 left we cannot hire our contractor to do an effective job of mosquito control. The public health will suffer as a result of the taxpayers' money being wasted on this non-productive fee. There has been a system (FIFRA) in place for years that satisfies our needs. The entire NPDES program must be eliminated before more damage is done to Montana's public health and the ability of ranchers and farmers to help create the food supply for America.

RESPONSE: Based upon comments received, the proposed fees have been reduced. See Responses to Comment Nos. 1, 2, and 3.

COMMENT NO. 8: Valley County Commissioners oppose any change in regulations or fees. Our mosquito control department feels that the present system is working well and that there is no need for change.

RESPONSE: Based upon comments received, the proposed fees have been reduced. See Responses to Comment Nos. 1, 2, and 3.

COMMENT NO. 9: The proposed fees are not a great amount, but our county watches all expenditures, and, if we can continue without any increase in costs, that is our preference. We are serious about the budget.

RESPONSE: Based upon comments received, the proposed fees have been reduced. See Responses to Comment Nos. 1, 2, and 3.

COMMENT NO. 10: The proposed fees for mosquito control included in the new rules will place a great hardship on our little town. Our entire mosquito control budget is \$4,715 for this fiscal year. Without mosquito control, the quality of life in our town will decline.

RESPONSE: Based upon comments received, the proposed fees have been reduced. See Responses to Comment Nos. 1, 2, and 3.

COMMENT NO. 11: Our county is concerned that the fees for the pesticide general permit program are too high. Broadwater County is a class 5 county and is very low in tax dollars. Last fall Eurasian Watermilfoil, a noxious weed, was found throughout our waterways from the Jefferson River to Canyon Ferry Reservoir. Many of the areas can be treated without the use of herbicides but, for some areas, herbicide treatment is the only feasible way to eradicate the plants. Also, the Jefferson and Missouri River form the boundary between Broadwater and Gallatin and Jefferson Counties, depending on the location. Since the weed is located on several different rivers and in several different counties, the fees would add up quite quickly making a cooperative effort very difficult.

RESPONSE: Based upon comments received, the proposed fees have been reduced. See Responses to Comment Nos. 1, 2, and 3.

COMMENT NO. 12: These rules may act as a disincentive to commercial applicators, who are educated, trained, and experienced professionals. Commercial applicators are in the best position to avoid environmental impacts from spraying, and they should be encouraged to stay in business.

RESPONSE: Based upon comments received, the proposed fees have been reduced. See Responses to Comment Nos. 1 and 2.

COMMENT NO. 13: The proposed permit fees for mosquito control entities are far too high for small business contractors. Our budgets are very tight and this added expense adds even more pressure. Government is supposed to encourage small business, not discourage it. Counterparts in other states say that their states' proposed fees are less than half of Montana's proposed fees.

RESPONSE: Based upon comments received, the proposed fees have been reduced. See Responses to Comment Nos. 1 and 2.

COMMENT NO. 14: A county weed control district is concerned about the cost of the permit and modifications. As aquatic weed awareness rises, they will continue to find new infestations of existing and new weeds that may require the use of an herbicide not listed on the original permit. There also will be new labeling for existing herbicides, as well as new herbicides. With an authorization fee of \$900, and about 30 modifications over the last five years, it would have cost the district an additional \$15,900 as well as the \$90,000 it has cost to treat aquatic weeds over the last five years.

RESPONSE: Based upon comments received, the proposed fees have been reduced. See Responses to Comment Nos. 1, 2, and 3. The need for a modification would depend on how the NOI was originally submitted. The NOI does not require the applicant to identify the specific type of pesticide used, so changing the type of pesticide will not necessarily trigger a modification. The NOI also allows a general statement of treatment location within a single county, e.g., "all water bodies"; so changing water bodies would not necessarily trigger a modification.

COMMENT NO. 15: I operate a small business that does mosquito control for 12 mosquito districts. Some of my districts have \$4,500 or less in their budget for this, and I was told to share with you that I would not have their business if this particular fee structure was passed.

RESPONSE: Based upon comments received, the proposed fees have been reduced. See Response to Comment No. 1. An applicator may decide that it is a good investment to obtain pesticide general permit coverage for all counties where the applicator might conduct pesticide applications. In that case, any district that hires the applicator would be covered under the applicator's authorization, and the district would not be required to submit a separate NOI. See Response to Comment No. 20.

COMMENT NO 16: The members of a grain growers association view this proposed fee structure as a tax and as an excessive paperwork burden.

RESPONSE: Based upon comments received, the proposed fees have been reduced. See Response to Comment No. 1.

COMMENT NO. 17: It is not fair that a farmer that farms in Hill County and Blaine County would only need a single-county permit, but a farmer that farms in Blaine and Phillips counties would be subject to a multi-county fee because the two counties were not in the same agriculture field office district.

RESPONSE: Based upon comments received, the proposed fees have been reduced, and the multi-county permit has been restructured. See Responses to Comment Nos. 1 and 2.

COMMENT NO. 18: If there is a way to streamline this process and reduce costs, it would go a long way towards addressing the concerns of a wood products association.

RESPONSE: Based upon comments received, the proposed fees have been reduced. See Responses to Comment Nos. 1 and 2.

COMMENT NO. 19: Would a separate permit authorization be required for each pesticide that an applicator uses or would a single authorization cover all pesticides used?

RESPONSE: The owner/operator applying for coverage under the permit is required to submit one NOI and fee for all pesticide applications to state waters for which they are responsible. As long as the NOI specifies all of the relevant pesticide use patterns that would be undertaken, the authorization would cover those within the county or counties indicated in the NOI. For example, if an owner/operator were responsible for both mosquito control and weed and algae control within one county, and the NOI indicated those applications, both could be permitted under a single authorization.

COMMENT NO. 20: How will the fee be applied to aerial applicators: individually on each farm, on each field, or can there be one single application fee just for business for a year?

RESPONSE: All pesticide applications to state water need to have coverage under the pesticide general permit. It will be up to the aerial applicators and their clients as to what the best permitting option may be. One of the parties needs to be responsible for submitting a complete NOI package and fee prior to any pesticide application that may affect state waters. The NOI can be as general or specific as the applicant determines. For instance, a county may obtain permit coverage for all applications to all state waters in the county. In that case, aerial applicators hired by the county could operate under the county's authorization. Conversely, an aerial applicator may obtain permit coverage for all contiguous counties where the applicator conducts pesticide applications. In that case, anyone hiring the applicator would be covered under the applicator's authorization and would not be required to submit a separate NOI.

The pesticide general permit authorization is on a five-year renewal cycle. The initial fee submitted with the NOI includes both the application fee and the first year's annual fee. Fees for each of the following four years are annual fees only. An applicant can choose to terminate the authorization at any time if they no longer intend to spray to state waters, but they will be responsible for the annual fee for the year in which they terminate.

