

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 11

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 The Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

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

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BEFORE THE STATE AUDITOR AND COMMISSIONER OF INSURANCE  
OF THE STATE OF MONTANA

In the matter of the proposed )  
adoption of New Rule I and )  
the proposed amendment of )  
ARM 6.6.6811 and 6.6.6815 )  
pertaining to captive )  
insurance companies )

NOTICE OF PUBLIC HEARING  
ON PROPOSED ADOPTION AND  
AMENDMENT

TO: All Concerned Persons

1. On July 7, 2005, at 10:00 a.m., a public hearing will be held in the 2nd floor conference room, State Auditor's Office, 840 Helena Avenue, Helena, Montana, to consider the proposed adoption of New Rule I, and amendment of ARM 6.6.6811 and 6.6.6815 pertaining to captive insurance companies.

2. The State Auditor's Office 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 office no later than 5:00 p.m., June 30, 2005, to advise us of the nature of the accommodation needed. Please contact Darla Sautter, State Auditor's Office, 840 Helena Avenue, Helena, MT 59601; telephone (406) 444-2726; Montana Relay 1-800-332-6145; TDD (406) 444-3246; facsimile (406) 444-3497 or e-mail to dsautter@state.mt.us.

3. The proposed New Rule provides as follows:

RULE I LIMIT OF RISK (1) The provisions of 33-2-1202, MCA, do not apply to a captive insurance company that is a risk retention group.

AUTH: 33-28-206, MCA  
IMP: 33-28-207, MCA

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

6.6.6811 ANNUAL AUDIT (1) Each company must have an annual audit by an independent certified public accountant, authorized by the commissioner, and must file the audited financial report with the commissioner ~~on or before June 30 of each year for the period ending December 31 of the immediately preceding year~~ within 180 days of the company's fiscal year end.

(2) through (3)(e) remain the same.

AUTH: 33-28-206, MCA  
IMP: 33-28-107, MCA

6.6.6815 FINANCIAL STATEMENTS (1) through (2)(b) remain the same.

(3) Any pure captive insurance company, branch captive insurance company, industrial insured captive insurance company, or association captive insurance company may make written application for filing the required report on a fiscal year-end basis. If a fiscal year-end reporting date is granted:

(a) the required report is due 60 days after the fiscal year-end; and

(b) in order to provide sufficient information to support the premium tax return, the captive insurance company shall file, prior to March 1 of each year for the prior calendar year-end, a report acceptable to the commissioner.

AUTH: 33-28-206, MCA

IMP: 33-28-107, MCA

5. REASONABLE NECESSITY STATEMENT: It is necessary to adopt New Rule I, and to amend ARM 6.6.6811 and 6.6.6815 to simplify the annual report filing requirements, to conform with the 2005 amendments to Title 33, Chapter 28, MCA, and to clarify that 33-2-1202, MCA, does not apply to a captive insurance company that is a risk retention group.

6. Concerned persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Darla Sautter, State Auditor's Office, 840 Helena Avenue, Helena, MT 59601, or by e-mail to dsautter@state.mt.us, and must be received no later July 15, 2005.

7. Don Harris has been designated to preside over and conduct the hearing.

8. The State Auditor's Office maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request which includes the name and mailing address of the person to receive notices and specifies whether the person wishes to receive notices regarding insurance rules, securities rules, or both. Such written request may be mailed or delivered to the State Auditor's Office, 840 Helena Avenue, Helena, MT 59601, faxed to (406) 444-3497, e-mailed to dsautter@state.mt.us, or may be made by completing a request form at any rules hearing held by the State Auditor's Office.

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

JOHN MORRISON, State Auditor  
and Commissioner of Insurance

By: /s/ Alicia Pichette  
Alicia Pichette  
Deputy Insurance Commissioner

By: /s/ Patrick M. Driscoll  
Patrick M. Driscoll  
Rule Reviewer

Certified to the Secretary of State on June 6, 2005.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment ) AMENDED NOTICE OF PROPOSED  
of ARM 17.30.1303, 17.30.1304, ) AMENDMENT  
17.30.1310, 17.30.1322, )  
17.30.1330, 17.30.1341 and ) (WATER QUALITY)  
17.30.1343 pertaining to )  
concentrated animal feeding )  
operations (CAFOs) and )  
adoption of Department )  
Circular DEQ 9 (Montana )  
Technical Standards for CAFOs))

TO: All Concerned Persons

1. On December 16, 2004, the Board of Environmental Review published MAR Notice No. 17-222 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 2962, 2004 Montana Administrative Register, issue number 24. The public comment period closed on February 4, 2005. This amended notice is being published to allow additional time for the U.S. Environmental Protection Agency (EPA) to revise the federal CAFO rules, which are the basis for this state rulemaking. The state CAFO rules that are the subject of this rulemaking incorporate revisions to the federal CAFO rules promulgated in 2003 by EPA. After publication of the Board's notice of proposed rulemaking in this matter (MAR Notice No. 17-222), a federal court of appeals invalidated part of EPA's 2003 CAFO rule revisions. *Waterkeeper Alliance, Inc., et al. v. EPA*, (2005 U.S. App. LEXIS 3395). The federal court vacated and remanded portions of the rule to EPA for further action.

This amended notice will provide a six-month extension of time for the Board to take final action in this rulemaking. If EPA republishes the CAFO rules without change within that period, the Board may be able to adopt the state CAFO rules as proposed in MAR Notice No. 17-222, or with changes based on public comments already received by the Board. If EPA republishes the federal CAFO rules with substantive changes, the Board will need to issue a new notice of proposed rulemaking, with an opportunity for additional public comment, before taking final action to adopt the federal CAFO rules.

2. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking or need an alternative accessible format of this notice. If you require an accommodation, contact the Board no later than 5:00 p.m., July 6, 2005, to advise us of the nature of the accommodation that you need. Please contact the Board Secretary at P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2544; fax (406) 444-4386; or email [ber@mt.gov](mailto:ber@mt.gov).

3. The Board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this

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

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

James M. Madden  
JAMES M. MADDEN  
Rule Reviewer

By: Joseph W. Russell  
JOSEPH W. RUSSELL, M.P.H.,  
Chairman

Certified to the Secretary of State June 6, 2005.



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

In the matter of the proposed ) NOTICE OF PUBLIC HEARING  
amendment of ARM 8.32.403 ) ON PROPOSED AMENDMENT,  
reexamination - registered nurse, ) ADOPTION AND REPEAL  
ARM 8.32.404 reexamination - )  
practical nurse, and ARM 8.32.408 )  
temporary practice permit, the )  
proposed adoption of NEW RULE I )  
pertaining to abatement of fees, )  
NEW RULE II and NEW RULE III )  
pertaining to foreign educated )  
applicants, and the proposed repeal )  
of ARM 8.32.406 licensure for )  
foreign nurses )

TO: All Concerned Persons

1. On July 8, 2005, at 2:00 p.m., a public hearing will be held in room 489 of the Park Avenue Building, 301 South Park Avenue, Helena, Montana to consider the proposed amendment, adoption and repeal of the above-stated rules.

2. The Department of Labor and Industry 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 Nursing no later than 5:00 p.m., July 1, 2005, to advise us of the nature of the accommodation that you need. Please contact Andy Verbanac, Board of Nursing, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2340; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdnur@mt.gov.

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

8.32.403 REEXAMINATION - REGISTERED NURSE

(1) Candidates who fail the licensing examination will be permitted to retake the examination after 90 days. Effective October 1, 2000, a candidate may retake the examination one time. If a candidate does not pass the retake, the candidate will be required to present a plan of study to the board before becoming eligible to take the examination again. A candidate may take the test a maximum of five times in three years. ~~If a candidate does not pass the examination within three years, the~~ The individual will be required to complete a school of nursing program before being able to test a sixth time.

AUTH: 37-1-131, 37-8-202, 37-8-406, MCA

IMP: 37-8-202, 37-8-406, MCA

8.32.404 REEXAMINATION - PRACTICAL NURSE

(1) Candidates who fail the licensing examination will be permitted to retake the examination after 90 days. Effective October 1, 2000, a candidate may retake the examination one time. If a candidate does not pass the retake, the candidate will be required to present a plan of study to the board before becoming eligible to take the examination again. A candidate may take the test a maximum of five times in three years. ~~If a candidate does not pass the examination within three years, the~~ The individual will be required to complete a school of nursing program before being able to test a sixth time.

AUTH: 37-1-131, 37-8-202, 37-8-406, MCA  
IMP: 37-8-202, 37-8-416, MCA

REASON: It is reasonable and necessary to amend ARM 8.32.403 and ARM 8.32.404 because the Board staff finds them to be confusing as written. License applicants might be confused by them as well. The proposed amendment makes clear that applicants who have taken the NCLEX a total of five times must complete another school of nursing program before s/he will be allowed to sit for the exam a sixth time. Applicants are not required, however, to complete another school of nursing program solely because they have not passed the exam within three years of some event. The amendment also supplements the citations to the Board's rulemaking authority.

8.32.408 TEMPORARY PRACTICE PERMIT (1) through (1)(b) remain the same.

~~(2) The temporary permit shall remain valid until the graduate is notified of the results of the licensing examination scheduled by the applicant under (1)(b). If the graduate fails the examination, the temporary practice permit is null and void and must be immediately returned to the board.~~

(2) The temporary permit issued to a graduate who fails the exam referred to in (1)(b) becomes null, void and invalid three days after the board mails notification to the graduate of the said exam result. Mailing is completed when said notification is deposited in the U.S. mail. The graduate shall immediately return the temporary permit to the board office upon receipt of the notice that s/he failed the exam referred to in (1)(b). Failure to do so is grounds for denial of a subsequent license application from the graduate and such other remedies as are provided by law.

(3) The temporary permit issued to a graduate who passes the exam referred to in (1)(b) remains valid until the license is granted or until two weeks after the board mails notification to the graduate of the said exam result, whichever occurs first. Mailing is completed when said notification is deposited in the U.S. mail.

~~(3)~~ (4) An applicant for licensure by endorsement in Montana may be granted a temporary permit to practice professional or practical nursing provided the applicant has submitted a completed application as described in ARM 8.32.405(1)(a) and that the initial screening by board staff shows no current discipline as identified in ARM 8.32.405(2) in the last two years. The temporary permit will remain valid until a license is granted or until notice of proposal to deny license is served, whichever occurs first. In the event that neither contingency has occurred within 90 days of issuance of the temporary permit to the endorsement applicant, the temporary permit shall expire on the 90th day following its issuance unless an extension is granted by the board. ~~the applicant completes the endorsement process, but shall not exceed 90 days without board approval.~~

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

AUTH: 37-8-202, MCA  
IMP: 37-1-305, 37-8-103, MCA

REASON: It is necessary to amend this rule to make it consistent with 37-1-305, MCA. Board staff members have delayed notifying temporary permit holders that they passed the exam referred to in (1)(b) because, pursuant to (2), unless the license could be issued simultaneously, the notification resulted in the automatic expiration of the temporary permit and a gap in the successful examinee's authority to practice. Successful examinees were not pleased about the delay in notification of their exam results. Expiration of a successful examinee's temporary permit upon notification of the exam result but before issuance of the license serves no purpose. The proposed amendment would also clarify when the temporary permit of an unsuccessful examinee expires.

4. The proposed new rules provide as follows:

NEW RULE I FEE ABATEMENT (1) The board of nursing adopts and incorporates by reference the September 24, 2004, fee abatement rule of the department of labor and industry found at ARM 24.101.301.

(2) A copy of ARM 24.101.301 is available by contacting the Board of Nursing, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513.

AUTH: 37-1-131, MCA  
IMP: 17-2-302, 17-2-303, 37-1-134, MCA

REASON: The Board has determined there is reasonable necessity to adopt and incorporate by reference ARM 24.101.301 to allow the Board to authorize the Department to perform renewal licensure fee abatements as appropriate and when needed, without further vote or action by the Board. The Department recently adopted ARM 24.101.301 to implement a

means for the prompt elimination of excess cash accumulations in the licensing programs operated by the Department.

Adoption and incorporation of ARM 24.101.301 will allow the Department to promptly eliminate excess cash balances of the Board that result from unexpectedly high licensing levels or other non-typical events. Abatement in such instances will allow the licensees who have paid fees into the Board's program to receive the temporary relief provided by abatement. Adoption of this abatement rule does not relieve the Board from its duty to use proper rulemaking procedures to adjust the Board's fee structure in the event of recurrent instances of cash balances in excess of the statutorily allowed amount.

NEW RULE II FOREIGN EDUCATED APPLICANTS FOR REGISTERED NURSE LICENSURE

(1) For purposes of this rule, "foreign educated" applicants are those individuals whose nursing education credential was conferred by an educational institution located outside the United States or its jurisdictions. The term includes, but is not limited to, applicants who studied nursing in the United States through either a distance learning program offered by or through a foreign educational institution or whose nursing education involved a collaboration between a foreign educational institution and an educational institution in the United States, so long as the credential was conferred by the foreign educational institution.

(2) Foreign educated applicants for registered nurse licensure by examination must:

(a) fulfill the requirements of ARM 8.32.402;

(b) pass the Montana licensing examination (i.e., NCLEX); and

(c) be certified by the commission on graduates of foreign nursing schools (CGFNS) as having successfully completed its certification program (CP) consisting of:

(i) an English language proficiency examination, except as provided under (4);

(ii) the CGFNS qualifying examination (also referred to as NCLEX predictor exam or screening exam); and

(iii) a credentials review verifying the applicant's nursing education credentials and comparing the applicant's foreign nursing education with the U.S. nursing education standards. The board may deny licensure to a foreign educated applicant if denial is deemed by the board to be warranted by the CGFNA credentials evaluation service (CES) report.

(3) Foreign educated applicants for registered nurse licensure by endorsement from another state of the United States must:

(a) fulfill the requirements of ARM 8.32.405(1)(a), (b), and (c);

(b) have passed the NCLEX or state board test pool exam in the other state;

(c) provide verification of licensure in good standing in the other state;

(d) complete the CGFNS CES healthcare profession and science course-by-course evaluation verifying the applicant's nursing education credentials and comparing the applicant's foreign nursing education with the U.S. nursing education standards. The board may deny licensure to a foreign educated applicant if denial is warranted by the CES report; and

(e) successfully complete an English proficiency examination recognized by CGFNS.

(4) The provisions of (2)(c)(i) and (3)(d) do not apply if the foreign educated applicant graduated from a nursing program at a college, university or professional nurses' training school in one of the following countries:

- (a) Australia;
- (b) Canada (except Quebec);
- (c) Ireland;
- (d) New Zealand;
- (e) Tobago;
- (f) Trinidad; or
- (g) United Kingdom.

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

IMP: 37-8-101, 37-8-405, 37-8-415, MCA

NEW RULE III FOREIGN EDUCATED APPLICANTS FOR PRACTICAL NURSE LICENSURE

(1) For purposes of this rule, "foreign educated" applicants are those individuals whose nursing education credential was conferred by an educational institution located outside the United States or its jurisdictions. The term includes, but is not limited to, applicants or candidates who studied nursing in the United States through either a distance learning program offered by or through a foreign educational institution or whose nursing education involved a collaboration between a foreign educational institution or program in the United States, so long as the credential was conferred by the foreign educational institution.

(2) Foreign educated applicants for practical nurse licensure by examination must:

- (a) fulfill the requirements of ARM 8.32.402;
- (b) pass the Montana licensing examination (i.e., NCLEX);

(c) provide a CGFNS credentials evaluation service (CES) report based on the CGFNS's healthcare profession and science course-by-course evaluation, verifying the applicant's nursing education credentials and comparing the applicant's nursing education with the U.S. nursing education standards. The board may deny licensure to a foreign educated applicant if denial is deemed by the board to be warranted by the CES report; and

(d) successfully complete an English proficiency examination recognized by CGFNS, except as provided in (4).

(3) Foreign educated applicants for practical nurse licensure by endorsement from another state of the United States must:

- (a) fulfill the requirements of ARM 8.32.405;
  - (b) provide verification of licensure in good standing in the other state;
  - (c) provide a CGFNS CES report based on the CGFNS's healthcare profession and science course-by-course evaluation, verifying the applicant's nursing education credentials and comparing the applicant's nursing education with the U.S. nursing education standards. The board may deny licensure to a foreign educated applicant if denial is warranted by the CES report; and
  - (d) successfully complete an English proficiency examination recognized by CGFNS, except as provided in (4).
- (4) The provisions of (2)(d) and (3)(d) do not apply if the foreign educated applicant graduated from a college, university or professional nurses' training school in one of the following countries:
- (a) Australia;
  - (b) Canada (except Quebec);
  - (c) Ireland;
  - (d) New Zealand;
  - (e) Tobago;
  - (f) Trinidad; or
  - (g) United Kingdom.