COMMENT NO. 21: Has the state considered permit-by-rule or a statewide NOI process? Forest ownerships often cross county and district boundaries and it seems punitive to have to pay these increased costs.

RESPONSE: A statewide general pesticide application permit would be too difficult to administer and would not be consistent with the way other MPDES permits are administered. To effectively track permit coverage and compliance, the department needs more specific information about pesticide application areas. However, based on comments the proposed fees have been reduced and the definition of multi-county has been changed. See Responses to Comment Nos. 1 and 2.

COMMENT NO. 22: What is the time frame for the permit application and approval? Monitoring for budworm populations starts in late May or early June. Initial monitoring may determine that certain properties do not need to be sprayed, while other properties will be recommended for spraying based on budworm activity.

RESPONSE: The rules authorizing the pesticide general permit and fees will be considered for final adoption by the board at their meeting on May 13, 2011. If adopted, the rules will be effective by the end of May 2011. The pesticide general permit itself was finalized by the April 9, 2011, deadline imposed by the federal court, although that deadline was subsequently extended to October 31, 2011. Accordingly, the pesticide general permit allows until October 31, 2011, for submittal of NOI and fee packages. This will allow the department time to provide outreach and education. In the meantime, the existing 308 authorization process will continue.

The department will process NOI submittals within a very short time frame. Coverage under the pesticide general permit is effective upon filing a complete NOI and fees, and the department will send out a letter confirming coverage within a week or ten days.

COMMENT NO. 23: What is the turn-around time from filing an application to receipt of the permit authorization? Our spray season begins in late April. If the permit would not be available until May or June, can we get an exemption?

RESPONSE: See Response to Comment No. 22.

COMMENT NO. 24: Fees are required to be paid in full at the time of application. Are they refundable if monitoring work determines that spraying is unnecessary?

RESPONSE: If a particular spray project is deemed unnecessary, but the applicant may do additional spraying throughout the year, it would be in the applicant's best interest to maintain permit coverage. However, if the applicant



terminates permit coverage under this permit, there is no provision in the fee rules to allow a fee refund.

COMMENT NO. 25: The department may assess an administrative processing fee when the permittee makes substantial alterations or additions, requiring significant review, to a pesticide discharge management plan. What circumstances would warrant additional administrative processing fees?

RESPONSE: In response to comments, the term "pesticide discharge management plan" was changed to "pesticide management plan," because an important purpose of the plan is to prevent discharges if possible.

According to ARM 17.30.201(6)(c), as amended, the department may assess an administrative processing fee under Schedule I.D when a permittee makes substantial alterations or additions, requiring significant additional review, to a pesticide management plan. This will not routinely occur, since pesticide management plans must be maintained on-site but are not required to be submitted to the department except under special circumstances. The administrative fee might apply if submittal of the pesticide management plan were required as part of a complaint investigation or during a compliance inspection, and the submitted plan was found to be deficient. The department could assess the administrative fee if significant plan review were required in that situation.

COMMENT NO. 26: Do pesticide management plans allow the flexibility to add new landowners on short notice? This commonly occurs when neighbors learn that a forest treatment is planned.

RESPONSE: Pesticide management plans can and should be continually updated by applicants to reflect changed conditions such as new application areas. Since the department is not requiring submittal of the plans except as part of a compliance inspection, complaint investigation, or other similar circumstance, no fees are required for revisions, other than as described above in the Response to Comment No. 25.

COMMENT NO. 27: Could this permit be combined with another permit, such as a storm water runoff permit?

RESPONSE: Combining this permit with the storm water general permit would not be appropriate. Based on federal requirements, discharge of pesticides to surface water through storm water runoff is considered a nonpoint source and is exempt from the discharge permit requirements.

COMMENT NO. 28: Could the application form be reduced to a page or two, to reduce the workload for the department so that the fee structure could be reduced?

RESPONSE: Based upon comments received, the proposed fees have been reduced. See Response to Comment No. 1. The NOI set out in the general permit will be as streamlined as possible. The current draft is three pages plus a signature page.

COMMENT NO. 29: If an application is submitted for an authorization under the suction dredge general permit, is the applicant required to pay a \$500 administrative fee in addition to the \$50 application fee?

RESPONSE: The administrative processing fee in ARM 17.30.201(6)(c) does not apply to suction dredge permit applications. An applicant for coverage under the suction dredge general permit would need to pay an initial fee, which is \$50 for residents of Montana or \$200 for non-residents. These fees include both the application fee and the first year's annual fee. After the first year, the annual fee is \$25 for residents or \$100 for non-residents. These fees are set in statute at 75-5-516(12), MCA, and are not being changed in this rulemaking.

COMMENT NO. 30: A Montana group of gold prospectors opposes the increase of fees for new applications for suction dredge permits.

RESPONSE: The fees for suction dredge permits have not been changed in this rulemaking. See Response to Comment No. 29.

COMMENT NO. 31: Who would be required to get the pesticide discharge permit?

RESPONSE: A detailed response to this question is outside the scope of this rulemaking, and will be addressed through the general permit process. In order to ensure that the regulated community is aware of the pesticide general permit and associated fees, the department intends to provide education and outreach in conjunction with existing pesticide training courses, and will provide information and updates on the department webpage at <http://deq.mt.gov/Permits.mcp>.

COMMENT NO. 32: How is the 640-acre pesticide use pattern threshold in the pesticide general permit determined? Is it determined by the distance and width of the surface water? If the owner/operator chooses not to spray *Bacillus thuringiensis* over state water bodies, what is the appropriate buffer distance?

RESPONSE: This question is outside the scope of this rulemaking and will be addressed through the general permit process. See Response to Comment No. 31.

COMMENT NO. 33: The requirements for a pesticide management plan appear rigid and burdensome. Are there some examples of the plans for *Bacillus thuringiensis* applications?

RESPONSE: This question is outside the scope of this rulemaking and will be addressed through the general permit process. See Response to Comment No. 31.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

/s/ James M. Madden

JAMES M. MADDEN

Rule Reviewer

By: /s/ Joseph W. Russell

JOSEPH W. RUSSELL, M.P.H.

Chairman

Certified to the Secretary of State, May 16, 2011.

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

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 24.183.502 and 24.183.504 )  
application processes for professional )  
engineers and professional land )  
surveyors )

TO: All Concerned Persons

1. On March 10, 2011, the Board of Professional Engineers and Professional Land Surveyors (board) published MAR notice no. 24-183-37 regarding the public hearing on the proposed amendment of the above-stated rules, at page 286 of the 2011 Montana Administrative Register, issue no. 5.