AUTH: 37-1-131, 37-8-202, MCA  
IMP: 37-8-101, 37-8-405, 37-8-415, MCA

REASON: There is reasonable necessity to repeal ARM 8.32.406 and adopt NEW RULES II and III relating to foreign educated applicants for LPN and RN licensure because the Board recently received a large influx of irregular-looking license applications from persons whose education credentials were purportedly conferred by foreign educational institutions. It became clear that ARM 8.32.406, especially with regard to LPN applicants, provided inadequate means for effectively evaluating foreign education credentials and needed to be repealed. Proposed NEW RULES II and III require evaluation of all foreign educated applicants' credentials by the Commission on Graduates of Foreign Nursing Schools (CGFNS) utilizing its various programs specific to the type of licensure being sought. CGFNS has long been recognized as having expertise in such matters.

5. The Board of Nursing proposes to repeal the following rule:

8.32.406 LICENSURE FOR FOREIGN NURSES found at ARM page 8-976.2.

AUTH: 37-1-131, 37-8-202, MCA  
IMP: 37-8-101, 37-8-406, 37-8-416, MCA

REASON: There is reasonable necessity to repeal ARM 8.32.406 as described in the statement of reasonable necessity provided for NEW RULES II and III.

6. Concerned persons may present their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to the Board of Nursing, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to [dlibsdnur@mt.gov](mailto:dlibsdnur@mt.gov), and must be received no later than 5:00 p.m., July 18, 2005.

7. An electronic copy of this Notice of Public Hearing is available through the Department's and Board's site on the World Wide Web at [www.nurse.mt.gov](http://www.nurse.mt.gov). The Department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems, and that a person's technical difficulties in accessing or posting to the e-mail address do not excuse late submission of comments.

8. The Board of Nursing 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 which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all Board of Nursing administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Board of Nursing, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, faxed to the office at (406) 841-2305, e-mailed to [dlibsdnur@mt.gov](mailto:dlibsdnur@mt.gov), or may be made by completing a request form at any rules hearing held by the agency.

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

10. Lorraine Schneider, attorney, has been designated to preside over and conduct this hearing.

BOARD OF NURSING  
KAREN POLLINGTON, RN, CHAIRPERSON

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

/s/ MARK CADWALLADER  
Mark Cadwallader  
Rule Reviewer

Certified to the Secretary of State June 6, 2005



BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY  
STATE OF MONTANA

In the matter of the proposed	)	NOTICE OF PUBLIC HEARING
amendment of ARM 24.35.111,	)	ON PROPOSED AMENDMENT,
24.35.131, 24.35.141,	)	ADOPTION AND REPEAL
24.35.202, 24.35.205,	)	
24.35.206, 24.35.207,	)	
24.35.302, and 24.35.303,	)	
the proposed adoption of	)	
NEW RULE I, and the proposed	)	
repeal of ARM 24.35.116 and	)	
24.35.301, all related to	)	
independent contractor	)	
exemption certificates	)	

TO: All Concerned Persons

1. On July 8, 2005, at 10:00 a.m. the Department of Labor and Industry will hold a public hearing in the DPHHS building auditorium, 111 N. Sanders Ave. (north entrance), Helena, Montana, to consider the proposed amendment, adoption and repeal of the above-stated rules.

2. The Department of Labor and Industry 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 30, 2005, to advise us of the nature of the accommodation that you need. Please contact the Employment Relations Division, Workers' Compensation Regulation Bureau, Attn: Dallas Cox, P.O. Box 8011, Helena, Montana 59624-8011; telephone (406) 444-9587; fax (406) 444-3465; TDD (406) 444-5549; or email dcox@mt.gov.

3. GENERAL STATEMENT OF REASONABLE NECESSITY: The 2005 Legislature enacted Chapter 448, Laws of 2005 (Senate Bill 108), to revise the independent contractor workers' compensation insurance exemption program. This legislation was proposed as the product of the interim study committee established by Chapter 578, Laws of 2003 (Senate Bill 270). It is reasonably necessary to revise the current rules in order to put the new program into effect. It is also reasonably necessary to apply the proposed rule changes retroactively to applications for independent contractor exemption certificates made on or after the effective date of Chapter 448 because the bill became effective immediately on passage on April 28, 2005. These rule changes are proposed in coordination with the fee change to ARM 24.35.121 proposed by MAR Notice No. 24-35-193, published April 14, 2005, and adopted in this issue of the Register.

The intent of the legislation is to alter the application requirements so that the grant of an exemption certificate

establishes a valid conclusive presumption of independent contractor status. In other words, the conclusive presumption is intended to establish without question the validity of a certificate subject to litigation. The legislation specifically mentions the previous program resulted in uncertainty in Montana's business community and that the revised program is intended to reduce that uncertainty as much as possible. Therefore, there is reasonable necessity to revise the current rules so that applicants have to meet extensive and stringent standards in order to receive a certificate. There is also reasonable necessity to make the application process as objective as possible so that all applicants are treated equally.

In addition, it is reasonably necessary to clarify the terminology used in the rules to indicate independent contractor exemption "certificates" because Chap. 448, L. of 2005, uses the term "certificates" for the revised program. It is also reasonably necessary to correct the AUTH and IMP citations for each rule to correspond to the new law. Citations will be made to the Montana Code Annotated after the code commissioner has assigned code numbers.

This statement of reasonable necessity applies to all the proposed rule amendments. Where there are specific bases for a proposed action, those additional reasons immediately follow the applicable rule.

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

24.35.111 APPLICATION AND RENEWAL FOR INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE (1) As provided in [section 1, Chap. 448, L. of 2005], ~~by 39-71-401, MCA, a sole proprietor, working member of a partnership, working member of a limited liability partnership, or working member of a member managed limited liability company~~ a person who regularly and customarily performs services at locations other than the person's own fixed business location and who has not elected to be personally bound by the provisions of workers' compensation plan 1, 2, or 3, represents to the public that the person is an independent contractor shall elect to be bound by the provisions of a workers' compensation plan but may apply for an exemption from the Workers' Compensation Act. shall apply for an independent contractor exemption certificate. In order to obtain an independent contractor exemption certificate, an applicant shall:

(a) submit a completed department application affidavit form bearing the applicant's original notarized signature in which the applicant swears or affirms under oath that the statements contained in the form and attached documentation are true and accurate to the best of ~~their~~ the applicant's ability; ~~and, which includes, but is not limited to:~~

(i) the applicant's correct name;

- (ii) the applicant's correct social security number;
  - (iii) each occupation for which the applicant is applying;
- and
- (iv) for each occupation listed, the:
    - (A) business name used;
    - (B) business structure (entity type);
    - (C) business mailing address; and
    - (D) business telephone number;
  - (b) pay a fee, as required by ARM 24.35.121-;
  - (c) submit an executed waiver bearing the applicant's original notarized signature and conforming to the requirements of (3); and

(d) submit documentation with the affidavit confirming the applicant is engaged in one or more independently established trades, occupations, professions, or businesses. The applicant's documentation for each trade, occupation, profession or business must receive 15 points or more to qualify the applicant for an exemption certificate for that trade, occupation, profession, or business. The value awarded to various types of documentation is as set out in (2).

(2) Documentation supporting the applicant as independently established in a trade, occupation, profession or business is divided into categories as designated below. A maximum of two items may be submitted to receive the total points in each category. The department has the discretion to assess the reliability of the documentation and to award points for the items submitted up to the total points for each category. Each item of documentation submitted may only count toward points in one category.

(a) The 10 point category includes workers' compensation, unemployment insurance, and department of revenue accounts for employees. This documentation is worth up to 10 points for all three types of proof submitted together, up to six points for two types of proof, and up to three points for one type of proof.

(b) The six point category includes:

(i) a contract or memo of understanding. Elements of the contract that may show proof of independent contractor status include but are not limited to:

- (A) payment based on a completed project basis;
- (B) an ending date of the contract;
- (C) liability for failure to complete the project;
- (D) identification of who provides the materials and supplies;

(E) signatures by both parties; and

(F) a defined body of work, complete project, or end result;

(ii) a list of equipment and tools owned or controlled by the applicant with approximate value. This may be demonstrated by a rental or lease agreement, county documents verifying the business equipment tax paid, or other means;

(iii) proof of business location ownership, rent or lease. This may be demonstrated by an IRS form filed for claiming use of the home as a business, otherwise known as Form 8829;

(iv) a commercial general liability insurance policy or bonding;

(v) filed business tax forms; or

(vi) a trucking company lease agreement.

(c) The three point category includes:

(i) miscellaneous income IRS Form 1099 and/or business tax receipts;

(ii) a partnership agreement. An applicant that is a working partner in a partnership or limited liability partnership must submit a written partnership agreement signed by all partners. Elements of the agreement that show proof of independent contractor status by virtue of a valid partnership include at least:

(A) intent to form the partnership;

(B) contribution by all partners;

(C) a proprietary interest and right of control by the working partner applying for an exemption certificate; and

(D) the sharing of profit/loss;

(iii) application for business license or permit;

(iv) a professional license. Applicants who are in a licensed profession must submit proof of compliance with the licensing requirements of that profession;

(v) a certificate demonstrating the business structure is registered with the Montana secretary of state;

(vi) a certificate demonstrating the business has a registered name with the Montana secretary of state;

(vii) educational certification;

(viii) membership in a professional association or affiliation; or

(ix) copies of advertising in a newspaper, phone book or on the internet.

(d) The one and a half point category includes:

(i) two or more bids or estimates;

(ii) a federal employer identification number (FEIN);

(iii) a business bank account;

(iv) a telephone bill in the business name;

(v) a credit card or charge account in business name;

(vi) printed invoices, cards, brochures, hats, shirts;

(vii) proof of advertising using a sign on vehicle, in yard, bulletin boards, corner lamp post, flyers; or

(viii) standard billing invoices.

(e) The applicant may submit any other supporting documentation. The department has discretion to assess the reliability of and determine the point value of any documentation not listed in this rule.

(2)(3) The department ~~waiver application affidavit form~~ requires the applicant to ~~provide their correct name and social security number and to~~ make the following representations for each trade, occupation, profession or business for which the applicant is seeking an independent contractor exemption certificate:

(a) that the applicant is engaged in ~~an~~ each independently established trade~~(s)~~, occupation~~(s)~~, profession~~(s)~~ or

business(es) which are is specifically identified on the affidavit;

~~(b)~~ that the applicant is responsible for all taxes related to the applicant's work as an independent contractor currently files or, if a new business is formed, will be filing the appropriate federal and state tax returns for the year in which the exemption is in effect and pays self employment taxes on the income earned as an independent contractor;

~~(c)~~ that the applicant has or will have a contract or accepted bid proposal;

~~(d)~~ that the applicant has documents such as printed invoices, business cards, current business licenses, permits, advertisements, etc., which support a finding of an independently established trade, occupation, profession or business;

~~(e)~~ that the applicant supplies substantially all of the tools and equipment necessary for the performance of the contract;

~~(f)~~(c) that the applicant controls the details of how to perform the contracted for services, both under contract and in fact, and that the ~~employer~~ hiring agent retains only the control necessary to ensure the bargained for end result; and

~~(g)~~(d) that the applicant understands and agrees that if the independent contractor exemption certificate is granted, the applicant waives the applicant's right to and is might not be eligible for workers' compensation benefits or occupational disease benefits or unemployment insurance benefits for an injury or occupational disease related to work performed as an independent contractor for which the exemption certificate is granted.

~~(3)~~(4) An application that is approved, and for which the exemption certificate is issued, shall be in effect for two years unless the department revokes or suspends the exemption certificate or is notified in writing prior to the expiration date that the exemption certificate holder wishes to have the exemption certificate ~~revoked~~ cancelled.

AUTH: 39-51-301, 39-51-302, 39-71-203 and 39-71-401 [section 1, Chap. 448, L. of 2005], MCA

IMP: 39-71-120, 39-71-401 39-51-201, 39-51-204, 39-71-105, [sections 1 and 2, Chap. 448, L. 2005], and 39-71-409, MCA

REASON: It is reasonably necessary to establish more extensive and stringent criteria for an independent contractor exemption certificate in order to conclusively verify an applicant is actually engaged in one or more independent businesses. The criteria include an executed waiver that waives workers' compensation and occupational disease benefits for work performed under the certificate, an affidavit with supporting documentation, and a fee.

Specifically, it is reasonably necessary to require an executed waiver in order to conclusively establish the applicant understands the implications of working under an exemption

certificate. It is also reasonably necessary to require an applicant to submit an affidavit with their name, social security number, business mailing address, business phone number, name of business, and business structure in order to verify the identity of the applicant. Because the independent contractor exemption applies for unemployment insurance wage records and taxation purposes as well as workers' compensation purposes, the use of the applicant's social security number is expressly authorized by 42 USC 405(c)(2)(C)(i).

Regarding the supporting documentation, it is reasonably necessary to require that an applicant submit a sufficient amount of documentation to prove the existence of their business. It is also reasonably necessary to require that all applicants be treated equally and objectively with regard to the documentation submitted. The proposed rule changes set up a point system that meets both these goals. The rule identifies a broad range of documentation that is typically used in the course of engaging in a business. The documentation is categorized by point value based on reliability. The rule provides for variation in the quality of documentation submitted by allowing the department to exercise discretion to assess the reliability of such documentation and assign a lower point value than the total allowed for a category when the documentation is not as reliable as comparable documentation. For example, if an applicant submits a business card with nothing but their name on it, the department can exercise its discretion to award less than the total point value it would award to a business card with full information such as business name, phone number, mailing address, physical address, and email address. The rule allows applicants to submit any documentation not categorized and provides that the department will assess the reliability of such documentation to award its point value toward an independent contractor exemption certificate. Finally, the point system is reasonably necessary as a general approach because it is in conformance with the legislative intent as determined from committee hearings during the 2005 legislature.

It is also reasonably necessary to add renewal applications to the rule so that renewals are governed by the same general application process as initial applications. By requiring renewal applicants to resubmit an affidavit with all the required supporting documentation and execute a new waiver, the rule ensures independent contractor exemption certificate holders are maintaining independent contractor status. This in turn ensures that an exemption certificate continues to establish a conclusive presumption as to independent contractor status.

There is reasonable necessity to amend the AUTH and IMP citations to update the references to the statutes that provide the Department with rulemaking authority, and to the statutes that the rule implements, while otherwise amending the rule.

24.35.131 SUSPENSION OR REVOCATION OF INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE (1) An independent contractor exemption certificate may be suspended or revoked by the department ~~for any of the following reasons:~~ pursuant to [section 2, Chap. 448, L. of 2005].

~~(a) the department determines the certificate holder is not acting as an independent contractor due to an employing unit's failure to treat the certificate holder as an independent contractor;~~

~~(b) the department determines the certificate holder made misrepresentations in the application affidavit form, or renewal application form, to obtain the independent contractor exemption certificate;~~

~~(c) the department determines the certificate holder altered or amended the application affidavit form, renewal application form or independent contractor certificate in a deceitful fashion; or~~

(2) Regarding suspensions, the department will consider the factors defined in ARM 24.35.302 in order to determine whether an employing unit is either exerting control or retains a right to control to a degree that causes a certificate holder to violate the provisions of section 1, Chap. 448, L. of 2005.

(3) Regarding revocations, the department will determine whether a certificate holder is uncooperative by considering the following factors:

(a) the department is unable to locate the certificate holder;

(b) the certificate holder refuses to provide information to the department, including but not limited to updated contact information for the certificate holder and contact information for each of the certificate holder's hiring agents;

(c) mail sent to the certificate holder is returned to the department; or

(d) any ~~other~~ reason the department determines sufficiently egregious to warrant ~~suspension or~~ revocation of the exemption certificate.

~~(2)(4)~~ Certificate holders may appeal ~~from~~ a department suspension or revocation of the certificate in the same manner as that provided for denial of an application pursuant to ~~39-71-401, MCA~~ [section 1, Chap. 448, L. of 2005].

~~(3)(5)~~ As used in this rule, the following definitions apply:

(a) "Revoked" and "revocation" mean that the independent contractor exemption certificate is no longer in force or effect.

(b) "Suspended" and ~~or~~ "suspension" mean that the independent contractor exemption certificate is not applicable to a particular job or to a series of jobs for a particular employing unit.

AUTH: 39-51-301, 39-51-302, 39-71-203 and 39-71-401 [section 1, Chap. 448, L. of 2005], MCA

IMP: 39-71-120 and 39-71-401 39-51-201, 39-51-204, [sections 1 and 2, Chap. 448, L. of 2005], MCA

REASON: Section 2, Chap. 448, L. of 2005, defined the circumstances under which the Department should suspend or revoke a certificate. As a result, it is reasonably necessary to amend this rule to clarify the factors the Department will consider before either suspending or revoking a certificate.

Under section 2, Chap. 448, L. of 2005, suspensions are only allowed when an employing unit is exerting control such that an independent contractor no longer has control or direction over the performance and details of their work. The rule clarifies that the department will consider the control factors in ARM 24.35.302 before deciding to suspend a certificate.

Revocations are only allowed when a certificate holder misrepresents information, alters or amends any documentation provided to or received from the Department, or fails to cooperate with the Department. It is reasonably necessary to clarify what is considered a failure to cooperate because the Department has had difficulty getting certificate holders to update their address and phone information when they move. The proposed rule clarifies that if a certificate holder fails to notify the Department regarding such changes and the Department is unable to contact the certificate holder, the Department may revoke the certificate.

There is reasonable necessity to amend the AUTH and IMP citations to update the references to the statutes that provide the Department with rulemaking authority, and to the statutes that the rule implements, while otherwise amending the rule.

24.35.141 GUIDELINES FOR DETERMINING WHETHER AN INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE IS NEEDED (1) The independent contractor exemption from the coverage requirements of the Workers' Compensation Act is available only to individual persons, not to business entities such as corporations or ~~partnerships~~ manager-managed limited liability companies. The independent contractor exemption certificate relieves the person holding the independent contractor exemption certificate from having to be personally covered by workers' compensation insurance. The independent contractor exemption certificate does not relieve the owner(s) of a business from having to provide workers' compensation coverage for all of the employees of the business.

(2) Notwithstanding this rule, any person who wishes to obtain an independent contractor exemption certificate and meets the requirements for having an independent contractor exemption certificate may obtain one.

(3) As used in this rule, ~~"owner"~~ "person" means a sole proprietor, working member of a partnership, working member of a limited liability partnership, or working member of a member-managed limited liability company.

(4) The following ~~owners of business operations~~ persons generally do not need to obtain the independent contractor



exemption certificate provided in ~~39-71-401(3)~~, MCA [section 1, Chap. 448, L. of 2005]:

(a) any ~~owner~~ person who is covered by a workers' compensation insurance policy for the work performed;

(b) ~~owners~~ persons who provide their own fixed regular commercial business location ~~out of which~~ where they render services to the public at large;

(c) ~~owners~~ persons who use their home as their fixed regular commercial business location where they render services to the public, ~~only~~ if the owner person is able to meet the IRS criteria to claim a business deduction for their home business location on their federal and state tax returns; and

(d) ~~owners~~ persons who practice in the traditional learned professions such as medicine, law and accounting, who provide their own business location but may periodically be called upon to render services to their customers at the customer's location.

(5) The following ~~owners~~ persons generally do need to obtain the independent contractor exemption certificate provided in ~~39-71-401(3)~~ [section 1, Chap. 448, L. of 2005], MCA:

(a) ~~any owner of a business who represents to the public that the owner is an independent contractor, regardless of whether the owner has any other employees~~ a person who regularly and customarily performs services at locations other than the person's own fixed business location;

(b) ~~an owner of a business, a person~~ not falling within the provisions of (4), where the owner person primarily provides personal services for commercial customers at the customer's place of business; and

(c) ~~an owner of a business, a person~~ not falling within the provisions of (4), where the owner person primarily provides personal services for commercial customers, where the services provided are substantially similar to the customer's business operations.

AUTH: 39-71-203 and ~~39-71-401~~ [section 1, Chap. 448, L. of 2005], MCA

IMP: ~~39-71-120 and 39-71-401~~ [section 1, Chap. 448, L. of 2005], MCA

REASON: It is reasonably necessary to amend this rule to conform its terminology to Chap. 448, L. of 2005. It is also reasonably necessary to clarify that under Chap. 448, L. of 2005, an independent contractor exemption certificate is generally required anytime a person regularly performs services at a location other than the person's own fixed business location rather than only when the person represents to the public that the person is an independent contractor.

#### 24.35.202 DETERMINATIONS REGARDING EMPLOYMENT STATUS

(1) To determine the employment status of an individual ~~or groups of similarly situated individuals~~, the department may:

(a) review written contracts between the individual and the hiring agent;

- (b) interview and obtain statements from the individual, co-workers and the hiring agent;
- (c) obtain statements from third parties;
- (d) examine the books and records of the hiring agent;
- (e) review filing status on income tax returns; ~~and~~
- (f) perform onsite visits; and
- (g) make any other investigation necessary to determine employment status.

(2) Determinations regarding employment status must comply with the ~~definitions of criteria for an independent contractor found at [section 1, Chap. 448, L. of 2005] ARM 24.35.301 through 24.35.303~~, as well as with existing law on partnership, joint ventures and other employment entities. The department will use the criteria in ARM 24.35.302 and 24.35.303 to assess employment status.

(3) Determinations regarding employment status will generally be issued by the department's independent contractor central unit (ICCU).

(4) ICCU determinations regarding employment status must be called "determinations" and are separate and distinct from the "orders" defined at ARM 24.29.205.

(5) ICCU determinations regarding employment status are binding on the department and on any other agency which elects to be included as a member of the department's ICCU, subject to the limitations contained in ARM 24.35.205(3). This does not include any agency which is merely appearing before the ICCU as a party in an employment status case (for example the state compensation insurance fund), and has not elected to be included as a member of the ICCU.

AUTH: 39-3-202, 39-3-403, 39-51-301, 39-51-302, ~~and~~ 39-71-203 and [section 1, Chap. 448, L. of 2005], MCA

IMP: 39-3-208, 39-3-209, 39-3-210, 39-51-201, 39-51-203, ~~39-71-120 and~~ 39-71-415 and [sections 1 and 2, Chap. 448, L. of 2005], MCA

REASON: It is reasonably necessary to amend this rule to clarify that the Department may perform onsite visits in order to gather information on employment status pursuant to its enforcement and audit duties. It is also reasonably necessary to correct the reference to the definition of independent contractor.

24.35.205 BINDING NATURE OF DETERMINATIONS REGARDING EMPLOYMENT STATUS

(1) Unless appealed pursuant to ARM 24.35.206, written determinations issued by the ICCU are binding on all parties with respect to employment status issues under the jurisdiction of the department of labor and industry and the jurisdiction of any other agency which elects to be included as a member of the ICCU. These determinations may affect a party's liability in matters related to unemployment insurance, the uninsured employer's fund, wage and hour issues, the human rights commission and state income tax withholding.

(2) Neither the department nor any other agency which elects to be included as a member of the ICCU may appeal the ICCU's employment status determination.

(3) If the ICCU's employment status determination is appealed by a party which has not elected to be included as a member of the ICCU, the determination is not binding on any party until all appeal rights are exhausted.

~~(4) Nothing in these rules shall be construed to limit the right of any similarly situated individual to mediation as provided for in ARM 24.35.206.~~

AUTH: 39-3-202, 39-3-403, 39-51-301, 39-51-302, ~~and~~ 39-71-203, and [section 1, Chap. 448, L. of 2005], MCA

IMP: 39-3-212, 39-51-1109, ~~39-71-120~~, [section 1, Chap. 448, L. of 2005] and 39-71-415, MCA

REASON: It is reasonably necessary to amend this rule to delete outdated, inaccurate, and inappropriate language regarding similarly situated individuals.

24.35.206 APPEAL OF DETERMINATIONS REGARDING EMPLOYMENT STATUS (1) A complaint received by the department is investigated by the ICCU. The ICCU will issue a determination of employment status.

~~(1)(2)~~ Except as provided in (3) and (4), disputes ~~Disputes~~ over an ICCU determination regarding employment status must be mediated by the department, and then, if mediation does not resolve the dispute, may proceed to the workers' compensation court. The party requesting mediation shall file a written request with the ICCU within 10 days of notice of the ICCU's determination.

~~(2)~~ A party is considered to have been given notice on the date a written notice is personally delivered or three days after a written notice is mailed to the party. ~~An appeal must be received by the ICCU within the time limits set forth above. However, the~~ The time limits may be extended by the ICCU for good cause shown.

(3) Disputes regarding the denial, revocation, or suspension of an independent contractor exemption certificate by an applicant or certificate holder must be appealed to the workers' compensation court without mediation as provided by [section 1, Chapter 448, L. of 2005].

(4) A dispute between a hiring agent and the department involving the issue of whether a worker is an independent contractor or an employee, but not involving workers' compensation benefits, must be appealed to the workers' compensation court without mediation as provided by 39-71-415, MCA.

(5) Whenever a party appeals to the workers' compensation court under this rule, the party must serve its notice of appeal on all interested parties of record.

AUTH: 39-3-202, 39-3-403, 39-51-301, 39-51-302, ~~and~~ 39-71-203 and [section 1, Chap. 448, L. of 2005], MCA

IMP: 2-4-201, 39-3-216, 39-51-1109, [sections 1 and 2, Chap. 448, L. of 2005] and 39-71-415, MCA

REASON: It is reasonably necessary to amend this rule to clarify the disputes that are not subject to mediation as provided by Sections 1, 2 and 11, Chap. 448, L. of 2005. It is also reasonably necessary to delete redundant language. It is reasonably necessary to add the requirement that appealing parties serve their notice of appeal on all other involved parties when petitioning the workers' compensation court in order to give proper notice.

24.35.207 TRANSFER OF FILE (1) Upon receiving a notice of appeal or mediation, the ICCU shall identify and mark all exhibits relied on in making the employment status determination and send copies of its administrative record, including the marked exhibits, to the workers' compensation court or the mediator, whichever applies, and to the parties of record.

AUTH: 39-3-202, 39-3-403, 39-51-301, 39-51-302, ~~and~~ 39-71-203 and [section 1, Chap. 448, L. of 2005], MCA

IMP: 2-4-201, 39-3-216, 39-51-1109, [sections 1 and 2, Chap. 448, L. of 2005] and 39-71-415, MCA

REASON: It is reasonably necessary to amend this rule to clarify that for disputes that are not subject to mediation as provided by sections 1, 2 and 11, Chap. 448, L. of 2005, the ICCU must send the record directly to the workers' compensation court.

24.35.302 DEFINITION OF INDEPENDENT CONTRACTOR--EVIDENCE OF CONTROL (1) through (1)(e) remain the same.

(f) The work is performed on the business premises or jobsite of the hiring agent. This factor is especially important if the work could be performed elsewhere;

(g) and (h) remain the same.

(i) The individual is paid based on the time spent doing the work rather than a ~~flat fee~~ payment for a completed project or end result;

(j) through (2) remain the same.

AUTH: 39-3-202, 39-3-403, 39-51-301, 39-51-302, ~~and~~ 39-71-203 and [section 1, Chap. 448, L. of 2005], MCA

IMP: ~~39-3-201, 39-51-201, 39-51-204, 39-71-120 and 39-71-401(3)~~ and [sections 1 and 2, Chap. 448, L. of 2005], MCA

REASON: It is reasonably necessary to amend this rule to clarify the title and to clarify the factors used to determine whether an individual is an independent contractor or an employee.

24.35.303 DEFINITION OF INDEPENDENT CONTRACTOR--INDEPENDENTLY ESTABLISHED BUSINESS (1) through (1)(j) remain the same.

(k) has an independent contractor exemption certificate ~~obtained pursuant to 39-71-401, MCA;~~  
(1) through (2) remain the same.

AUTH: 39-3-202, 39-3-403, 39-51-301, 39-51-302, ~~and 39-71-203~~  
and [section 1, Chap. 448, L. of 2005], MCA  
IMP: 39-3-201, 39-51-201, 39-51-204, ~~39-71-120 and 39-71-~~  
~~401(3)~~ and [sections 1 and 2, Chap. 448, L. of 2005], MCA

REASON: It is reasonably necessary to amend this rule to amend the catchphrase and to conform the terminology to Chap. 448, L. of 2005.

5. The proposed new rule provides as follows:

NEW RULE I NOTICE OF SUSPENSION OR REVOCATION OF INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE (1) When the department suspends or revokes an independent contractor exemption certificate pursuant to [section 2, Chap. 448, L. of 2005], the certificate holder's waiver of worker's compensation benefits is no longer effective upon notice to the hiring agents as designated in this rule.

(2) Regarding a suspension, a hiring agent is considered to have been given notice of the suspension of the exemption certificate on the date a written notice is personally delivered to the hiring agent, or three days after a written notice is mailed to the hiring agent, whichever is earlier.

(3) Regarding a revocation, if the department has contact information for a given hiring agent, that hiring agent is considered to have been given notice of the revocation of the exemption certificate on the date a written notice is personally delivered to the hiring agent, or three days after a written notice is mailed to the hiring agent, whichever is earlier.

(a) With respect to unknown hiring agents or potential future hiring agents, such hiring agents are deemed to have notice that an exemption certificate is revoked at the earlier of when:

(i) the department posts notice of the revoked certificate at its website; or

(ii) the hiring agent has actual knowledge of the department's revocation of the exemption certificate.

(4) The website address for the department's independent contractor information is [www.mtcontractor.com](http://www.mtcontractor.com). The telephone number for verifying the status of an independent contractor exemption certificate is (406) 444-7734.

AUTH: 39-71-203, [sections 1 and 2, Chap. 448, L. of 2005], MCA  
IMP: [section 2, Chap. 448, L. 2005], MCA

REASON: It is reasonably necessary to adopt NEW RULE I in order to explain the process by which the Department notifies hiring agents that an individual's independent contractor exemption certificate has been suspended or revoked. The rule implements section 2(3), Chap. 448, L. of 2005. The Department knows of no

feasible means of providing actual notice of revoked exemption certificates to unknown hiring agents and hiring agents for which it has no useful contact information. Further, the Department intends to post a list of current, valid independent contractor exemption certificates at its World Wide Web page ([www.mtcontractor.com](http://www.mtcontractor.com)) for reference use by the public. Therefore, the Department proposes to also provide an on-line listing of revoked exemption certificates at the same web page, along with a telephone number for individual inquiries. The Department believes its web page is the optimal method of providing notice to unknown and potential hiring agents because of the speed, low cost, access and timeliness in notifying the public a certificate holder's waiver of worker's compensation benefits is no longer valid.

6. The rules proposed for repeal are as follows:

24.35.116 RENEWAL OF INDEPENDENT CONTRACTOR EXEMPTION  
found at ARM page 24-3522.

AUTH: 39-71-203 and 39-71-401, MCA  
IMP: 39-71-120 and 39-71-401, MCA

REASON: It is reasonably necessary to repeal this rule because as mentioned above, this notice proposes to govern renewal applications through the general application process as set out in ARM 24.35.111.

24.35.301 DEFINITION OF INDEPENDENT CONTRACTOR found at  
ARM page 24-3575.

AUTH: 39-3-202, 39-3-403, 39-51-301, 39-51-302, and 39-71-203,  
MCA  
IMP: 39-3-201, 39-51-201, 39-51-204, 39-71-120, and 39-71-401,  
MCA

REASON: It is reasonably necessary to repeal this rule because the statutory definition of independent contractor has been changed as a result of Chap 448, L. of 2005, and the rule is no longer consistent with the law.

7. 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:

Keith Messmer, Bureau Chief  
Workers' Compensation Regulation Bureau  
Employment Relations Division  
Department of Labor and Industry  
PO Box 8011  
Helena, Montana 59624-8011

and must be received by no later than 5:00 p.m., July 15, 2005. Comments may also be submitted electronically as noted in the following paragraph.

8. An electronic copy of this Notice of Public Hearing is available through the Department's website at <http://dli.state.mt.us/events/calendar.asp>, under the Calendar of Events, Administrative Rules Hearings section. Interested persons may make comments on the proposed rules via the comment forum, <http://dli.state.mt.us/forum.asp>, linked to the Notice of Public Hearing, but those comments must be posted to the comment forum by 5:00 p.m., July 15, 2005. The Department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems, and that a person's difficulties in accessing or posting to the comment forum do not excuse late submission of comments.

9. The Department maintains lists 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 mailing lists shall make a written request which includes the name and mailing address of the person to receive notices and any specific topic or topics over which the Department has rulemaking authority. Such written requests may be delivered to Mark Cadwallader, 1327 Lockey St., Room 412, Helena, Montana, mailed to Mark Cadwallader, P.O. Box 1728, Helena, MT 59624-1728, faxed to the office at (406) 444-1394, e-mailed to [mcadwallader@mt.gov](mailto:mcadwallader@mt.gov), or made by completing a request form at any rules hearing held by the Department.

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

11. The Hearings Bureau of the Centralized Services Division of the Department has been designated to preside over and conduct the hearing.

/s/ MARK CADWALLADER  
Mark Cadwallader,  
Rule Reviewer

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

Certified to the Secretary of State June 6, 2005

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

In the matter of the proposed ) NOTICE OF PROPOSED  
amendment of ARM 24.114.403 ) AMENDMENT AND ADOPTION  
regarding business entity )  
practice and the proposed ) NO PUBLIC HEARING  
adoption of NEW RULE I ) CONTEMPLATED  
pertaining to fee abatement )

TO: All Concerned Persons

1. On July 18, 2005, the Board of Architects proposes to amend ARM 24.114.403 business entity practice and to adopt NEW RULE I fee abatement.

2. The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Architects no later than 5:00 p.m., on July 11, 2005, to advise us of the nature of the accommodation that you need. Please contact Brooke Jasmin, Board of Architects, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2351; Montana Relay 1-800-253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdark@mt.gov.

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

24.114.403 BUSINESS ENTITY PRACTICE (1) remains the same.

(2) Nothing shall prevent a partnership (including a registered limited liability partnership), limited liability company, or corporation (including a professional corporation) from performing or holding itself out as able to perform any of the services involved in the practice of architecture, provided that:

(a) two-thirds of the total general partners (if a partnership), ~~two-thirds of the~~ managers (if a limited liability company), or ~~two-thirds of the~~ directors (if a corporation) are registered under the laws of any United States jurisdiction or any foreign jurisdiction approved by the board as architects or engineers; and ~~that~~

(b) one-third of the total general partners, managers or directors are registered as architects in Montana.