2. On April 4, 2011, a public hearing was held on the proposed amendment of the above-stated rules in Helena. No comments were received by the April 12, 2011 comment deadline.

3. The board has amended ARM 24.183.502 and 24.183.504 exactly as proposed.

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

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

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

Certified to the Secretary of State May 16, 2011

VOLUME NO. 54

OPINION NO. 2

CLERKS - Provision of the Open-space Land and Voluntary Conservation Easement Act delaying recordation of conservation easements until county planning agency completes review does not apply to conservation easements acquired or created by the United States under federal law;

COUNTIES - Provision of the Open-space Land and Voluntary Conservation Easement Act dictating duration of conservation easements and delaying recordation of conservation easements until county planning agency completes review do not apply to conservation easements acquired or created by the United States under federal law;

LAND USE - Provision of the Open-space Land and Voluntary Conservation Easement Act dictating duration of conservation easements and delaying recordation of conservation easements until county planning agency completes review does not apply to conservation easements acquired or created by the United States under federal law;

PUBLIC LANDS - Provision of the Open-space Land and Voluntary Conservation Easement Act dictating duration of conservation easements and delaying recordation of conservation easements until county planning agency completes review does not apply to conservation easements acquired or created by the United States under federal law;

STATUTORY CONSTRUCTION - Where meaning of statute is unclear, construction that avoids potential constitutional infirmity is preferred;

MONTANA CODE ANNOTATED - Title 76, chapter 6; sections 1-3-232, 70-21-201, 76-6-103(1), -104(4), -105(2), -202, -206, -207;

UNITED STATES CODE - 16 U.S.C. § 3837b(2);

HELD: Montana Code Annotated §§ 76-6-202, 76-6-206 and 76-6-207 do not apply to conservation easements acquired or created by federal agencies pursuant to federal law.

May 6, 2011

Mr. Joe Coble  
Teton County Attorney  
P.O. Box 899  
Choteau, MT 59422-0899

Dear Mr. Coble:

You have requested my opinion on a question I have rephrased as follows:

Do the requirements of Mont. Code Ann. §§ 76-6-202, 76-6-206 and 76-6-207 apply to agencies of the federal government?

Montana Code Annotated Title 76, chapter 6, the "Open-Space Land and Voluntary Conservation Easements Act" (the Act), deals with the creation, recognition and enforcement of conservation easements. Among other things, it authorizes "public bodies" and "qualifying private organizations," both terms defined by the Act, to participate in transactions creating a conservation easement. Mont. Code Ann. § 76-6-103(1). However, it is not the only means by which an easement preserving open space will be recognized or created, as it is clear that the Act does not intend to occupy the field of "easement[s], covenant[s], condition[s], or restriction[s]." Mont. Code Ann. § 76-6-105(2).

Federal agencies also participate in the creation of conservation easements under the authority of federal statutes. See, e.g., 16 U.S.C. § 3837b(2) (creation of easements by U.S. Fish and Wildlife Service).

The Act defines the terms "public body" and "qualified private organization" in ways that exclude their application to the federal government. Mont. Code Ann. § 76-6-104(4) ("Public body" means the state, counties, cities, towns, and other municipalities.); (5) (defining "Qualified private organization" as a nongovernmental entity). Accordingly, those provisions of the Act specifically relating to public bodies and qualified public organizations cannot be extended to a federal agency based on the plain language of the definitions.

This analysis does not completely answer your question, as there are three provisions of the Act that do not expressly contain language either specifically referring to those defined terms or otherwise limiting the reach of that specific section to the Act:

1. Montana Code Annotated § 76-6-202 limits the duration of conservation easements to a minimum of fifteen years and provides that any such easement not created in perpetuity may be renewed for a minimum term of fifteen years.
2. Montana Code Annotated § 76-6-206 provides that "all conservation easements" must be subject to review and advisory comment by the local planning authority for the county. Although that review is not binding, the easement cannot be recorded until the review is complete or 90 days have elapsed.
3. And, Mont. Code Ann. § 76-6-207 provides that the easement is to be recorded in the county where the land lies in the same way that other property documents are recorded, see Mont. Code Ann. §§ 70-21-201 et seq. (generally describing recordation of real property documents).

Your questions are specific to the operation of Mont. Code Ann. §§ 76-6-202, -206 and -207, and whether those apply to the federal government.

Even though those three provisions do not contain language expressly limiting their application to the Act, I conclude that those provisions only apply to those easements created under the Act. I reach that conclusion for three reasons. First, given that the Legislature understood that other laws might exist providing for the preservation of open space, and specifically intended to respect those laws, it is highly unlikely that it would have limited the reach of almost, but not quite, all of the Act only to conservation easements created under it, while attempting in a few sections to regulate other kinds of such easements. Second, basic canons of construction provide that "[s]tatutes are not to be read in isolation, but as a whole." In re Adoption of K.P.M., 2009 MT 31, ¶ 14, 349 Mont. 170, 201 P.3d 833. And finally, it is hard to reach any other conclusion in light of the savings clause found in Mont. Code Ann. § 76-6-105(2).

Accordingly, just as these provisions do not apply to easements created under other provisions of state law, they also do not apply to easements created under federal law. The latter interpretation also has the benefit of avoiding potential conflict with federal law. It is well-established that where two interpretations of a law are available, one of which presents a potential constitutional issue and the other of which does not, the construction that avoids the constitutional issue is to be preferred. Confederated Salish and Kootenai Tribes v. Clinch, 1999 MT 342, ¶¶ 25-27, 297 Mont. 448, 992 P.2d 244; Mont. Code Ann. § 1-3-232 (an interpretation that gives effect is to be preferred over one that renders void).

THEREFORE, IT IS MY OPINION:

Montana Code Annotated §§ 76-6-202, 76-6-206 and 76-6-207 do not apply to conservation easements acquired or created by federal agencies pursuant to federal law.

Sincerely,

/s/ Steve Bullock  
STEVE BULLOCK  
Attorney General

sb/cdt/jym

## **NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE**

### **Interim Committees and the Environmental Quality Council**

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

#### **Economic Affairs Interim Committee:**

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

#### **Education and Local Government Interim Committee:**

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

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

- Department of Public Health and Human Services.

#### **Law and Justice Interim Committee:**

- Department of Corrections; and
- Department of Justice.

#### **Energy and Telecommunications Interim Committee:**

- Department of Public Service Regulation.

#### **Revenue and Transportation Interim Committee:**

- Department of Revenue; and
- Department of Transportation.