AUTH: ~~37-65-101, 37-65-102, 37-1-131,~~ 37-65-204, MCA  
IMP: ~~37-1-303,~~ 37-65-101, ~~37-65-204,~~ 37-65-302, MCA

REASON: The Board has determined that it is reasonable and necessary to amend ARM 24.114.403 to reduce confusion among



licensees and license applicants and clarify the intent of the Board regarding business entities engaged in the practice of architecture. The intent of the Board has been, and remains to be, to require business entities offering architectural services in Montana to have 2/3 of the total number of managers, general partners or directors be registered or licensed somewhere as architects or engineers, and have 1/3 of the total managers, partners or directors be Montana-licensed architects. The Board has received and responded to numerous requests for clarification of this rule. The authority and implementation cites are being amended to correctly identify the full statutory authority of the Board to engage in rulemaking and the statutes implemented through this administrative rule.

4. The proposed new rule provides as follows:

NEW RULE I FEE ABATEMENT (1) The board of architects adopts and incorporates by reference the September 24, 2004, fee abatement rule of the department of labor and industry found at ARM 24.101.301.

(2) A copy of ARM 24.101.301 is available by contacting the Board of Architects, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513.

AUTH: 37-1-131, MCA

IMP: 17-2-302, 17-2-303, 37-1-134, MCA

REASON: The Board has determined there is reasonable necessity to adopt New Rule I and incorporate by reference ARM 24.101.301 to allow the Board to authorize the Department to perform renewal licensure fee abatements as appropriate and when needed, without further vote or action by the Board. The Department recently adopted ARM 24.101.301 to implement a means for the prompt elimination of excess cash accumulations in the licensing programs operated by the Department.

Adoption and incorporation of ARM 24.101.301 will allow the Department to promptly eliminate excess cash balances of the Board that result from unexpectedly high licensing levels or other non-typical events. Abatement in such instances will allow the licensees who have paid fees into the Board's program to receive the temporary relief provided by abatement. Adoption of this abatement rule does not relieve the Board from its duty to use proper rulemaking procedures to adjust the Board's fee structure in the event of recurrent instances of cash balances in excess of the statutorily allowed amount.

5. Concerned persons may present their data, views or arguments concerning the proposed amendment and adoption in writing to the Board of Architects, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to [dlibsdark@mt.gov](mailto:dlibsdark@mt.gov). Any

comments must be received no later than 5:00 p.m., July 15, 2005.

6. If persons who are directly affected by the proposed amendment and adoption wish to express their data, views and arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to the Board of Architects, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to [dlibsdark@mt.gov](mailto:dlibsdark@mt.gov) to be received no later than 5:00 p.m., July 15, 2005.

7. If the board receives requests for a public hearing on the proposed amendment and adoption from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed amendment and adoption; from the appropriate administrative rule review committee of the legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 46 persons based on approximately 459 licensees.

8. The Board of Architects 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 which includes the name and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all Board of Architects administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Board of Architects, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; faxed to the office at (406) 841-2305; e-mailed to [dlibsdark@mt.gov](mailto:dlibsdark@mt.gov); or may be made by completing a request form at any rules hearing held by the agency.

9. An electronic copy of this Notice of proposed amendment and adoption is available through the Department and Board's site on the World Wide Web at <http://www.architect.mt.gov>, in the Rules Notices section. The Department strives to make the electronic copy of this Notice of proposed amendment and adoption conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due

to system maintenance or technical problems, and that a person's technical difficulties in accessing or posting to the e-mail address do not excuse late submission of comments.

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

/s/ KEITH KELLY

Keith Kelly, Commissioner  
DEPARTMENT OF LABOR & INDUSTRY

/s/ MARK CADWALLADER

Mark Cadwallader  
Rule Reviewer

Certified to the Secretary of State June 6, 2005

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

In the matter of the proposed ) NOTICE OF PUBLIC HEARING  
amendment of ARM 24.180.607 ) ON PROPOSED AMENDMENT  
pertaining to temporary practice ) AND ADOPTION  
permits and the proposed adoption )  
of NEW RULE I pertaining to )  
continuing education requirements )

TO: All Concerned Persons

1. On July 8, 2005, at 1:00 p.m., a public hearing will be held in room B-07 of the Park Avenue Building, 301 South Park Avenue, Helena, Montana to consider the proposed amendment and adoption of the above-stated rules.

2. The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or who need an alternative accessible format of this notice. If you require an accommodation, contact Mr. Dan Bernhardt no later than 5:00 p.m., July 1, 2005, to advise us of the nature of the accommodation you need. Please contact Mr. Dan Bernhardt, Board of Plumbers, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2350; Montana Relay 1-800-253-4091; TDD (406) 444-2978; Facsimile (406) 841-2309; e-mail dlibsdlu@mt.gov.

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

24.180.607 TEMPORARY PRACTICE PERMITS (1) and (2) remain the same.

(3) A second temporary permit will be issued only to an applicant who:

(a) has failed the examination with a score of 65 through 69%;

(b) is scheduled to take the next scheduled examination;  
and

(c) upon receipt of:

(i) a letter from the applicant requesting a second temporary permit and requesting to be scheduled for the next scheduled examination;

(ii) a letter from the employer stating that the applicant is employed and under the direct supervision of a licensed master plumber; and

(iii) payment of the appropriate fees.

(4) If the applicant does not appear for, cancels or fails the next scheduled examination, the second temporary permit expires on the date the board office learns of that occurrence.

~~(3)~~(5) An applicant for the master plumbing license may not work as a master until such time as ~~he~~ the applicant successfully passes the master's examination and a master plumber's license has been issued to ~~him~~ the applicant.

AUTH: 37-1-319, MCA

IMP: 37-1-305, MCA

REASON: It is reasonable and necessary to amend ARM 24.180.607 easing the process for an applicant who has failed the examination to obtain a second temporary permit. Currently, if an applicant fails their first exam, they are required to submit a request to the Board of Plumbers to obtain a second temporary permit. Because the Board meets quarterly, the applicant is unable to work and may be required to wait up to three months to hear a response. There have been recent instances of such situations. By allowing the Department to issue a second temporary permit to an applicant who meets the above requirements, the Board believes it is improving the current Administrative Rules to benefit both the licensees and the public. It is also reasonable and necessary to insert gender-neutral language into (5) while the rule is otherwise being amended.

4. The proposed new rule provides as follows:

NEW RULE I CONTINUING EDUCATION REQUIREMENTS

(1) Beginning September 1, 2006, each journeyman or master plumber shall obtain at least four hours of board approved continuing education annually in order to renew the person's license. The license renewal application must be signed by the licensee and certify that the licensee has completed the required amount of continuing education.

(a) New licensees are exempt from the requirements during their first renewal cycle. Those licensees changing from journeyman licenses to master plumber licenses are not exempt from completing at least four hours of continuing education.

(2) In general, courses should be designed to advance the knowledge and skills of licensees. A licensee may receive credit only for continuing education courses that have received prior approval of the curriculum by the board or the department and to which a course approval number has been assigned by the department. Course approval expires when changes in plumbing code, statutes or rules necessitate.

(a) Course curriculum must be based on:

(i) the adopted state plumbing code;

(ii) Title 37, chapter 69, MCA, pertaining to licensure of plumbers;

(iii) Title 50, chapter 60, MCA, pertaining to building codes and permit requirements;

(iv) ARM Title 24, chapter 180, pertaining to the board's rules;

(v) ARM 24.301.301 through 24.301.351, pertaining to building code plumbing matters; or

(vi) other subjects related to the plumbing industry, as approved by the board.

(b) Course sponsors are responsible for ensuring that instructors are credentialed as one or more of the following:

(i) a Montana licensed journeyman or master plumber, with additional training in related subject areas;

(ii) a certified teacher with board approved plumbing credentials;

(iii) a certified journeyman and apprentice plumbing inspector;

(iv) a plumbing inspector possessing a state journeyman or master plumber's license; or

(v) continuing education instructor from another state or jurisdiction who is approved by the board.

(c) Course sponsors shall provide the department with a minimum of 15 working days prior notice of the time and place of every course or seminar.

(d) Course sponsors shall provide each person completing a continuing education course with a completion certificate. The completion certificate must contain all of the following information:

(i) the date of course;

(ii) the location of course;

(iii) the name of instructor(s);

(iv) the name of licensee completing the course;

(v) the state assigned course approval number; and

(vi) the number of completed hours of instruction.

(3) For quality assurance or evaluation purposes, representatives of the department or the board may audit the course for content without charge. Such a person shall not receive or be issued a certificate of completion for that course.

(4) The department may conduct a random audit of up to 30% of all active licensees following the license renewal process.

(a) All licensees shall retain course completion certificates for a minimum of three years, for auditing purposes.

(b) Audited licensees are required to furnish to the department certificates of completion which demonstrate attainment of the four hour continuing education requirement.

(c) Failure by the licensee to provide certificates of completion when audited shall constitute grounds for implementation of disciplinary proceedings against the licensee.

(5) All requests for exemption from the continuing education requirements will be reviewed by the board and determinations will be done on a case-by-case basis.

(6) If a licensee does not timely file a renewal application, and thereafter files a late renewal application, the late renewal application must contain documentary proof

that the licensee has obtained the required amount of continuing education.

AUTH: 37-69-202, MCA  
IMP: 37-1-306, MCA

REASON: The board believes it is reasonably necessary to implement a continuing education program to better protect the public health, safety and welfare. Better education for all licensees means better service to the public and fewer instances of ineffectual and incompetent workmanship. The financial impact per licensee will vary depending upon each licensee's professional affiliation. The board does not anticipate the cost to any licensee will be more than \$50.00 per year. There will be approximately 1,658 affected licensees. A survey conducted in 2001 showed that 61% of all licensees supported continuing education for the plumbing profession.

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 by mail to Mr. Dan Bernhardt, Board of Plumbers, Department of Labor and Industry, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2309, or by e-mail to [dlibsdpplu@mt.gov](mailto:dlibsdpplu@mt.gov) and must be received no later than 5:00 p.m., July 18, 2005.

6. An electronic copy of this Notice of Public Hearing is available through the Department and Board's web site on the World Wide Web at <http://www.plumber.mt.gov>, in the Rules Notices section. The Department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems, and that a person's technical difficulties in accessing or posting to the e-mail address do not excuse late submission of comments.

7. The Board of Plumbers 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 and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding all Board of Plumbers administrative rulemaking proceedings or other administrative proceedings. Such written request may be mailed or delivered to the Board of Plumbers, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-

0513, faxed to the office at (406) 841-2309, e-mailed to dlibsdpplu@mt.gov or may be made by completing a request form at any rules hearing held by the agency.

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

9. Lon Mitchell, attorney, has been designated to preside over and conduct this hearing.

BOARD OF PLUMBERS  
TIM REGAN, PRESIDING OFFICER

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

/s/ MARK CADWALLADER  
Mark Cadwallader  
Rule Reviewer

Certified to the Secretary of State June 6, 2005



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

In the matter of the proposed ) NOTICE OF PUBLIC HEARING  
amendment of ARM 37.78.102 ) ON PROPOSED AMENDMENT  
and 37.82.101 pertaining to )  
temporary assistance for )  
needy families (TANF), )  
medical assistance, purpose )  
and incorporation of policy )  
manuals )

TO: All Interested Persons

1. On July 6, 2005, at 1:30 p.m., a public hearing will be held in Room C207 of the Cogswell Building, 1400 Broadway, Helena, Montana to consider the proposed amendment of the above-stated rules.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice or provide reasonable accommodations at the public hearing site. If you need to request an accommodation, contact the department no later than 5:00 p.m. on June 27, 2005, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

2. The rules as proposed to be amended provide as follows. Matter to be added is underlined. Matter to be deleted is interlined.

37.78.102 TANF: FEDERAL REGULATIONS ADOPTED BY REFERENCE

(1) The TANF program shall be administered in accordance with the requirements of federal law governing temporary assistance for needy families as set forth in Title IV of the Social Security Act, 42 USC 601 et seq., as amended by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and the Balanced Budget Act of 1997.

(2) The Montana TANF cash assistance manual in effect ~~July 1, 2004~~ July 1, 2005 is adopted and incorporated by this reference. A copy of the Montana TANF cash assistance manual is available for public viewing at each local office of public assistance, and at the Department of Public Health and Human Services, Human and Community Services Division, 1400 Broadway, P.O. Box 202952, Helena, MT 59620-2952. Manual updates are also available on the department's website at ~~www.dphhs.state.mt.us~~ www.dphhs.mt.gov.

AUTH: Sec. 53-4-212, MCA  
IMP: Sec. 53-4-211 and 53-4-601, MCA

37.82.101 MEDICAL ASSISTANCE, PURPOSE AND INCORPORATION OF POLICY MANUALS (1) Subject to applicable state and federal laws, regulations and rules, the Montana medicaid program pays for covered medically necessary services for persons determined eligible by the department or its agents.

(2) The department adopts and incorporates by reference the state policy manuals governing the administration of the medicaid program effective ~~January 1, 2004~~ July 1, 2005. The Family Medicaid Manual, the SSI Medicaid Manual and the proposed manual updates are available for public viewing at each local office of public assistance or at the Department of Public Health and Human Services, Human and Community Services Division, 1400 Broadway, P.O. Box 202952, Helena, MT 59620-2952. The proposed manual updates are also available on the department's website at ~~www.dphhs.state.mt.us~~ www.dphhs.mt.gov/legalresources/proposedmanualchange.shtml.

AUTH: Sec. 53-2-201 and 53-6-113, MCA

IMP: Sec. 53-6-101, 53-6-131 and 53-6-141, MCA

3. The proposed amendments to ARM 37.78.102 and 37.82.101 are necessary in order to incorporate into the Administrative Rules of Montana the version of the policy manual effective July 1, 2005, and to permit all interested parties as well as the public to comment on the Department of Public Health and Human Services' (Department) policies and to offer suggested changes. Many of these changes are being made in order to comply with federal law or regulations.

53-6-101, MCA requires the Department to comply with federal law in order to receive federal matching funds. In accordance with 2-4-307, MCA of the Montana Administrative Procedure Act (MAPA), an agency may adopt by reference any model code, federal agency rule, rule of any agency of this state, or other similar publication if the publication of the model code, rule, or other publication would be unduly cumbersome, expensive, or otherwise inexpedient. The manuals incorporated by reference by these rule changes fit all three of these criteria. It would be unduly cumbersome, expensive and otherwise inexpedient to attempt to place this information into rule format. In addition, the Secretary of State's publishing guidelines require that rules be short, readable and encompass a single idea. The TANF and Medicaid provisions set forth in these manuals are of such in depth complexity, they cannot be effectively or coherently reduced to fit these requirements.

The Montana Medicaid Program is a joint federal-state program that pays medical expenses for eligible low income individuals. To qualify for the Montana Medicaid Program, an individual must meet the eligibility requirements set forth in ARM Title 37, Chapter 82. Additionally, the Family Medicaid Manual and the SSI Medicaid Manual set forth information about the eligibility requirements for Medicaid that is more detailed

than that in administrative rules. These state policy manuals are published by the Department to provide guidance to employees of the local Offices of Public Assistance who determine eligibility for Medicaid.

The Temporary Assistance for Needy Families (TANF) cash assistance program provides cash assistance to eligible low income Montanans. To qualify for the TANF Program, families must meet the eligibility requirements as set forth in ARM Title 37, Chapter 78. The program is jointly funded by the State and Federal governments and is administered by the State in accordance with federal and State law and regulations.

ARM 37.82.101 adopts and incorporates by reference the Medicaid policy manuals effective July 1, 2005, and ARM 37.78.102 adopts and incorporates by reference the TANF policy manual effective July 1, 2005. By incorporating these manuals into the administrative rules, the Department gives interested parties and the public general notice and an opportunity to comment on policies governing Medicaid and TANF eligibility. Additionally, as a result of the incorporation of the manuals into the administrative rules, the policies contained in the Family Medicaid Manual, the SSI Medicaid Manual and the TANF Manual have the force of law in case of litigation between the Department and a Medicaid or TANF applicant or recipient concerning the applicant or recipient's eligibility for Medicaid or TANF.

The Department proposes to make some revisions to these manuals that will take effect on July 1, 2005. The proposed amendments to ARM 37.82.101 and 37.78.102 are therefore necessary in order to incorporate into the Administrative Rules of Montana the revised versions of the policy manuals and to permit all interested parties to comment on the Department's policies and to offer suggested changes. It is estimated that changes to the Family Medicaid and SSI Medicaid Manuals could affect 83,503 Medicaid recipients and changes to the TANF Manual could affect 12,443 TANF recipients.

Manuals and draft manual material are available for review in each local office of Public Assistance and online at [www.dphhs.mt.gov/legalresources/proposedmanualchange.shtml](http://www.dphhs.mt.gov/legalresources/proposedmanualchange.shtml). Following is a brief overview of the changes being made to each manual section for the Family Medicaid Manual, the Supplemental Security Income (SSI) Related Medicaid Manual and the Temporary Assistance for Needy Families (TANF) Cash Assistance Manual.

#### Family Medicaid Manual

Fiscal impact based on the proposed changes to the Family Medicaid Manual is expected to be zero. Except as is otherwise specifically noted below, the following proposals are expected to have no fiscal impact.

FMA 201-12 Coverage Groups - Breast and Cervical Cancer Treatment - The proposal makes clear that applications can be submitted by either the Montana Breast and Cervical Health Program (MBCHP) Site Administrator, or by the woman seeking assistance. The woman, however, must be screened through MBCHP before submitting an application. The proposal also makes clear that the application date is the date the Public Assistance Bureau (PAB) Central Office date stamps the signed application (HCS/BC-002). Applications received at any other location are not considered filed. The proposal also makes clear that the retroactive coverage period is based on the date the application is received, as is the case with all other Medicaid coverage groups. Medicaid coverage, however, cannot be provided for any month prior to the woman's diagnosis.

FMA 307-3 Non-financial Requirements - Health Coverage - Trauma Questionnaires - This new manual section details the requirements which apply to the Office of Public Assistance (OPA) staff and to the Medicaid recipient when a "Trauma Questionnaire" is sent. Trauma questionnaires are sent based on specific procedure codes. The questionnaire is sent when a Medicaid recipient receives treatment with one of these specific procedure codes and Medicaid pays for that treatment. When a Medicaid recipient receives a trauma questionnaire, the recipient is required to complete and return the questionnaire to the Third Party Liability Unit. If the questionnaire is not completed and returned, a copy of the "final request" is sent to the OPA which must close coverage if the recipient is an adult who is receiving Medicaid. If no adult is receiving Medicaid, a notice must be sent requesting that the questionnaire be completed. Children's coverage is not affected by an adult's failure to complete the questionnaire.

FMA 307-4 Non-financial Requirements - Health Coverage - Estate Recovery - This new manual section provides OPA staff with policy and information regarding the Estates Recovery Program. Pursuant to this section, Medicaid recipients are subject to estates recovery if Medicaid paid expenses on the recipient's behalf while the recipient was in a nursing home, intermediate care facility for the mentally retarded, or institute for mental disease or for those who were 55 or older. This section also explains that most Medicaid covered expenses are recoverable, explains when a claim will be filed against the deceased individual's estate, provides for a hardship exemption, and lists the Estates Recovery Program address and phone number.

FMA 307-5 Non-financial Requirements - Health Coverage - Liens - This new manual section provides OPA staff with policy and information on Medicaid liens. The section explains that those Medicaid recipients who reside in a nursing home, intermediate care facility for the mentally retarded or an institute for mental disease are subject to having a lien placed on their property. The new section also details the procedure OPA must follow in order to notify the Estates Recovery Unit of a

potential lien and lists exemptions to having a lien placed. The section also explains that the lien amount is calculated upon the Medicaid recipient's death, sets forth those Medicaid covered services which will be included in the lien amount and provides for the dissolution of a lien when the Medicaid recipient is discharged from the facility and returns home.

FMA 402-1 Resources - Countable and Excluded Resources - This proposal changes two resource policies to make them consistent between Family Medicaid and SSI Medicaid. The first policy change excludes one burial plot per family member without regard to whether the family member does or does not live in the home. Previously, Family Medicaid (FMA) excluded one burial plot per filing unit member. The change is not expected to have any fiscal impact because the majority of families eligible under Family Medicaid have little income and have not had the opportunity to accumulate enough resources to buy burial plots for their immediate family, let alone other family members. The second policy change deems a lump sum payment to be income in the month it is received and a resource in the following months to the extent it is retained. FMA policy previously deemed a lump sum payment to be a resource not only in the month it is received but also in the following months. This change is also not anticipated to have any fiscal impact because in order to deem a lump sum to be either income or a resource, it must be able to be anticipated that the payment will be received in a future month, which is usually not possible. For this reason, such payments are seldom counted in the month of receipt and only the remainder is counted as an available resource the following month. There are also several modifications throughout this section that merely clarify, without changing, existing policy.

FMA 500 Income - Income Overview - This proposal provides that in determining Medicaid eligibility, if a person in a Medicaid filing unit is legally entitled to receive child support payments which that person could have pursued but did not pursue, the amount of child support payments that person could have received by pursuing those payments but did not receive will be counted as if the person had received that payment amount. This proposal is an alternative to denying Medicaid outright when child support is involved. The proposed change also provides that periodic payments of income received in months prior to Medicaid application, but for which retroactive coverage is requested, will be counted in full in the retroactive month.

FMA 501-1 Income - Unearned Income - The proposal contains the proposed policy change regarding lump sum payments previously discussed in reference to FMA 402-1, above. No other policy changes are contained in this section, only clarification of existing policies.

FMA 501-2 Income - Native American Income - The proposal

excludes interest earned on all Native American funds and resources. FMA policy currently excludes interest earned on all excluded Native American funds and resources. This proposal is not expected to have any fiscal impact because the amount of interest earned on countable Native American funds and resources is negligible. This proposal will make it administratively easier to process cases in which recipients have Native American funds and/or resources, and will make FMA policy consistent with SSI Medicaid policy.

FMA 502-1 Income - Earned Income - The proposal contains the policy change proposal for the treatment of lump sum payments as described above in FMA 402-1 above. The proposal contains no other policy changes, only clarification of existing policies.

FMA 703-1 Medically Needy - Medical Expense Option - This proposal specifically provides that medical bills must be provided to the Office of Public Assistance within the time period during which they are eligible to be used to meet a recipient's incurment. No fiscal impact is expected with reference to this change because recipients will be informed they must timely report and verify their medical expenses. This proposal also adds Nicoderm and postage expenses for mail ordered prescription drugs to the list of expenses which are allowed toward offsetting an incurment. Nicoderm is currently a Medicaid covered over the counter medication. Allowing offset for the cost of postage for mail order prescriptions encourages individuals to use mail order discounts for drugs and to avoid the cost of more expensive travel in purchasing their prescriptions. No fiscal impact is expected from this proposal because Nicoderm would be allowed as an offset regardless of this proposal pursuant to Nicoderm being a covered service under the Montana Medicaid State Plan and because the postage expenses for purchasing prescriptions are usually minimal.

#### SSI Medicaid Manual

Except as is otherwise specifically noted below, the following proposals are expected to have no fiscal impact.

MA 305-2 Non-financial Requirements - Health Insurance Coverage - HIPPS - While this proposal is new to the manual, most information contained in it is simply moved from MA 305-2. The substantive change to this section requires an applicant or recipient not only to cooperate in maintaining cost effective health insurance coverage, but also to cooperate with the Third Party Liability Unit in making the cost effectiveness determination as a condition of eligibility.

MA 305-3 Non-financial Requirements - Health Coverage - Trauma Questionnaires - This proposed new manual section details the requirements that apply to the Office of Public Assistance (OPA) staff and to the Medicaid recipient when a "Trauma Questionnaire" is sent. Trauma questionnaires are sent based on

specific procedure codes. The questionnaire is sent when a Medicaid recipient receives treatment with one of these specific procedure codes and when Medicaid pays for that treatment. When a Medicaid recipient receives a trauma questionnaire, the recipient is required to complete and return the questionnaire to the Third Party Liability Unit. If the questionnaire is not completed and returned, a copy of the "final request" is sent to the OPA which must close coverage if the recipient is an adult receiving Medicaid. If no adult is receiving Medicaid, a notice must be sent requesting that the questionnaire be completed. Children's coverage is not affected by an adult's failure to complete the questionnaire.

MA 402-1 Resources - Countable and Excluded Resources - This proposal corrects current policy to reflect the required activity in the operation of the business must be ten hours in all weeks annually. The current policy, which requires 100 hours over a period of at least five weeks annually, was a single part of a four part test to determine self-employment of a farmer and specifically referred to physical labor activities on a farm, and was therefore an incorrect and incomplete standard. The definition of income producing property has also been amended to clarify that this exclusion is only available for nonliquid property, as is consistent with SSI policy. This section also clarifies that retirement accounts owned by community spouses are countable in both the resource assessment and subsequent eligibility determination, unless otherwise excluded.

MA 404-1 Resources - Asset Transfers - This proposal includes the making of an unsecured loan as an example of uncompensated transfers. The hardship exception for excluding the transfer of assets for less than fair market value requires that all legal avenues be exhausted in seeking to reclaim assets. This section was modified to clarify that exhausting all legal avenues includes filing a civil suit to regain possession of assets. This is consistent with the language in ARM 37.82.417 and with the intention of the policy. The filing of criminal charges, which have a higher standard of proof than civil charges, is not required because their filing is not within the control of a victim.

MA 404-2 Resources - Penalty Periods for Asset Transfers - This section was modified to update the average cost of nursing home care in Montana that is used in determining uncompensated asset transfer penalties. The updated average cost of nursing home care based upon a survey undertaken by the Department is \$4,039.00, to be used effective July 1, 2005.

MA 500 Income - Income Overview - The proposal provides that in determining Medicaid eligibility, if a person in a Medicaid filing unit is legally entitled to receive child support payments which that person could have pursued but did not pursue, the amount of child support payments that person could

have received by pursuing those payments will be counted as if the person had received that payment amount. This proposal is an alternative to denying medicaid outright when child support is involved. The proposed change also provides that periodic payments of income received in months prior to Medicaid application, for which retroactive coverage is requested, will be counted in full in the retroactive month. The proposal also updates in kind income policy to make it consistent with recent changes in SSI regulations by which receipt of clothing does not constitute in kind income.

MA 501-1 Income - Unearned Income - This proposal updates in kind income policy to render it consistent with recent changes to SSI regulations by which receipt of clothing does not constitute in kind income. Policy regarding interest is also changed to render it consistent with changes to SSI policy. The proposal provides that interest income earned on countable assets is excluded, and only interest income earned on excluded assets is countable. SSI related Medicaid is required to be consistent with SSI cash assistance policy. The fiscal impact of these changes is expected to be negligible because SSI related Medicaid recipients must have less than \$2000 in countable assets; excluding interest earned on less than \$2000 annually does not normally affect eligibility. In kind income in the form of clothing will have a fiscal impact because in kind income related to clothing can nearly never be anticipated.

MA 501-2 Income - Native American Income - The proposal excludes interest earned on all Native American funds and resources. Current FMA policy excludes interest earned on all excluded Native American funds and resources. Recent changes to SSI eligibility policy excluding interest earned on countable assets also require this change. This proposal will also make it administratively easier to process cases in which recipients have Native American funds and/or resources. This proposal is not expected to have any fiscal impact because the amount of interest earned on countable Native American funds and resources is negligible. Under this proposal, and consistent with SSI and Family Medicaid methodologies and policies, the manner in which income of Native American Indians is deemed countable in determining eligibility is also changed from annualizing to counting such income when it is received. This proposal change is not expected to have any fiscal impact because the change will not affect the amount of income counted, but only the months in which it is counted.

MA 502-1 Income - Earned Income - The proposal incorporates the latest SSI policy standards for disregarding earned income of disabled students under age 22. The SSI policy standards are updated annually and became effective January 1, 2005. This proposal is expected to have only minimal fiscal impact because the change does not exceed \$150 annually for a disabled student wage earner. Fewer than 100 disabled students under age 22 also work, and if all of them used this disregard, it would reduce



their incurments by a total of \$15,000 annually, resulting in general fund impact of approximately \$4,050.00 annually. The proposal also includes an update to in kind income policy to render it consistent with recent changes to SSI regulations that receipt of clothing does not constitute in kind income. FMA policy regarding interest is also changed consistent with changes to SSI policy. Under this change, interest income earned on countable assets is excluded, and only interest income earned on excluded assets is countable. SSI related Medicaid is required to be consistent with SSI cash assistance policy. The fiscal impact of these changes is expected to be negligible because SSI related Medicaid recipients must have less than \$2,000 in countable assets, and excluding interest earned on less than \$2,000 annually does not normally affect eligibility. Likewise, it is anticipated the fiscal impact of the proposed changes related to in kind income in the form of clothing will have a negligible fiscal impact because in kind income related to clothing can seldom be anticipated.

MA 503-1 Income - Self-Employment Income - The proposal includes a discussion of guidelines to determine if an income producing investment is considered earned self-employment. The current policy is being corrected to reflect the required activity in the operation of the business must be ten hours in all weeks annually. The current policy, which requires 100 hours over a period of at least five weeks annually, was a single part of a four part test to determine self-employment of a farmer and specifically referred to physical labor activities on a farm, and was therefore an incorrect and incomplete standard. In addition, the discussion of "significant participation in a business activity" will allow for instances where an individual's activities are the direct result of the generation of income, as in the case of a self-employed computer programmer who works only eight hours per week, but whose income is directly tied to the specific activities of the individual. It is anticipated there will be no fiscal impact from this proposal because the changes should have no impact on true self-employment income.

MA 601-3 Eligibility and Benefit Determination - Income Disregards - The proposal amends policy to render it consistent with SSI policy that disabled individuals are entitled to disregards of earned income to offset costs of employment expenses related to their disabilities. The policy previously allowed expenses only for the blind. This policy is amended to be consistent with 20 CFR 416.1112. The fiscal impact of this change is expected to be minimal because the expenses allowed include only items such as adaptive equipment not covered by Medicaid. Most of the costs allowed would be covered by Medicaid and would therefore not be allowed as expenses to offset income.

MA 603-1 Eligibility and Benefit Determination - Income Computation for Individuals and Couples - This proposal corrects

a previous error when the computation was last revised. The previous revision erroneously eliminated the allowance of \$65 and one half of the remainder of earned income of a deemed ineligible spouse when calculating eligibility for the eligible spouse. No fiscal impact is expected from this proposal because this error was made in the manual and was not reflected in The Economic Assistance Maintenance System (TEAMS), which calculates benefits, and because benefits have been calculated correctly, notwithstanding this error in the manual.

MA 702-1 Medically Needy - Cash Option - This proposal corrects previous policy that was inconsistent with the Centers for Medicare and Medicaid Services State Medicaid Manual 3645.2, pursuant to which only payments made or bills incurred in prior months can be used to offset the cash option. To allow otherwise would not only be contrary to federal guidance, but would also be contrary to State policy in anticipating expenses. No fiscal impact is anticipated because any bill incurred in a Medicaid covered month which is not a Medicaid covered service would be allowed to offset the following month's incurment.

MA 703-1 Medically Needy - Medical Expense Option - This proposal specifically provides that medical bills must be provided to the Office of Public Assistance within the time period during which they are eligible to be used to meet a recipient's incurment. No fiscal impact is expected with reference to this change because recipients will be informed they must timely report and verify their medical expenses. This proposal also adds Nicoderm and postage expenses for mail ordered prescription drugs to the list of expenses which are allowed toward offsetting an incurment. Nicoderm is currently a Medicaid covered over the counter medication. Allowing offset for the cost of postage for mail order prescriptions encourages individuals to use mail order discounts for drugs and to avoid the cost of more expensive travel in purchasing their prescriptions. No fiscal impact is expected from this proposal because Nicoderm would be allowed as an offset regardless of this proposal pursuant to Nicoderm being a covered service under the Montana Medicaid State Plan and because the postage expenses from purchasing prescriptions are usually minimal.

MA 904-2 Residential Medical Institutions - Income Disregards for Institutionalized Spouses - This proposal adds court ordered child support and court ordered alimony as allowable deductions from income when determining cost of care for Medicaid purposes. This will bring the State's policy into compliance with a decision of the Court of Appeals for the Ninth Circuit regarding child support and alimony, and with a recent State Plan amendment. No fiscal impact is expected in regard to this proposal because court ordered child support and court ordered alimony have already been treated consistent with the requirements of the ruling by the Court of Appeals which, as a matter of law, took precedence over this section, and because the policy is outlined elsewhere in the manual. This proposal

also corrects policy in regard to the method of considering utility expenses when calculating the spousal income maintenance allowance. The Centers for Medicare and Medicaid Services State Medical Manual requires states to choose only one method for considering utility allowance for all affected cases. The previous policy allowed couples to choose either a standard utility allowance or actual expenses. In order to comply with the federal guidance, the state has chosen to use the standard allowance in all cases because it is usually higher than actual expenses and, therefore, is already used in most cases.

MA 904-3 Residential Medical Institutions - Income Disregards for Institutionalized Individuals - This proposal adds court ordered child support and court ordered alimony as allowable deductions from income when determining cost of care for Medicaid purposes. This will bring the State's policy into compliance with a decision of the Court of Appeals for the Ninth Circuit regarding child support and alimony, and with a recent State Plan amendment. No fiscal impact is expected in regard to these changes regarding child support and alimony because court ordered child support and court ordered alimony have already been treated consistent with the requirements of the ruling by the Court of Appeals, which as a matter of law took precedence over this section. In addition, this proposed change recognizes family maintenance allowance as an allowable deduction for an unmarried institutionalized individual who may have dependents other than the spouse living in the community. No fiscal impact is expected in regard to the changes in the treatment of family maintenance allowance because that allowance has already been programmed into The Economic Assistance Maintenance System (TEAMS) and has been recognized under federal regulations for some time. The policy, therefore, has already been in place in practice.