**State Administration and Veterans' Affairs Interim Committee:**

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

**Environmental Quality Council:**

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

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

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



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

### Definitions:

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

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

### Use of the Administrative Rules of Montana (ARM):

- |                  |   |
|------------------|---|
| Known<br>Subject | 1. Consult ARM Topical Index.<br>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 December 31, 2010. This table includes those rules adopted during the period January 1, 2011, through March 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 December 31, 2010, this table, and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule, and the page number at which the action is published in the 2011 Montana Administrative Register.

To aid the user, the Accumulative Table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number.

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## 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 April 2011 appear. Vacancies scheduled to appear from June 1, 2011, through August 31, 2011, 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 May 1, 2011.

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 APRIL 2011

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
<b>Board of Optometry</b> (Labor and Industry)			
Mr. Peter Fontana Great Falls Qualifications (if required): public member	Governor	Hill	4/3/2011 4/3/2015
Mr. Douglas Kimball Bozeman Qualifications (if required): registered optometrist	Governor	reappointed	4/3/2011 4/3/2015
<b>County Printing Board</b> (Administration)			
Mr. Dan Killoy Miles City Qualifications (if required): printing industry representative	Governor	reappointed	4/1/2011 4/1/2013
Commissioner Laura Obert Townsend Qualifications (if required): county commissioner	Governor	reappointed	4/1/2011 4/1/2013
Mr. Calvin J. Oraw Sidney Qualifications (if required): public representative	Governor	reappointed	4/1/2011 4/1/2013
Commissioner Marianne Roose Eureka Qualifications (if required): county commissioner	Governor	reappointed	4/1/2011 4/1/2013

## BOARD AND COUNCIL APPOINTEES FROM APRIL 2011

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
<b>County Printing Board</b> (Administration) cont.			
Mr. Milton Wester	Governor	reappointed	4/1/2011
Laurel			4/1/2013
Qualifications (if required): printing industry representative			
<b>State Compensation Insurance Fund Board</b> (Administration)			
Ms. Elizabeth Best	Governor	Dwyer	4/28/2011
Great Falls			4/28/2015
Qualifications (if required): public member			
Commissioner Joe Brenneman	Governor	Taylor	4/28/2011
Kalispell			4/28/2015
Qualifications (if required): private enterprises representative and a policy holder			
Mr. Wayne Dykstra	Governor	Yovetich	4/28/2011
Billings			4/28/2015
Qualifications (if required): private enterprise representative and a policy holder			
<b>State Emergency Response Commission</b> (Military Affairs)			
Mr. Dale Nelson	Governor	Jacobson	4/7/2011
Ronan			10/1/2011
Qualifications (if required): representative of a tribal emergency response commission			
<b>State-Tribal Economic Development Commission</b> (Commerce)			
Mr. Rodney Miller	Governor	reappointed	4/20/2011
Wolf Point			6/30/2013
Qualifications (if required): representative of the Fort Peck Assiniboine & Sioux Tribes			

## BOARD AND COUNCIL APPOINTEES FROM APRIL 2011

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
<b>State-Tribal Economic Development Commission</b> (Commerce) cont.			
Ms. Cheryl Reevis	Governor	Davis-Bird	4/20/2011
Browning			6/30/2013
Qualifications (if required): representative of the Blackfeet Tribe			
Mr. Forrest Smith	Governor	White Tail Feather	4/20/2011
Poplar			6/30/2013
Qualifications (if required): representative of the Fort Peck Assiniboine & Sioux Tribes			
Rep. Jack Wells	Governor	Kittson	4/20/2011
Bozeman			6/30/2013
Qualifications (if required): representative of the Blackfeet Tribe			
<b>Statewide Independent Living Council</b> (Public Health and Human Services)			
Ms. Bobbie Becker	Governor	Maffit	4/6/2011
Glendive			12/1/2013
Qualifications (if required): Independent Living Center representative			
Mr. Chris Cragwick	Governor	reappointed	4/6/2011
Missoula			12/1/2013
Qualifications (if required): public representative/disabilities community representative			
Mr. Tim Harris	Governor	reappointed	4/6/2011
Helena			12/1/2013
Qualifications (if required): agency representative			

## BOARD AND COUNCIL APPOINTEES FROM APRIL 2011

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
<b>Statewide Independent Living Council</b> (Public Health and Human Services) cont.			
Mr. Bob Maffit	Governor	reappointed	4/6/2011
Helena			12/1/2013
Qualifications (if required): public representative/disabilities community representative			
Ms. Donell Neiss	Governor	reappointed	4/6/2011
Missoula			12/1/2013
Qualifications (if required): public representative/disabilities community representative			
Mr. Troy Spang	Governor	Oats	4/6/2011
Ashland			12/1/2013
Qualifications (if required): Section 121 representative			
<b>Traumatic Brain Injury Advisory Council</b> (Public Health and Human Services)			
Ms. Cindi Laukes	Governor	Brown	4/6/2011
Missoula			1/1/2012
Qualifications (if required): representative of an injury control or prevention program			
Ms. Melveena Malatare	Governor	Clark	4/6/2011
Browning			1/1/2014
Qualifications (if required): advocate of brain injured			
Ms. Kathy Smith	Governor	Ostrowski	4/6/2011
Great Falls			1/1/2014
Qualifications (if required): advocate of brain injured			

## BOARD AND COUNCIL APPOINTEES FROM APRIL 2011

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
<b>Traumatic Brain Injury Advisory Council</b> (Public Health and Human Services) cont.			
Dr. James Wright	Governor	Hunt	4/6/2011
Butte			1/1/2013
Qualifications (if required): advocate of brain injured			

## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Aging Advisory Council</b> (Public Health and Human Services) Rep. Beverly Barnhart, Bozeman Qualifications (if required): public representative	Governor	7/18/2011
Mrs. Jessie James-Hawley, Harlem Qualifications (if required): public representative	Governor	7/18/2011
Ms. Lauren Lynch, Butte Qualifications (if required): public representative	Governor	7/18/2011
Ms. Toni Hagener, Havre Qualifications (if required): public representative	Governor	7/18/2011
Mr. Marvin Carter, Laurel Qualifications (if required): public representative	Governor	7/18/2011
Mr. Alex Ward, Helena Qualifications (if required): public representative	Governor	7/18/2011
<b>Agriculture Development Council</b> (Agriculture) Mr. Bill Koenig, Kalispell Qualifications (if required): agriculture producer	Governor	7/1/2011
Ms. Patricia Quisno, Harlem Qualifications (if required): agriculture producer	Governor	7/1/2011
Mr. David Tyler, Belgrade Qualifications (if required): agriculture producer	Governor	7/1/2011



## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Board of Banking</b> (Administration) Dr. Maureen J. Fleming, Missoula Qualifications (if required): public representative	Governor	7/1/2011
Mr. John King, Kalispell Qualifications (if required): state bank officer of a small size bank	Governor	7/1/2011
<b>Board of Hearing Aid Dispensers</b> (Labor and Industry) Ms. Lee Frantz Oines, Missoula Qualifications (if required): dispenser with master's degree and national certification	Governor	7/1/2011
Mr. Jim Lieberg, Helena Qualifications (if required): public representative with a hearing aid	Governor	7/1/2011
<b>Board of Nursing</b> (Labor and Industry) Ms. Sharon L. Dschaak, Wolf Point Qualifications (if required): licensed practical nurse	Governor	7/1/2011
Ms. Laura Weiss, Great Falls Qualifications (if required): registered nurse	Governor	7/1/2011
<b>Board of Pharmacy</b> (Labor and Industry) Mr. William D. Burton, Helena Qualifications (if required): licensed pharmacist	Governor	7/1/2011
<b>Board of Physical Therapy Examiners</b> (Labor and Industry) Mr. Richard Smith, Missoula Qualifications (if required): physical therapist	Governor	7/1/2011

## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Board of Private Security</b> (Labor and Industry) Mr. Raymond Murray, Missoula Qualifications (if required): representative of the Public Safety Officer Standards and Training Council	Governor	8/1/2011
Ms. Holly Dershem-Bruce, Glendive Qualifications (if required): public representative	Governor	8/1/2011
<b>Board of Professional Engineers and Land Surveyors</b> (Labor and Industry) Ms. Ingrid Clare Lovitt-Abramson, Missoula Qualifications (if required): public representative	Governor	7/1/2011
<b>Board of Radiologic Technologists</b> (Labor and Industry) Ms. Anna L. Hazen, Fort Benton Qualifications (if required): permit holder	Governor	7/1/2011
Mr. Charles L. McCubbins, Shelby Qualifications (if required): radiologic technician	Governor	7/1/2011
<b>Board of Regents</b> (Governor) Ms. Teresa Snyder, Bozeman Qualifications (if required): university student	Governor	6/30/2011
<b>Board of Sanitarians</b> (Labor and Industry) Ms. Kathleen Driscoll, Hamilton Qualifications (if required): public representative	Governor	7/1/2011
Mayor Gene Townsend, Three Forks Qualifications (if required): public representative	Governor	7/1/2011

## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Board of Sanitarians</b> (Labor and Industry) cont.		
Mr. Gerald Cormier, Billings Qualifications (if required): sanitarian	Governor	7/1/2011
Ms. Susan K. Brueggeman, Polson Qualifications (if required): sanitarian	Governor	7/1/2011
<b>Board of Veterans' Affairs</b> (Military Affairs)		
Rep. Robert "Bob" Pavlovich, Butte Qualifications (if required): individual with experience with veterans' issues	Governor	8/1/2011
Mr. James E. Heffernan, Helena Qualifications (if required): individual with experience with veterans' issues	Governor	8/1/2011
Mr. Lloyd Jackson, Pablo Qualifications (if required): representative of tribal councils	Governor	8/1/2011
Mr. Harvey Rattey, Glendive Qualifications (if required): veteran and tribal member	Governor	8/1/2011
Mr. C.E. Crookshanks, Missoula Qualifications (if required): individual with experience with veterans' issues	Governor	8/1/2011
<b>Board of Veterinary Medicine</b> (Labor and Industry)		
Dr. Bob Sager, Wilsall Qualifications (if required): veterinarian	Governor	7/31/2011

## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Burial Preservation Board</b> (Administration)		
Mr. Robert P. Four Star, Poplar Qualifications (if required): representative of the Fort Peck Tribes	Governor	8/22/2011
Mr. Steve Platt, Helena Qualifications (if required): representative of the State Historic Preservation Office	Governor	8/22/2011
Mr. John Murray, Browning Qualifications (if required): representative of the Blackfeet Tribe	Governor	8/22/2011
Ms. Marilyn Silva, Miles City Qualifications (if required): public representative	Governor	8/22/2011
<b>Community Health Center Advisory Group</b> (Governor)		
Mr. David Herrera, Missoula Qualifications (if required): public representative	Governor	7/1/2011
Ms. Laurie Francis, Livingston Qualifications (if required): executive employee of a community health center	Governor	7/1/2011
Ms. Jill Baker, Great Falls Qualifications (if required): public representative	Governor	7/1/2011
Ms. Marge Levine, Helena Qualifications (if required): representative of the Montana Primary Care Association	Governor	7/1/2011
Ms. Devri Rockwood, Libby Qualifications (if required): chief financial officer of a community health center	Governor	7/1/2011

## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Community Service Commission</b> (Labor and Industry)		
Mr. Robert E. Harris, Great Falls Qualifications (if required): public representative	Governor	7/1/2011
Mr. James B. Corson, Billings Qualifications (if required): public representative	Governor	7/1/2011
Mr. James Steele, Pablo Qualifications (if required): representative of Tribal government	Governor	7/1/2011
Mr. Jack Chambers, Missoula Qualifications (if required): representative of the disabilities community	Governor	7/1/2011
<b>District Court Council</b> (Justice)		
Mr. Jim Reno, Billings Qualifications (if required): none specified	District Court	6/30/2011
Judge John C. McKeon, Malta Qualifications (if required): none specified	District Court	6/30/2011
Judge Katherine "Kitty" Curtis, Columbia Falls Qualifications (if required): none specified	District Court	6/30/2011
Ms. Glenda Travitz, Qualifications (if required): none specified	District Court	6/30/2011

## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Economic Development Advisory Council</b> (Commerce)		
Ms. Sheila Hogan, Butte	Governor	7/23/2011
Qualifications (if required): public representative		
Mr. Curt Starr, Billings	Governor	7/23/2011
Qualifications (if required): public representative		
Ms. Kathie Bailey, Lewistown	Governor	7/23/2011
Qualifications (if required): public representative		
Ms. Linda Twitchell, Wolf Point	Governor	7/23/2011
Qualifications (if required): public representative		
<b>Economic Development Advisory Council</b> (Commerce)		
Ms. Estelle Tafoya, Red Lodge	Governor	7/23/2011
Qualifications (if required): public representative		
<b>Electrical Board</b> (Labor and Industry)		
Ms. Dawn Achten, Billings	Governor	7/1/2011
Qualifications (if required): public representative		
<b>Electronic Government Advisory Council</b> (Administration)		
Director Mary Sexton, Helena	Governor	6/18/2011
Qualifications (if required): agency representative		
Mr. Tim Christensen, Missoula	Governor	6/18/2011
Qualifications (if required): public representative		

## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Electronic Government Advisory Council</b> (Administration) cont. Mr. Christian Mackay, Helena Qualifications (if required): agency representative	Governor	6/18/2011
Ms. Karen Harrison, Lolo Qualifications (if required): public representative	Governor	6/18/2011
Commissioner Andy Hunthausen, Helena Qualifications (if required): local government official	Governor	6/18/2011
<b>Family Education Savings Oversight Committee</b> (Higher Education) Mr. John Driscoll, Helena Qualifications (if required): public representative	Governor	7/1/2011
<b>Flathead Basin Commission</b> (Natural Resources and Conservation) Mr. Clinton Whitney, Polson Qualifications (if required): public representative	Governor	6/30/2011
Mr. Ed Heger, Kalispell Qualifications (if required): public representative	Governor	6/30/2011
Mr. Donald Loranger, Bigfork Qualifications (if required): public representative	Governor	6/30/2011
<b>Judicial Standards Commission</b> (Justice) Ms. Sue Schleif, Valier Qualifications (if required): public representative	Governor	7/1/2011

## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Land Information Advisory Council</b> (Administration)		
Director Dan R. Bucks, Helena Qualifications (if required): agency representative	Governor	6/30/2011
Mr. Lance Clampitt, Bozeman Qualifications (if required): U.S. Interior Department representative	Governor	6/30/2011
Mr. Art Pembroke, Helena Qualifications (if required): local government representative	Governor	6/30/2011
Mr. Alex Philip, Missoula Qualifications (if required): private sector representative	Governor	6/30/2011
Director Richard Oppen, Helena Qualifications (if required): agency representative	Governor	6/30/2011
Director Jim Lynch, Helena Qualifications (if required): agency representative	Governor	6/30/2011
Ms. Catherine Maynard, Bozeman Qualifications (if required): U.S. Agriculture Department representative	Governor	6/30/2011
Mr. Don Patterson, Missoula Qualifications (if required): U.S. Agriculture Department representative	Governor	6/30/2011
Mr. Lorin Peterson, Pablo Qualifications (if required): tribal government representative	Governor	6/30/2011



## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Land Information Advisory Council</b> (Administration) cont.		
Mr. Ed Madej, Helena Qualifications (if required): private sector representative	Governor	6/30/2011
Ms. Annette Cabrera, Billings Qualifications (if required): local government representative	Governor	6/30/2011
Ms. Christiane von Reichert, Missoula Qualifications (if required): land surveyor	Governor	6/30/2011
Commissioner Joe Brenneman, Kalispell Qualifications (if required): Local government agency representative	Governor	6/30/2011
Mr. Rudy Cicon, Chester Qualifications (if required): land surveyor	Governor	6/30/2011
Mr. Joe Maurier, Helena Qualifications (if required): agency representative	Governor	6/30/2011
Ms. Kris Larson, Helena Qualifications (if required): GIS professional	Governor	6/30/2011
Ms. Erin Geraghty, Helena Qualifications (if required): GIS professional	Governor	6/30/2011
Ms. Janet Hess-Herbert, Helena Qualifications (if required): designee	Director	6/30/2011

## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Land Information Advisory Council</b> (Administration) cont. BLM James D. Claflin, Billings Qualifications (if required): representative of the U.S. Interior Department	Governor	6/30/2011
<b>Mental Disabilities Board of Visitors</b> (Governor) Mr. Patrick Wayne, Missoula Qualifications (if required): consumer of mental health services	Governor	7/1/2011
Ms. Lin Olson, Helena Qualifications (if required): consumer of developmental disability services	Governor	7/1/2011
Ms. Betty N. Cooper, Heart Butte Qualifications (if required): public representative	Governor	7/1/2011
Ms. Patricia Harant, Helena Qualifications (if required): consumer of mental health services	Governor	7/1/2011
<b>Mental Health Ombudsman</b> (Governor) Ms. Alicia Pichette, Helena Qualifications (if required): none specified	Governor	8/2/2011

## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Montana Historical Society Board of Trustees</b> (Historical Society) Secretary Bob Brown, Whitefish Qualifications (if required): public member	Governor	7/1/2011
Mr. George Horse Capture, Great Falls Qualifications (if required): public representative	Governor	7/1/2011
Mr. Thomas Nygard, Bozeman Qualifications (if required): public representative	Governor	7/1/2011
Ms. Crystal Wong Shors, Helena Qualifications (if required): public representative	Governor	7/1/2011
<b>Montana Noxious Weed Management Advisory Council</b> (Agriculture) Mr. Terry Turner, Havre Qualifications (if required): representative of the Montana Weed Control Association	Director	6/30/2011
Mr. Gary Olsen, Harlowton Qualifications (if required): representative of eastern counties	Director	6/30/2011
Mr. Todd Wagner, Glasgow Qualifications (if required): representative of agriculture crop production	Director	6/30/2011
Mr. Jim Story, Corvallis Qualifications (if required): representative of biological research and control	Director	6/30/2011
Mr. Jim Gordon, Huntley Qualifications (if required): representative of herbicide dealers and applicators	Director	6/30/2011

## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Montana Noxious Weed Management Advisory Council</b> (Agriculture) cont.		
Ms. Margie Edsall, Sheridan Qualifications (if required): representative of western counties	Director	6/30/2011
Mr. Brent Roeder, Fort Shaw Qualifications (if required): representative of a consumer group	Director	6/30/2011
Mr. Kurt Myllymaki, Stanford Qualifications (if required): representative of consumer group	Director	6/30/2011
<b>Montana Organic Commodity Advisory Committee</b> (Agriculture)		
Mr. Tennyson Doney, Harlem Qualifications (if required): none specified	Director	8/18/2011
Sen. Gene Thayer, Great Falls Qualifications (if required): none specified	Director	8/18/2011
Ms. Sharon Lindquist, Bloomfield Qualifications (if required): none specified	Director	8/18/2011
<b>Montana Wheat and Barley Committee</b> (Agriculture)		
Mr. Leonard Schock, Vida Qualifications (if required): wheat and barley grower and resident of District 7	Governor	8/20/2011
Mr. Frank Schoonover, Dutton Qualifications (if required): wheat or barley grower and resident of District 4	Governor	8/20/2011

## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Motorcycle Safety Advisory Commission</b> (Commissioner of Higher Education)		
Mr. Dal Smilie, Helena Qualifications (if required): cycle group member	Governor	7/1/2011
Captain Clancy King, Kalispell Qualifications (if required): peace officer	Governor	7/1/2011
Mr. Randy Baldwin, Glendive Qualifications (if required): cycle group member	Governor	7/1/2011
<b>Petroleum Tank Release Compensation Board</b> (Environmental Quality)		
Ms. Theresa Blazicevich, Stevensville Qualifications (if required): environmental regulatory experience	Director	6/30/2011
Mr. Steve Sendon, Bozeman Qualifications (if required): banker	Director	6/30/2011
<b>Postsecondary Scholarship Advisory Council</b> (Higher Education)		
Ms. Margaret Bird, Browning Qualifications (if required): experience in financial aid at a postsecondary institution	Governor	6/20/2011
<b>Private Lands/Public Wildlife</b> (Fish, Wildlife and Parks)		
Mr. Brenden Nichols, Bozeman Qualifications (if required): sportsperson	Governor	7/30/2011
Mr. Mike Penfold, Billings Qualifications (if required): sportsperson	Governor	7/30/2011

## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Private Lands/Public Wildlife Council</b> (Fish, Wildlife and Parks) cont.		
Rep. Bob Ream, Helena Qualifications (if required): Fish, Wildlife and Parks Commissioner	Governor	7/30/2011
Mr. Jack Billingsley, Glasgow Qualifications (if required): outfitter	Governor	7/30/2011
Mr. Rick Miller, Colstrip Qualifications (if required): sportsperson	Governor	7/30/2011
Commissioner Chris King, Winnett Qualifications (if required): landowner	Governor	7/30/2011
Ms. Kathy Hadley, Deer Lodge Qualifications (if required): landowner	Governor	7/30/2011
Sen. Steve Gallus, Butte Qualifications (if required): legislator	Governor	7/30/2011
Mr. Mike Penfold, Billings Qualifications (if required): sportsperson	Governor	7/30/2011
Mr. Jack Rich, Seeley Lake Qualifications (if required): outfitter	Governor	7/30/2011
Mr. Land Tawney, Missoula Qualifications (if required): sportsperson	Governor	7/30/2011

## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Private Lands/Public Wildlife Council</b> (Fish, Wildlife and Parks) cont.		
Mr. Richard Iverson, Culbertson Qualifications (if required): landowner	Governor	7/30/2011
Ms. Lindsay A. Giem-Seidensticker, Twin Bridges Qualifications (if required): landowner	Governor	7/30/2011
Mr. Brett Todd, Big Timber Qualifications (if required): outfitter	Governor	7/30/2011
Rep. Jeff Welborn, Dillon Qualifications (if required): legislator	Governor	7/30/2011
Mr. Joe Cohenour, East Helena Qualifications (if required): sportsperson	Governor	7/30/2011
Mr. Wagner Harmon, Bainville Qualifications (if required): outfitter	Governor	7/30/2011
<b>Professional Engineers and Land Surveyors</b> (Labor and Industry)		
Mr. James Hahn, Billings Qualifications (if required): licensed land surveyor	Governor	7/1/2011
Mr. Casey E. Johnston, Butte Qualifications (if required): licensed electrical engineer	Governor	7/1/2011
Mr. Mohammad Ruhul Amin, Bozeman Qualifications (if required): licensed mechanical engineer and an instructor	Governor	7/1/2011

## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Public Defender Commission</b> (Administration)		
Ms. Caroline Fleming, Miles City	Governor	7/1/2011
Qualifications (if required): public representative nominated by the Speaker of the House		
Ms. Jennifer L. Hensley, Butte	Governor	7/1/2011
Qualifications (if required): member of organization advocating on behalf of people with mental illness		
Mr. James Park Taylor, Pablo	Governor	7/1/2011
Qualifications (if required): attorney nominated by the State Bar		
Mr. Kenneth R. Olson, Great Falls	Governor	7/1/2011
Qualifications (if required): attorney nominated by the Montana Supreme Court		
<b>Research and Commercialization Technology Board</b> (Commerce)		
Mr. Jim Davison, Anaconda	Governor	7/1/2011
Qualifications (if required): public representative		
<b>Reserved Water Rights Compact Commission</b> (Natural Resources and Conservation)		
Rep. Dorothy Bradley, Bozeman	Governor	6/1/2011
Qualifications (if required): public representative		
Mr. Gene Etchart, Glasgow	Governor	6/1/2011
Qualifications (if required): public representative		
Mr. Richard Kirn, Poplar	Governor	6/1/2011
Qualifications (if required): public representative		



## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Reserved Water Rights Compact Commission</b> (Natural Resources and Conservation) cont. Mr. Mark DeBruycker, Bynum Qualifications (if required): public representative	Governor	6/1/2011
<b>State Workforce Investment Board</b> (Labor and Industry) Mr. Michael Grove, White Sulphur Springs Qualifications (if required): private sector representative	Governor	7/1/2011
Director Keith Kelly, Helena Qualifications (if required): public sector representative (Department of Labor and Industry Director)	Governor	7/1/2011
Commissioner Connie Eissinger, Brockway Qualifications (if required): private sector representative	Governor	7/1/2011
Mr. Evan Barrett, Butte Qualifications (if required): governor's representative	Governor	7/1/2011
Mr. Michael McGinley, Dillon Qualifications (if required): county commissioner	Governor	7/1/2011
Ms. Linda Woods, Darby Qualifications (if required): public sector representative (job corps)	Governor	7/1/2011
Director Anthony Preite, Helena Qualifications (if required): public sector representative (Department of Commerce Director)	Governor	7/1/2011
Mr. Jeff Rupp, Bozeman Qualifications (if required): public sector representative (nonprofit organization)	Governor	7/1/2011

## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>State Workforce Investment Board</b> (Labor and Industry) cont.		
Mr. Dave Crum, Great Falls Qualifications (if required): private sector representative	Governor	7/1/2011
Ms. Martina Copps, Broadus Qualifications (if required): private sector representative	Governor	7/1/2011
Mr. Thomas Curry, Billings Qualifications (if required): labor representative	Governor	7/1/2011
Mr. Michael DesRosier, Browning Qualifications (if required): county commissioner	Governor	7/1/2011
Mr. Kirk Hammerquist, Kalispell Qualifications (if required): private sector representative	Governor	7/1/2011
Ms. Jacquie Helt, Missoula Qualifications (if required): labor representative	Governor	7/1/2011
Ms. Maureen Kenneally, Butte Qualifications (if required): private sector representative	Governor	7/1/2011
Mr. Robbe Lindsay, Missoula Qualifications (if required): private sector representative	Governor	7/1/2011
Mr. Rodney Miller, Wolf Point Qualifications (if required): Section 166 representative	Governor	7/1/2011

## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>State Workforce Investment Board</b> (Labor and Industry) cont.		
Mr. Alan Skari, Chester Qualifications (if required): private sector representative	Governor	7/1/2011
Mrs. Sandi Miller, Helena Qualifications (if required): private sector representative	Governor	7/1/2011
Ms. Georgia Gibbs-Atkinson, Poplar Qualifications (if required): private sector representative	Governor	7/1/2011
Mr. Thomas McKenna, Lewistown Qualifications (if required): private sector representative	Governor	7/1/2011
Ms. Anna Whiting-Sorrell, Helena Qualifications (if required): public sector representative (Public Health and Human Services Director)	Governor	7/1/2011
Mr. Major Robinson, Billings Qualifications (if required): private sector representative	Governor	7/1/2011
Mr. George Kipp, Browning Qualifications (if required): Section 166 representative	Governor	7/1/2011
Mr. Brian Sheridan, Missoula Qualifications (if required): private sector representative	Governor	7/1/2011
Superintendent Denise Juneau, Helena Qualifications (if required): public sector representative (Superintendent of Public Instruction)	Governor	7/1/2011

## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>State Workforce Investment Board</b> (Labor and Industry) cont.		
Mr. Brad Eldridge, Helena Qualifications (if required): public sector representative (Higher Education)	Governor	7/1/2011
Ms. Vicki Judd, Missoula Qualifications (if required): private sector representative	Governor	7/1/2011
Mr. Henry Dykema, Red Lodge Qualifications (if required): private sector representative	Governor	7/1/2011
Mr. Jim Paquette, Billings Qualifications (if required): private sector representative	Governor	7/1/2011
Mr. John DeMichiei, Roundup Qualifications (if required): private sector representative	Governor	7/1/2011
Ms. Mary Moe, Helena Qualifications (if required): public sector representative (Higher Education)	Governor	7/1/2011
<b>State-Tribal Economic Development Commission</b> (Commerce)		
Mr. Joseph Durglo, Pablo Qualifications (if required): representative of the Confederated Salish & Kootenai Tribes	Governor	6/30/2011
Mr. Richard Sangrey, Box Elder Qualifications (if required): representative of the Chippewa Cree Tribe of the Rocky Boy's Reservation	Governor	6/30/2011
Mr. Bud Moran, Pablo Qualifications (if required): alternate representative of the Confederated Salish & Kootenai Tribes	Governor	6/30/2011

## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>State-Tribal Economic Development Commission</b> (Commerce) cont.		
Mr. Joe Fox Jr., Lame Deer	Governor	6/30/2011
Qualifications (if required): representative of the Northern Cheyenne Tribe		
Mr. Allen Fisher, Lame Deer	Governor	6/30/2011
Qualifications (if required): alternate representative of the Northern Cheyenne Tribe		
<b>Teachers' Retirement Board</b> (Administration)		
Ms. Mona Bilden, Miles City	Governor	7/1/2011
Qualifications (if required): teacher		
Mr. Darrell Layman, Glendive	Governor	7/1/2011
Qualifications (if required): retired teacher		
Mr. Jeff Greenfield, Shepherd	Governor	7/1/2011
Qualifications (if required): teacher		
<b>Telecommunications Access Services for Persons with Disabilities</b> (Public Health and Human Services)		
Mr. Drew Arnot, Missoula	Governor	7/1/2011
Qualifications (if required): independent local exchange company representative		
Ms. Susan Kalarchik, Butte	Governor	7/1/2011
Qualifications (if required): audiologist		
<b>Telecommunications Advisory Council Services for Persons with Disabilities</b> (Public Health and Human Services)		
Ms. Char Harasymczuk, Billings	Governor	7/1/2011
Qualifications (if required): having a hearing disability		

## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Telecommunications Advisory Council Services for Persons with Disabilities</b> (Public Health and Human Services) cont.		
Ms. Colette Custer, Plentywood Qualifications (if required): independent local exchange company representative	Governor	7/1/2011
Ms. Kristen Bruner-Kober, Billings Qualifications (if required): audiologist	Governor	7/1/2011
Mr. Charles Charette, Lame Deer Qualifications (if required): having a hearing disability	Governor	7/1/2011
<b>Tourism Advisory Council</b> (Commerce)		
Mr. Paul Tuss, Havre Qualifications (if required): resident of Russell Country	Governor	7/1/2011
Ms. Ramona Holt, Lolo Qualifications (if required): resident of Glacier Country	Governor	7/1/2011
Mr. Ed DesRosier, East Glacier Park Qualifications (if required): resident of Glacier Country	Governor	7/1/2011
Commissioner Dolores Plumage, Chinook Qualifications (if required): resident of Russell Country	Governor	7/1/2011
Ms. Gail Richardson, Bozeman Qualifications (if required): resident of Yellowstone Country	Governor	7/1/2011

## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Tourism Advisory Council</b> (Commerce) cont.		
Ms. Sandra Cahill, Livingston Qualifications (if required): resident of Yellowstone Country	Governor	7/1/2011
Ms. Amber Woods-Jensen, Butte Qualifications (if required): resident of Goldwest Country	Governor	7/1/2011
Ms. Meg O'Leary, Big Sky Qualifications (if required): resident of Yellowstone County	Governor	7/1/2011
<b>Upper Clark Fork River Basin Remediation and Restoration Advisory Council</b> (Justice)		
Mr. Jim Kambich, Butte Qualifications (if required): resident of the Upper Clark Fork River Basin	Governor	7/31/2011
Mr. Jon A. Krutar, Helena Qualifications (if required): resident of the Upper Clark Fork River Basin	Governor	7/31/2011
Director Mary Sexton, Helena Qualifications (if required): Director of the Department of Natural Resources and Conservation	Governor	7/31/2011
Director Richard Oppen, Helena Qualifications (if required): Director of the Department of Environmental Quality	Governor	7/31/2011
Mr. William Rossbach, Missoula Qualifications (if required): resident of the Upper Clark Fork River Basin	Governor	7/31/2011
Mr. Joe Maurier, Helena Qualifications (if required): Director of the Department of Fish Wildlife and Parks	Governor	7/31/2011

## VACANCIES ON BOARDS AND COUNCILS -- JUNE 1, 2011 THROUGH AUGUST 31, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<b>Upper Clark Fork River Basin Remediation and Restoration Advisory Council</b> (Justice) cont.		
Mr. Roy O'Connor, Missoula	Governor	7/31/2011
Qualifications (if required): resident of the Upper Clark Fork River Basin		
Mr. Elton Ringsak, Butte	Governor	7/31/2011
Qualifications (if required): resident of the Upper Clark Fork River Basin		
Ms. Katherine Eccleston, Anaconda	Governor	7/31/2011
Qualifications (if required): resident of the Upper Clark Fork River Basin		
Mr. Michael McLean, Anaconda	Governor	7/31/2011
Qualifications (if required): resident of the Upper Clark Fork River Basin		
Ms. Maureen Connor, Philipsburg	Governor	7/31/2011
Qualifications (if required): resident of the Upper Clark Fork River Basin		
<b>Western Interstate Commissioner for Higher Education</b> (Governor)		
Mr. Clayton Christian, Missoula	Governor	6/19/2011
Qualifications (if required): public representative		