MA 904-6 Residential Medical Institutions - Long Term Care Insurance - This proposal adopts a change in federal policy under Public Law 108-422, Section 202, enacted on November 11, 2004, which bars states from considering Veterans Administration per diem payments to state veterans homes in determining Medicaid eligibility and payment for services. The expected increase in costs to the Medicaid program from this change will be for 17 persons currently eligible for Medicaid at \$57 per day for 365 days a year (\$353,685.00) in both SFY 06 and 07. The funding is at the applicable Federal Medicaid Assistance Percentage (FMAP) match rate of 29.29% in SFY 06 (General Fund = \$103,594) and .2992 in SFY 07 (General Fund = \$105,822).

TANF Manual

Except as otherwise specifically noted below, the following proposals are expected to have no fiscal impact.

TANF 001 Monthly Income Standards - This proposal that beginning January 1, 2005, \$30.00 be added to the monthly TANF benefit

amount after all eligibility computations are completed was implemented when a greater amount of TANF funds were available than had previously been projected. The increase of benefits by a uniform \$30.00 was deemed to be an equitable means of providing a substantive increase for all beneficiaries. This impacts 4,800 TANF cases per month at a cost of \$1.8 million per year to TANF.

TANF 201-1 Household Composition - This section of the manual is being changed to exclude SSI 1619B recipients as required members of the assistance unit in accordance with their SSI status. Based on information from Social Security, individuals classified as 1619B are still considered to be SSI eligible even though a payment is not issued to them. They are eligible throughout the entire time period they are 1619B. SSI is administered under Title XVI and 1619B is included under that jurisdiction. Current policy, which counts the income and resources of the 1619B individual toward the TANF grant, is incorrect and does not match their current SSI status. This change will impact approximately 30 TANF participants per month, increasing the case benefits by \$77 per participant for an annual cost of \$27,720 per year to TANF.

TANF 704-2 Work Support Payment - This proposal is made pursuant to the direction of the Governor that Work Support Payment (WSP) be reinstated effective January 1, 2005, with the first payment available February 2005. This payment was reinstated to assist the families whose TANF case closes due to new or increased earned income. The intention of the WSP is to serve as a bridge-the-gap payment to help with the family's basic needs until they receive their first paycheck or the increased paycheck that resulted in closure of their case due to being over the income standard. Regardless of family size, the amount of the WSP payment is \$375, which is the benefit amount for a family of three. ARM 37.78.425 governs the Work Support Payment. It is expected that this change will impact approximately 200 TANF cases per month at a cost of \$900,000.00 per year to TANF.

TANF 1203-1 Expungement of TANF Benefits - Pursuant to 17-8-303, MCA, payments issued for DPHHS must be presented for payment within 180 days of issue. TANF participants receive benefits by warrant, direct deposit or Electronic Benefit Transfer (EBT). This section provides for the expunging of stale dated benefits from the EBT card and explains the participant notification and the process for reclaiming expunged EBT benefit amounts. It is expected that this process may impact 90 TANF participants per month at no cost to the Department.

4. Interested persons may submit their data, views or arguments either orally or in writing at the hearing. Written data, views or arguments may also be submitted to Gwen Knight, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 202951, Helena, MT 59620-2951, no later than

5:00 p.m. on July 14, 2005. Data, views or arguments may also be submitted by facsimile to (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

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

Dawn Sliva  
Rule Reviewer

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

Certified to the Secretary of State June 6, 2005.

BEFORE THE DEPARTMENT OF ADMINISTRATION  
OF THE STATE OF MONTANA

In the matter of the adoption )  
of new rules I through X ) CORRECTED NOTICE OF  
pertaining to the State of ) ADOPTION  
Montana Voluntary Employees' )  
Beneficiary Association )  
Health Benefit Plan )

TO: All Concerned Persons

1. On November 18, 2004, the Department of Administration published MAR Notice No. 2-2-349 regarding the proposed adoption of the above-stated rules at page 2779 of the 2004 Montana Administrative Register, issue number 22. On April 28, 2005, the Department published notice of the adoption of the above-stated rules at page 643 of the 2005 Montana Administrative Register, issue number 8.

2. The Department is filing this corrected notice of adoption to correct the chapter number of the adopted rules in ARM Title 2. The new numbering of the rules is outlined in paragraph 3 of this notice.

3. The permanent rule numbers are corrected as follows:

RULE #:	ADOPTED #:	CORRECTED #:	
I	2.18.1930	2.21.1930	SHORT TITLE
II	2.18.1931	2.21.1931	POLICY AND OBJECTIVES
III	2.18.1932	2.21.1932	DEFINITIONS
IV	2.18.1933	2.21.1933	MONTANA VEBA HRA ADMINISTRATION
V	2.18.1934	2.21.1934	FEEES
VI	2.18.1937	2.21.1937	ELIGIBILTY
VII	2.18.1938	2.21.1938	ELECTIONS
VIII	2.18.1939	2.21.1939	PARTICIPATION
IX	2.18.1940	2.21.1940	CONTRIBUTIONS
X	2.18.1941	2.21.1941	BENEFITS IN THE EVENT OF DEATH

4. REASON: The Department is changing the location and chapter number of the Montana VEBA HRA rules as set forth in the Notice of Adoption in order to place them in the same

chapter as other personnel related rules adopted by the Department. The rules were inadvertently placed in a reserved chapter of Title 2.

5. The text of the rules as published in the notice of proposed adoption and the notice of adoption remain the same.

BY: /s/ Janet R. Kelly  
Janet R. Kelly, Director

/s/ Dal Smilie  
Dal Smilie, Rule Reviewer

Certified to the Secretary of State June 6, 2005

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

In the matter of the ) NOTICE OF AMENDMENT  
amendment of ARM 2.43.441 )  
and 2.43.1015 pertaining to )  
transfer of funds for )  
certain service purchases )

TO: All Concerned Persons

1. On March 31, 2005, the Public Employees' Retirement Board published MAR Notice No. 2-2-353 regarding a public hearing on the proposed amendment of ARM 2.43.441 and 2.43.1015 at page 400 of the 2005 Montana Administrative Register, Issue Number 6.

2. The Board has amended ARM 2.43.441 and 2.43.1015 with the following changes, stricken matter interlined, new matter underlined:

2.43.441 PURCHASE OF SERVICE THROUGH DIRECT TRUSTEE-TO-TRUSTEE TRANSFER OF FUNDS

(1) remains as proposed.

(2) A transfer of funds from the member's 26 USC 403(b) tax-sheltered annuity or 26 USC 457 governmental plan prior to the member's severance from employment can be made only if the transfer is either for the purchase of permissive service credit (as defined in section 415(n)(3)(A) of the Internal Revenue Code) under the receiving defined benefit governmental plan or a repayment to which section 415 of the Code does not apply by reason of section 415(k)(3) of the Code. A purchase of service pursuant to 19-3-513, 19-5-409, 19-6-804, 19-7-804, ~~19-8-904~~, 19-9-411, or 19-13-405, MCA, is not a purchase of permissive service credit.

AUTH: 19-2-403, 19-2-1010, 19-3-2104, MCA  
IMP: 19-2-704, 19-3-2113, 19-3-2115, MCA

2.43.1015 PURCHASE OF SERVICE NOT PERMITTED BY PARTICIPANT IN DEFINED CONTRIBUTION RETIREMENT PLAN

(1) through (5) remain as proposed.

(a) A transfer of funds from the member's 26 USC 403(b) or 26 USC 457 governmental plan prior to the member's severance from employment can be made only if the transfer is either for the purchase of permissive service credit (as defined in section 415(n)(3)(A) of the Internal Revenue Code) under the receiving defined benefit governmental plan or a repayment to which section 415 of the Code does not apply by reason of section 415(k)(3) of the Code. A purchase of service pursuant to 19-3-513, 19-5-409, 19-6-804, 19-7-804, ~~19-8-904~~, 19-9-411, or 19-13-405, MCA, is not a purchase of permissive service credit.

(6) through (9) remain as proposed.



AUTH: 19-2-403, 19-2-1010, 19-3-2104, MCA  
IMP: 19-2-710, 19-3-2111, 19-3-2112, 19-3-2115, MCA

3. A public hearing was held on May 2, 2005. No comments or testimony were received. The following written comments were received and appear with the Board's responses:

COMMENT 1: The legislative rule reviewer noted in written comment that the rules seem to omit similar necessary sections from other affected retirement systems, specifically, the same purchase of service credit by transfer of funds for Judges' Retirement System (19-5-409, MCA), Municipal Police Officers' Retirement System (19-9-411, MCA), and Firefighters' Unified Retirement System (19-13-405, MCA).

RESPONSE: The observation is valid. The systems and statutes noted that are not listed should be listed. The final rule is changed to correct the oversight. Members of those systems affected were timely notified of the impending rule change.

COMMENT 2: The legislative rule reviewer also requested an explanation of the reason a transfer of funds, for example, under 19-3-513, MCA, violates 26 USC 415(n)(3)(A), in consideration of the limitations of 19-3-514, MCA.

RESPONSE: The Title 19 statutes listed in the proposed rule as now amended concern purchases of "one-for-five" service, allowing a member to purchase one year of service for each five years of membership service in the retirement system. The year of service that can be purchased does not reflect a year of actual employment, but is a benefit improvement allowed by the retirement system. On the other hand, the definition of "permissive service credit" in section 415(n)(3)(A) of the Internal Revenue Code is limited to service credit not otherwise granted for a period of actual employment time. "Code section 415(n) operates only in situations where credit has not been provided by the plan to the employee for a period of service." Internal Revenue Service Private Letter Ruling 200229051 (April 26, 2002). The only kind of service that can be purchased under Title 19 that does not meet the definition of "permissive service credit" is "one-for-five" service. 19-3-514, MCA does not address the "permissive service credit" limitation in section 415(n)(3)(A) of the Internal Revenue Code.

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

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

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

Certified to the Secretary of State June 6, 2005.

BEFORE THE BOARD OF PUBLIC EDUCATION  
OF THE STATE OF MONTANA

In the matter of the ) NOTICE OF AMENDMENT  
amendment of ARM 10.57.102, )  
10.57.104 and 10.57.201 )  
relating to educator licensure )

TO: All Concerned Persons

1. On March 31, 2005 the Board of Public Education published MAR Notice No. 10-57-236 regarding the public hearing on the proposed amendment of the above-stated rules concerning educator licensure at page 407 of the 2005 Montana Administrative Register, Issue Number 6.

2. The Board of Public Education has amended ARM 10.57.102 and 10.57.201 exactly as proposed.

3. The Board of Public Education has amended ARM 10.57.104 with the following changes, stricken matter interlined, new matter underlined:

10.57.104 STUDENT TEACHING/SUPERVISED PRACTICE

(1) Persons seeking initial licensure must successfully complete a supervised teaching experience either as part of an accredited professional educator preparation program ~~and/or~~ successfully complete one year of teaching experience in ~~an~~ a state accredited elementary and/or secondary school or school district either in Montana or elsewhere.

4. The following comment was received and appears with the Board of Public Education's response:

COMMENT 1: Robert Clemens, Director of Field Placement and Certification at MSU-Bozeman commented that the "and/or" was confusing and that there was no requirement that an applicant have a successful teaching experience.

RESPONSE 1: The Board of Public Education concurs with Mr. Clemens comments and has amended ARM 10.57.104 as set forth above.

/s/ Dr. Kirk Miller  
Dr. Kirk Miller, Chair  
Board of Public Education

/s/ Steve Meloy  
Steve Meloy, Executive Secretary  
Rule Reviewer  
Board of Public Education

Certified to the Secretary of State June 6, 2005.

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

In the matter of the adoption of ) NOTICE OF ADOPTION AND  
new rules I through IV, and the ) AMENDMENT  
amendment of ARM 12.11.202, )  
12.11.205, 12.11.210, 12.11.215, )  
and 12.11.220, pertaining to the )  
Beaverhead and Big Hole rivers )

TO: All Concerned Persons

1. On January 27, 2005, the Fish, Wildlife and Parks Commission (commission) published MAR Notice No. 12-303 regarding public hearings on the proposed adoption of new rules I through IV and the amendment of ARM 12.11.202, 12.11.205, 12.11.210, 12.11.215, and 12.11.220 pertaining to the Beaverhead and Big Hole rivers at page 144 of the 2005 Montana Administrative Register, issue no. 2. On May 12, the commission published a notice of amendment pertaining to the proposed amendments only at page 737 of the 2005 Montana Administrative Register, issue no. 9. In the May 12, 2005 notice the commission explained its intention of acting on these rules in a two step process. The commission's first step was to extend the deadline for commission action on the rules from May 1, 2005 to June 1, 2005 to allow for further commission consideration of the rule proposal and further consideration of public comment on the proposal. After this consideration, the commission amended and adopted the remainder of the rulemaking proposal with the changes outlined in this notice of adoption and amendment.

2. The commission has adopted New Rule II (ARM 12.11.207) and New Rule IV (ARM 12.11.212) as proposed.

3. The commission has adopted New Rule I (ARM 12.11.206) and New Rule III (ARM 12.11.211) with the following changes, stricken matter interlined, new matter underlined:

NEW RULE I (ARM 12.11.206) USE OF TEMPORARY CLIENT DAYS ON THE BEAVERHEAD RIVER (1) through (6) remain as proposed.

(7) In addition to temporary client days, ~~one boat outfitters may acquire nonpool client days~~ one-boat outfitters may use non-pool client days that are transferred to them as part of the sale or transfer of an outfitter's business in its entirety from authorized outfitters on the Beaverhead River. They must remain a one-boat outfitter, however, in order to apply for or retain the use of temporary client days. The transfer of those outfitting businesses that these rules regulate on the Beaverhead River are governed by 37-47-310, MCA.

AUTH: 87-1-301, 87-1-303, MCA  
IMP: 87-1-303, MCA

NEW RULE III (ARM 12.11.211) USE OF TEMPORARY CLIENT DAYS ON THE BIG HOLE RIVER (1) through (6) remain as proposed.

(7) In addition to temporary client days, ~~one boat outfitters may acquire nonpool client days~~ one-boat outfitters may use non-pool client days that are transferred to them as a part of the sale or transfer of an outfitter's business in its entirety from authorized outfitters on the Big Hole River. They must remain a one-boat outfitter, however, in order to apply for or retain the use of temporary client days. The transfer of those outfitting businesses that these rules regulate on the Big Hole River are governed by 37-47-310, MCA.

AUTH: 87-1-301, 87-1-303, MCA  
IMP: 87-1-303, MCA

4. The commission has amended the following rules with the following changes, stricken matter interlined, new matter underlined:

12.11.202 RIVER DEFINITIONS The following definitions apply to this subchapter:

(1) and (2) remain as proposed.

(3) "Guide" means a person as defined in ~~87-37-101~~ 37-47-101, MCA.

(4) and (5) remain as proposed.

~~(6) The commission shall repeal or amend this rule on or before June 1, 2005.~~

(6) "One-boat outfitter" means an outfitter who operates no more than one boat and is the sole guide. An outfitter may operate as a one-boat outfitter on the Beaverhead River while operating as a multi-boat outfitter on the Big Hole River and other rivers. An outfitter may operate as a one-boat outfitter on the Big Hole River while operating as a multi-boat outfitter on the Beaverhead River and other rivers.

(7) remains the same.

AUTH: 87-1-301, 87-1-303, MCA  
IMP: 87-1-303, MCA

12.11.205 BEAVERHEAD RIVER RECREATIONAL USE RESTRICTIONS

(1) Starting on the third Saturday in May through Labor Day, recreational use of the Beaverhead River from Clark Canyon Dam to its mouth shall be allowed and restricted in designated river reaches as follows:

(a) in the river reach from Clark Canyon Dam to Henneberry fishing access site, each outfitter is limited to launching or use within the reach of a maximum of three boats in any day;

(b) in the river reach from Henneberry fishing access site to Barretts Diversion, each outfitter is limited to launching or use within the reach of a maximum of three boats in any day;

(c) in the river reach from Barretts Diversion to ~~Selway Bridge Highway 91 South (Tash) Bridge~~, each outfitter is limited to launching or use within the reach of a maximum of one boat in any day; ~~and~~

~~(d) the river reach from Highway 91 South (Tash) Bridge to Selway Bridge is closed to any float outfitting; and~~

~~(d) (e)~~ in the river reach from Selway Bridge to Jessen Park in Twin Bridges, each outfitter is limited to launching or use within the reach of a maximum of one boat in any day.

(2) remains the same.

~~(3) The commission shall repeal or amend this rule on or before June 1, 2005.~~

AUTH: 87-1-301, 87-1-303, MCA

IMP: 87-1-303, MCA

12.11.210 BIG HOLE RIVER RECREATIONAL USE RESTRICTIONS

(1) and (2) remain as proposed.

~~(3) The commission shall repeal or amend this rule on or before June 1, 2005.~~

AUTH: 87-1-301, 87-1-303, MCA

IMP: 87-1-303, MCA

12.11.215 NEW OUTFITTER MORATORIUM AND OUTFITTER RESTRICTIONS ON THE BEAVERHEAD RIVER

(1) An outfitter with documented use of the Beaverhead River prior to December 31, 1998, may continue to operate on the Beaverhead River, except as provided in ~~(3)~~(2).

(2) ~~An~~ ~~Outfitters~~ authorized to outfit on the Beaverhead River forfeits all of his/her client days and is no longer authorized to outfit on the Beaverhead River if one or more of the following occur:

(a) when an outfitter does not report any use any of their allocated client days for any two consecutive years, effective June 17, 2005, or;

(b) an outfitters did not report any use any of their allocated client days for the five years prior to [the adoption of these rules], forfeit all of their client days and are no longer authorized to outfit on the Beaverhead River December 31, 2004; or

(c) the license of an outfitter has lapsed.

(3) The department shall establish a pool of temporary client days that consists of the forfeited client days. The total number of temporary client days, including client days that have been allocated and client days available in the pool, shall not exceed 2,000.

~~(3)~~(4) An outfitter who has not documented use on the Beaverhead River prior to December 31, 1998, may not operate on the Beaverhead River unless the outfitter was licensed by the board of outfitters between December 1, 1998, and July 1, 1999, and the outfitter's operating plan included the Beaverhead River, except as allowed in ARM 12.11.206.

~~(4)~~(5) Each outfitter from July 1 through August 31, inclusive, on the Beaverhead River shall not exceed the number of client days served by the outfitter on the Beaverhead River during those same months for the outfitter's highest client use year from among the years 1995, 1996, 1997, 1998, 1999, or 2000. The records submitted by the outfitter to and maintained by the board of outfitters will determine the number of client days in each year.

(6) Client days may only be used by an outfitter authorized to conduct use on the Beaverhead River. An authorized outfitter may hire or contract a guide or outfitter serving as a guide to provide guiding services to clients provided the guide or outfitter serving as a guide only serves in the capacity of a guide and does not recruit clients, make agreements with clients concerning monetary consideration or services provided, or collect fees from clients.

(7) An outfitter may not sell, lease, rent, or otherwise receive compensation from an outfitter or guide for the opportunity to use client days.

(8) An outfitter found to be selling, leasing, renting, or transferring client days in any way other than when transferring a business in its entirety shall permanently forfeit these client days. The forfeited client days will be allocated to the temporary client day pool.

(9) An outfitter serving as a guide for an outfitter authorized to conduct use on the Beaverhead River must be the person providing the guiding services and may not hire a guide to provide the services on their behalf.

~~(5)~~(10) In the event of the death of an outfitter who has an opportunity to outfit on the Beaverhead River as outlined in this sub-chapter, that opportunity may be assumed by a member of the immediate family of the deceased outfitter. This provision does not supersede the outfitter licensing requirements and authority of the board of outfitters.

~~(6)~~(11) All outfitters given the opportunity to operate on the Beaverhead River, as outlined in this sub-chapter, will be issued boat tags that will identify them as authorized by the commission to operate on this river. These boat tags must be displayed on all authorized outfitter boats when operating on the Beaverhead River.

~~(7) The commission shall repeal or amend this rule on or before June 1, 2005.~~

AUTH: 87-1-301, 87-1-303, MCA  
IMP: 87-1-303, MCA

12.11.220 NEW OUTFITTER MORATORIUM AND OUTFITTER RESTRICTIONS ON THE BIG HOLE RIVER (1) An outfitter with documented use of the Big Hole River prior to December 31, 1998, may continue to operate on the Big Hole River, except as provided in ~~(3)~~(2).

(2) An ~~Outfitters~~ authorized to outfit on the Big Hole River forfeits all of his/her client days and is no longer

authorized to outfit on the Big Hole River if one or more of the following occur:

(a) when an outfitter does not report any use any of their allocated client days for any two consecutive years, effective June 17, 2005, or;

(b) an outfitters did not report any use any of their allocated client days for the five years prior to [the adoption of these rules], forfeit all of their client days and are no longer authorized to outfit on the Big Hole River December 31, 2004; or

(c) the license of an outfitter has lapsed.

(3) The department shall establish a pool of temporary client days that consists of the forfeited client days. The total number of temporary client days, including client days that have been allocated and client days available in the pool, shall not exceed 2,000.

~~(3)~~(4) An outfitter who has not documented use on the Big Hole River prior to December 31, 1998, may not operate on the Big Hole River unless the outfitter was licensed by the board of outfitters between December 1, 1998, and July 1, 1999, and the outfitter's operating plan included the Big Hole River, except as allowed in ARM 12.11.211.

~~(4)~~(5) Each outfitter from July 1 through August 31, inclusive, on the Big Hole River shall not exceed the number of client days served by the outfitter on the Big Hole River during those same months for the outfitter's highest client use year from among the years 1995, 1996, 1997, 1998, 1999, or 2000. The records submitted by the outfitter to and maintained by the board of outfitters will determine the number of client days in each year.

(6) Client days may only be used by an outfitter authorized to conduct use on the Big Hole River. An authorized outfitter may hire or contract a guide or outfitter serving as a guide to provide guiding services to clients provided the guide or outfitter serving as a guide only serves in the capacity of a guide and does not recruit clients, make agreements with clients concerning monetary consideration or services provided, or collect fees from clients.

(7) An outfitter may not sell, lease, rent, or otherwise receive compensation from an outfitter or guide for the opportunity to use client days.

(8) An outfitter found to be selling, leasing, renting, or transferring client days in any way other than when transferring a business in its entirety shall permanently forfeit these client days. The forfeited client days will be allocated to the temporary client day pool.

(9) An outfitter serving as a guide for an outfitter authorized to conduct use on the Big Hole River must be the person providing the guiding services and may not hire a guide to provide the services on their behalf.

~~(5)~~(10) In the event of the death of an outfitter who has an opportunity to outfit on the Big Hole River as outlined in this sub-chapter, that opportunity may be assumed by a member of the immediate family of the deceased outfitter.



This provision does not supersede the outfitter licensing requirements and authority of the board of outfitters.

~~(6)~~(11) All outfitters given the opportunity to operate on the Big Hole River, as outlined in this sub-chapter, will be issued boat tags that will identify them as authorized by the commission to operate on this river. These boat tags must be displayed on all authorized outfitter boats when operating on the Big Hole River.

~~(7) The commission shall repeal or amend this rule on or before June 1, 2005.~~

AUTH: 87-1-301, 87-1-303, MCA

IMP: 87-1-303, MCA

5. The department received written comments from 66 people and/or entities.

In addition, the department received 132 postcards signed by people supporting the following statement:

Yes! I have enjoyed the Big Hole and Beaverhead river recreation rules that regulate commercial use and protect resident angler opportunity. Please adopt the proposed rules that will slightly modify the existing recreation plans.

The department received 229 postcards signed by people supporting the following statement:

I petition the Montana Fish Wildlife and Parks Commission to reinstate the following section of the Beaverhead River Rules, "The river reach from Highway 91 South (Tash) Bridge to Selway Bridge is closed to float outfitting." And I support Montana Resident's Day where there is not float fishing by nonresidents or float outfitting on designated sections of the river on designated days.

Additionally, the commission received a petition with 372 signatures. The petition stated:

We the undersigned petition the Montana Fish Wildlife and Parks Commission to reinstate the following section of the Beaverhead River Rules "The river reach from Highway 91 South (Tash) Bridge to Selway Bridge is closed to float outfitting." We the undersigned support Montana Resident's Day where there is no float fishing by nonresidents or float outfitting on designated sections of the river on designated days and we support having the River Rules in effect year long, not just from the third Saturday in May through Labor Day.

The department conducted three public hearings (Bozeman, Butte, Dillon). Seven people attended the Bozeman hearing where two people testified. Approximately 60 people attended the Butte hearing where 11 people testified. Approximately 32 people attended the Dillon hearing where nine people testified.

In conjunction with this rulemaking, the department conducted an environmental assessment that also was a subject for public comment. The proposed administrative rules and the environmental assessment are two separate documents. However, people did not distinguish between the environmental assessment and administrative rules when submitting comments. The following comments address the proposed administrative rules and the environmental assessment.

#### General Comments on Outfitting Use

COMMENT 1: One person commented that current restrictions on outfitting are reasonable and effective. While client days have decreased in recent years, the downward trend is merely a reflection of the overall decline in angler days on the two rivers and is probably the result of prolonged drought conditions, poor stream flows, and shortened angling seasons.

RESPONSE: The department's environmental assessment noted that there are a number of factors that can influence the travel industry and a person's decision to recreate on the Beaverhead or Big Hole rivers. The rules could also influence use on the rivers. Some people might choose not to recreate on these rivers due to the presence of the rules. Other people might choose to recreate on these rivers because of the rules and improved conditions on the river.

COMMENT 2: One person recommended that when water flows reach a critical low all fishing and guiding should be immediately halted to ensure protection and survival of fish populations.

RESPONSE: The commission adopts emergency angling closures when conditions warrant such action.

COMMENT 3: One person commented that outfitters in this area use outfitters like the commentor because guides are very limited at this point in time because of the nonresident closures. Also, due to the low water, the season is short and therefore not profitable.

RESPONSE: Under the new rules an outfitter will still be allowed to serve as a guide for an authorized outfitter so long as the outfitter serving as a guide does not recruit clients, make agreements with clients concerning monetary considerations or services provided, or collect fees from clients (see response to comment 24).

Regarding the concern that nonresident closures limit guiding opportunities, the commission points out that the float outfitting restrictions apply equally to nonresidents and residents who are using the services of a guide. Therefore, the nonresident float fishing restriction only adds an additional restriction on nonresidents who are not using the services of a guide - the guided nonresidents are already regulated under the float outfitting restriction.

In regard to low water, the drought has affected everyone's recreational opportunities, including guided and nonguided sectors of use.

COMMENT 4: One person commented that he strongly supports the weekend ban on outfitter floats that is currently in place.

RESPONSE: Comment noted.

COMMENT 5: One person commented that the sections of the river closed to float outfitting are not warranted because nonguided users are not using these sections but are floating and fishing on the commercial sections.

RESPONSE: The rules do not require non-guided users to recreate on the sections closed to float outfitting and nothing prevents them from recreating on the sections open to float outfitting. The rules are designed to provide that type of experience for those who want it.

COMMENT 6: According to one person, the more restrictions that are placed on these two rivers the better. This individual commented that it is obvious that the overwhelming number of outfitters, guides, and other fishermen warrants restrictions.

RESPONSE: Comment noted.

#### Comments on Outfitter Moratorium

COMMENT 7: Some people expressed concern that the moratorium on outfitters is not letting new outfitters from this area come into business unless they find an outfitter that is going out of business and have enough money to buy their business.

RESPONSE: Together, the moratorium and the cap on client days define the maximum amount of outfitted use that is allowed on these two rivers. The moratorium is important for the reason that it sets an upper limit to the number of outfitters authorized to use the Beaverhead and Big Hole rivers. In the absence of a moratorium, the commission predicts that outfitters currently not authorized to use these rivers would do so in the future. Even if the cap on the overall number of client days was retained, the commission would have to determine a way to allocate client days to the incoming

outfitters, which would likely be unpopular to those outfitters who are currently authorized to use the rivers and would stand to lose client days.

COMMENT 8: One person commented that the moratorium originally arose out of a social conflict. This individual firmly believes the social conflict has been resolved via the boat distribution and the distribution mechanism that has been in place through the current rules is working. He stated that the distribution mechanism is working very well and there is no need for the moratorium. He also commented that the moratorium has done nothing over on the two rivers but create a permit that people are buying and selling on a daily basis these days. This person recommended that if there is going to be a moratorium, it should be implemented statewide to put everyone on an even playing field.

RESPONSE: If the moratorium was removed, the commission predicts that there would be an influx of new outfitters operating on the Beaverhead and Big Hole rivers. Although the float outfitting reach restrictions would curtail outfitted use on specified days and reaches, non-restricted reaches would experience greater use if the moratorium was repealed. Furthermore, there is a cap on client days and if the commission repealed the moratorium, it would also have to identify a mechanism for re-allocating some of the client days from existing outfitters to new outfitters, which could be contentious. A statewide moratorium on new outfitters would have to be coordinated with the Board of Outfitters. The commission is not prepared to implement a statewide moratorium at this time.

COMMENT 9: Some people voiced support for the outfitter moratorium. The Friends of the Beaverhead wrote that this organization supports the moratorium on outfitters and disagreed with the department's data for the Beaverhead River that estimated outfitter use was 10% of the total use. The organization commented that the majority of use on the Beaverhead River, from Sunday to Friday, on the reach from the Dam to Henneberry, is outfitted/guided. The organization also commented that there is not a verified number for the cap on outfitters, and that the outfitter data is poor to nonexistent. The organization commented that outfitters should be accountable for keeping complete and accurate records.

RESPONSE: The commission has retained the moratorium on new outfitters. The sources of information considered by the commission include the department's angling pressure estimates and the Board of Outfitters' outfitting records. Although the department's environmental assessment did not report the percentage of outfitted use on the Beaverhead River in 2003, it is assumed that the "10%" figure noted in the comment was derived from the data showing overall river use (26,968 angler

days) and overall outfitted use for that particular year (2,462 client days), which indicates that reported outfitted use was just under 11% of the estimated total angling use. Based on surveys conducted on the river, the department estimated that outfitted use on the Beaverhead was 55% in 1999, 34% in 2000, and 38% in 2002. It should be noted that this information comes from a different data set than the angling pressure estimates and the Board of Outfitters records.

The Board of Outfitters recently audited the records for use on the Beaverhead and Big Hole rivers from 1995 through 2000, the years that determined the client day cap. The audit resulted in a revised figure for the cap on both rivers. The department will continue to work with the Board of Outfitters on ways to ensure accurate reporting of use.

COMMENT 10: One person commented that the moratorium on new outfitters is a necessary element in the long-term protection of the river resources, and that if the moratorium were to be discontinued, the two rivers would likely see a large influx of new outfitters trying to establish their presence on the river. The result would be overcrowding and growing conflict between commercial and noncommercial anglers. Because of the rules, the last six years has seen a decrease in commercial/non-commercial conflicts, the result of the reasonable controls on the outfitters. Most of the affected outfitters and guides on the rivers support the current rules and reasonable limits.

RESPONSE: The decision to retain the moratorium on new outfitters was based in part on a concern that there would be an influx of new outfitters if the moratorium was lifted, and that the associated increase in use would likely lead to more social conflicts and impacts to the fishery.

#### Comments on Client Day Caps

COMMENT 11: One person commented that the number of permitted commercial float trips should be reduced, not increased.

RESPONSE: The commission decided not to change the total number of client days allocated to outfitters on the Beaverhead and Big Hole rivers. In ARM 12.11.207 and 12.11.212, the Beaverhead and Big Hole rules require the commission to evaluate the rules within five years and the commission can reassess the client day cap at that time.

COMMENT 12: One person commented that outfitters should be accountable for keeping complete and accurate records.

RESPONSE: The Montana Board of Outfitters maintains the records for fishing and hunting outfitters. The department has a cooperative relationship with the Board of Outfitters

and the department has discussed record keeping with the Board's executive director. The department will continue to engage in this dialogue for the purpose of ensuring accurate records.

COMMENT 13: Some people commented that because of their association with fishing lodges, a few outfitters have the majority of the days on the Beaverhead River. They expressed concern that this is not fair to outfitters that have had operations on the river for many years and that it is not fair to the public.

RESPONSE: The commission is aware that some individuals were allocated a large number of client days due to their association with a lodge and its guests. The rules currently do not address this. Based on discussions with the public, it appears people disagree as to whether the allocation of client days to an outfitter due to their association with a lodge is contrary to what the rules were intended to accomplish in the first place. It appears that the greatest contention occurs when these outfitters don't use all the client days themselves and allow other outfitters to use them for a price. The response to Comment 24 addresses this issue.

COMMENT 14: One person commented that the original citizen advisory committees recommended that the department regulate range of operation (outfitted boats, rather than client days). This person explained that range of operation was based on an average of use consistent with management that is already in place on federal land (forest use permits). He pointed out that this recommendation was not adopted and instead the department adopted the historical use system that is in place today, which violated the original sideboards set by the commission and resulted in huge numbers of days allocated to certain individuals associated with a lodge. This person commented that in the original committees' work these huge spikes in use were not rewarded but averaged out, and that much of the "leasing" or "farming out of days" have come from the "gift days" created by the current rules.

RESPONSE: The commission decided not to change the rules pertaining to allocation of client days on the Beaverhead and Big Hole rivers (other than creating temporary client days for one-boat outfitters - see response to Comment 18). The commission heard from a number of people regarding the allocation system, some who support the existing system and some who would like to see it changed. The commission decided to retain the existing system due to the fact that at this time there is no consensus within the outfitting industry on the fairest way to allocate use. In addition, the existing system does satisfy the interests of some outfitters and the creation of temporary client days should meet the interests of other outfitters who want the opportunity to conduct use on

these two rivers. Please refer to the response to Comment 24 regarding the selling or leasing of client days.

COMMENT 15: One person observed that some outfitters have more days than they can ever use but most of the outfitters have just barely enough days to get by. When they run out of days they have to go to other rivers and take their business out of the area. This person recommended that the commission get rid of the peak period or shorten it. He pointed out that the (actual) peak period on the Big Hole River is just two weeks during the Salmon Fly Hatch, which on the average happens from the second week in June to the fourth week in June. After that, the fishermen are following the salmon flies to other rivers.

RESPONSE: The commission decided not to change the rules pertaining to allocation of client days on the Beaverhead and Big Hole rivers (other than creating temporary client days for one-boat outfitters - see response to comment 18). The commission heard from a number of people regarding the allocation system, some who support the existing system and some who would like to see it changed. The commission decided to retain the existing system due to the fact that at this time there is no consensus within the outfitting industry on the fairest way to allocate use. In addition, the existing system does satisfy the interests of some outfitters, and the creation of temporary client days should meet the interests of other outfitters who want the opportunity to conduct use on these two rivers.

COMMENT 16: One person wrote that by changing elements of the rule concerning caps businesses are affected much more than one realizes. This person wrote that if their cap is negatively affected, he is prepared to seek legal counsel and protest the additional restrictions. He commented that the commission couldn't average, change years, or change peak seasons without affecting someone in an adverse way thereby creating grounds for a lawsuit.

RESPONSE: The commission decided not to change the rules pertaining to allocation of client days on the Beaverhead and Big Hole rivers (other than creating temporary client days for one-boat outfitters - see response to Comment 18). The commission heard from a number of people regarding the allocation system, some who support the existing system and some who would like to see it changed. The commission decided to retain the existing system due to the fact that at this time there is no consensus within the outfitting industry on the fairest way to allocate use. In addition, the existing system does satisfy the interests of some outfitters, and the creation of temporary client days should meet the interests of other outfitters who want the opportunity to conduct use on these two rivers. It should be noted that the allocated client days are not a property right, and an outfitter is not

entitled to use of allocated days. The commission is authorized to make changes to the allocation system and the number of client days.

COMMENT 17: One person recommended that the commission/department establish two categories of outfitters:

Category One Outfitter:

\*Give every outfitter with the Beaverhead and Big Hole rivers on their operation plan a peak period use of 240 client days and the use of the unrestricted season for each river.

\*Each outfitter would be limited to four client days per day on a restricted river peak season.

\*The outfitter would have to be the primary guide with an additional guide boat allowed after that.

\*The outfitter and guide would have to operate on the same river but not necessarily on the same stretch.

\*In case of season ending injury, the outfitter could petition for an exemption to designate the outfitter boat as a guide.

Category Two Outfitter:

\*Based on the audited cap, outfitters that have in excess of 240 client use days per river would retain current operational use rights.

RESPONSE: The commission decided not to change the rules pertaining to allocation of client days on the Beaverhead and Big Hole rivers (other than creating temporary client days for one-boat outfitters - see response to Comment 18). The commission heard from a number of people regarding the allocation system, some who support the existing system and some who would like to see it changed. The commission decided to retain the existing system due to the fact that the Beaverhead Big Hole Citizen Advisory Committee did not make any recommendations for changes to the allocation system other than the temporary client days for one-boat outfitters. The commission also noted that at this time there is no consensus within the outfitting industry on the fairest way to allocate use. In addition, the existing system does satisfy the interests of some outfitters and the creation of temporary client days should meet the interests of other outfitters who want the opportunity to conduct use on these two rivers.

Comment on Proposal to Create Temporary Client Days



COMMENT 18: Some people raised concerns about the proposal to create temporary client days. One person observed that the temporary client days are contingent on an existing outfitter reporting zero use, which means his willingness to give up \$300. According to this person, \$300 is what a use-day is going for on the commercial market. This person wrote that he doesn't know too many people who are willing to give away money and commented that the rules would require a person to use just one client day to keep all of their days. He doesn't foresee one of those days becoming available.

Another person commented that as a small home-based outfitter in Dillon, he doesn't foresee that he would get one day out of the temporary client day system. This person said he has a handful of use days on the Beaverhead and Big Hole and would like to have more days to ensure a viable business. Under the system proposed here, this person commented that he would not get enough days to have a viable business and that people like him that are small, home-based independent outfitters can't have a viable business unless they spend \$40,000. This person commented that he is going to go out of business, go into a different industry, or throw in with the large operations. He foresees that down the road in five years if these rules are still in place, there will be five outfitters on the Beaverhead and Big Hole running all the trips.

One commentor wrote that the idea of restricting an outfitter to "one boat" severely limits his marketing opportunities and limits the potential growth and success of his business. This person noted that it is unclear at this time whether or not a "one boat" outfitter would be allowed to operate more than one boat on unrestricted rivers, or if the outfitter would have to be a one-boat outfitter on all rivers in the state. If the latter is the case, he questioned whether it is legal to adopt rules for the Beaverhead and Big Hole that would affect an outfitter's use of other rivers in the state.

Another person wrote that the drop in outfitted use on these rivers shows there might be some wiggle room for a one-boat outfitter to come in underneath these caps. He commented that the system that has been proposed would only provide enough use for one outfitter, and because you would only be able to apply for up to 60 client days, only two new people could realistically get in. He commented that this system would not serve their purpose and unfortunately that means he has to support Alternative D, which distresses him because he loves many of the things that the outfitting industry and the resident people have come to support.

RESPONSE: The commission decided to adopt the rules creating temporary client days for one-boat outfitters. The commission made some changes to the rules based on public comments and additional analysis by the department. The rules clarify that a "one-boat outfitter" means an outfitter who operates no more

than one boat on the Beaverhead River, or an outfitter who operates no more than one boat on the Big Hole River. In either case the outfitter is the sole guide. The rules allow a one-boat outfitter on the Beaverhead or Big Hole to operate more than one boat on other rivers in the state. This provision addressed the concern that requiring an outfitter to operate one boat on all rivers in the state would severely limit their ability to conduct a viable business. The statewide river recreation rules (see, ARM Title 12, Chapter 11, Subchapter 4) state that management processes should encourage viable and diverse types of commercial services. Outfitters operating more than one boat on other rivers in the state would, however, only be allowed to operate one boat on the Beaverhead or Big Hole and they would have to serve as the guide.

The commission anticipates that there will be some temporary client days created over time due to lapsed licenses, deceased outfitters, and outfitters reporting zero use for two consecutive years. Additionally, after three years of using temporary client days, the following year one-boat outfitters can only apply for the highest number of days they actually used during the first three years. The remainder of the days would go back into the temporary client day pool. The temporary client day system might not produce a large number of days but it should provide some opportunities for small outfitters who are unable to purchase another outfitter's business, which was the intention of the citizen's advisory Committee (CAC) when it recommended this system.

Regarding the sale of use days, the new rules clarify that renting, selling, or leasing of use days is prohibited. (See, response to comment 24.)

COMMENT 19: One person wrote that when the Beaverhead and Big Hole rules were initially put in place part of the reason was to put a moratorium on pressure on these rivers. This individual commented that it appears now that the proposed temporary use days are intended to keep commercial use at a maximum amount.

RESPONSE: The temporary client day system is intended to provide an opportunity for small outfitters who are unable to purchase another outfitter's business. The commission anticipates that the number of temporary client days will be small compared to the overall number of client days allocated to outfitters. The amount of use generated by one-boat outfitters should not have a significant impact on other users.

COMMENT 20: The Fishing Outfitters Association of Montana (FOAM) and some individuals recommended that all outfitters currently operating on the Beaverhead and Big Hole rivers should be allowed to participate in the use of temporary

client days. FOAM commented that the definition of 'one-boat outfitter' was intended to satisfy a single interest, that of smaller, typically single-craft outfitters, and that this definition is unfair to those other outfitters with slightly or considerably larger operations who could also benefit from additional temporary client days on these rivers. They recommended that if the idea was to create temporary days for an outfitter who, because of his or her small operation, would be the person at the oars for these temporary days:

- (1) All outfitters under the current moratorium be allowed to apply for temporary days
- (2) That any outfitter granted temporary days MUST row the craft and/or guide the clients for those days
- (3) No other outfitter or guide may use these granted temporary days until the days have been allocated to the original successful recipient outfitter according to New Rule I (12.11.206).

Another person recommended that if there are temporary client days issued, they need to be issued to outfitters that are presently authorized to operate on the Big Hole and Beaverhead Rivers. This person believes that allowing outfitters who are not currently authorized to operate on these rivers is going to create conflict in the future and more pressure for more temporary client days. Another person commented that the proposal to create temporary client days eliminates any possibility of regulating the number of fishing guides and the number of guided boats used on the Big Hole River, and that this is an irresponsible proposal because at present there are more fishing guides on the Big Hole River than at any time in the past.

RESPONSE: The temporary client day system was an attempt by the CAC to create opportunities for small-sized outfitting businesses that are unable to purchase another outfitter's business in its entirety. The temporary client days are available to authorized outfitters on the Beaverhead and Big Hole so long as they meet the definition of a one-boat outfitter. Authorized outfitters who do not meet the definition of a one-boat outfitter still have the option to purchase another authorized outfitter's business in its entirety and assume use of the transferred client days. A critical component of this system is that the outfitter must not operate more than one boat on the river, and the outfitter must serve as the guide. The fact that the rules require the one-boat outfitter to serve as the guide should eliminate concerns that another outfitter or guide would be able to use the temporary client days. The rules say that "zero use outfitters" and "lapsed license outfitters" will forfeit their days and will no longer be authorized to conduct use on the river. The department estimates that the number of one-boat outfitters using temporary client days will be less than the number of outfitters that forfeited their days, which should

alleviate some concerns about more outfitters operating on the rivers and creating additional conflicts.

COMMENT 21: The Montana Wildlife Federation commented that it was unsure that the temporary client provision would significantly increase commercial outfitting use of the Beaverhead and Big Hole because of the stipulation that total use shall not exceed the cap originally set in the biennial rule process. Considering that Montana's seven-year drought has added stress factors to the resource, the organization requested that the cap number be reevaluated. The organization does not object to outfitter services on Montana's rivers if they are offered in such a way that does not detract from or inhibit the ability of other members of the public to enjoy the resources. Furthermore, such outfitted use must include sideboards to assure the public that a vested right in those outfitter days has not been created and that those outfitters will not be brokers for the normal use of these public rivers. This organization also requested that cap numbers be reviewed to assure the public that the resource is not being compromised.

RESPONSE: The commission anticipates that the number of temporary client days will be small compared to the overall number of client days allocated to outfitters. The amount of use generated by one-boat outfitters should not have a significant impact on other users. The allocation of temporary client days does not establish a property right. The commission can choose to remove, eliminate, or change the number of temporary client days at any time. Furthermore, the temporary client days cannot be sold or leased to another outfitter or guide. Please refer to the response to comment 24 regarding the selling or leasing of client days. As for the overall client day cap, the commission decided not to change the overall client day cap at this time. In ARM 12.11.207 and 12.11.212, the Beaverhead and Big Hole rules require the commission to evaluate the rules within five years and the commission can reassess the cap at that time.

COMMENT 22: Some people supported the proposal to create temporary client days for one-boat outfitters. The Skyline Sportsmen noted that its members cautiously support the proposal to allow new single-boat outfitters to enter the outfitting pool on both rivers. However, they asked that this proposal be adopted only if there is no net increase in client days.

RESPONSE: The temporary client days will be derived from existing client days and therefore there could not be an increase in the overall number of client days allocated.

COMMENT 23: One person wrote that the addition of provisions to allow new single-boat outfitters would allow "new blood" to enter the profession and keep the industry fresh, while

maintaining no net increase in client days. One person commented that he is in favor of allowing one-boat outfitters to acquire day use on the Beaverhead and Big Hole rivers, and that all fishermen should be allowed the use of the entire river to help spread out use. One person commented that the option to let the one-boat outfitters acquire day use is very important.

RESPONSE: The commission viewed the temporary client day system as a way to allow some opportunities for small-sized outfitting businesses without having a negative impact on the general public.

#### Comments on the Selling or Leasing of Client Days

COMMENT 24: Some people expressed concern that some authorized outfitters are charging other outfitters or guides a fee for the opportunity to conduct use using the authorized outfitters' client days. Their concern is that some outfitters on the Beaverhead or Big Hole have excess client days and rather than hiring or contracting a guide or an outfitter serving as a guide, they sell or lease these days to other outfitters or guides and the outfitter with the allocated use has no connection to the clients. Some people commented that this practice is illegal and that it violates the original intention of the Beaverhead and Big Hole rules. The concern is that these unauthorized outfitters book the clients and then lease client days from an authorized outfitter.

RESPONSE: The original rule allocated client days to outfitters with historical use and the intention was that the authorized outfitters or their guides would use the days. The intention was not to allow the authorized outfitters to "broker" the days to other outfitters or guides for a profit. With that in mind, the commission decided to add additional language to the rules that would further clarify that an outfitter may not sell, lease, rent, or otherwise receive compensation from an outfitter or guide for the opportunity to use client days. This language does not prevent the transfer of river use days on a restricted use river when a fishing outfitter transfers their business in its entirety. The commission also points out that the use of client days is a privilege and not a property right that can be sold.

#### Comments on Nonresident Restrictions

COMMENT 25: Some people expressed opposition to retaining the restrictions on nonresident float fishing. The Federation of Fly Fishers commented that it believes the proposed changes as written are discriminatory to nonresident anglers and based on questionable conclusions. The organization questioned the 1999 determination of nonresidents as the primary contributor to overcrowding on the rivers, and requests that the data and

process used to make this determination be made clearly available to the public.

RESPONSE: The commission's decision to retain the restrictions on nonresident float fishing was based on the department's environmental assessment, angling pressure estimates, the user surveys conducted by the department in 1999, 2000, and 2002, and public comments. The commission also consulted the statewide river recreation rules. All of the data considered by the department and the commission during the rulemaking process is referenced in the draft environmental assessment. After careful consideration, the commission concluded that nonresidents are a primary contributor to social conflicts on both the Beaverhead and Big Hole rivers and nonresident float restrictions on Saturdays and Sundays on a very short section of the river are a reasonable method for addressing this concern.

The rule notice released in January of 2005 states, "The amount of use by nonresidents at that time (pre-2001) was considered a primary contributor to the crowding problem (on the Big Hole)." Arguably, this statement is somewhat confusing because the commission in 2001 did not use the words "primary contributor." The commission's intent, however, was to address a nonresident crowding problem that warranted restrictions. An improvement on the statement in the rule notice would be to say that the commission at that time concluded that the amount of nonresident use warranted restrictions.

COMMENT 26: One person asked if there is a specific threshold of angler days that constitutes overcrowding, and if there is a specific percentage at which nonresidents become a "primary contributor" to overcrowding. This person commented that on the Big Hole River, the percentages of users are generally less than 50% nonresidents. Another person wrote that the statewide river recreation rules say nonresidents should receive equal consideration.

RESPONSE: The amount of nonresident use on the Big Hole River has varied over time. Some people have argued that nonresident use has always been less than resident use, and therefore they question how the commission could conclude that nonresidents are a primary contributor to the crowding problem (in 2003 the department estimated there were 28,171 nonresident angler days and 29,114 resident angler days). The commission points out that a sector of use does not have to be the majority of use in order to be a primary contributor to a crowding problem. Furthermore, the commission considered other important aspects of the statewide rules when making its decision.

The statewide rules say, "Planning and management of Montana's river systems should provide for and conserve a full variety of recreation experiences and assure that river recreation

historically enjoyed by people in Montana is recognized." The statewide rules also say, "Nonresidents should have reasonable and equitable opportunities compared to other recreational users to enjoy Montana's resources, and that 'Reasonable and equitable' as applied to nonresidents means recreational use that fairly considers the interests of all types of recreational users, and is not intended to mean that each type of recreational user must have the exact same share of use in terms of the timing, amount, and location of use."

COMMENT 27: The Fishing Outfitter's Association of Montana commented that the data regarding nonresident use on the Big Hole River does not demonstrate their primary contribution to an identified problem. The organization commented that neither the CAC or the department has asserted that there are emergency biological conditions or issues of public safety that warrant restrictions on nonresident float angling alone. ARM 12.11.420(4). The organization commented that absent best-available data or emergency biological conditions to the contrary, only the "value-driven" considerations of the new administrative rules for river recreation management remain as the basis for continued restrictions.

RESPONSE: The commission considered the best available information and concluded that nonresident use on the Big Hole River is a primary contributor to crowding. The commission noted that a sector of use could be less than fifty percent of overall use and still be a primary contributor to a problem, which was the situation on the Big Hole River (see response to comment 26). The commission also considered other important elements of the statewide river recreation rules (see response to comment 26).

The commission also concluded that float fishing contributes more to social conflicts than other types of river recreation on the Beaverhead and Big Hole rivers. Therefore, the commission decided to retain a rule restricting nonresident float fishing, as opposed to a broader restriction on nonresident use of the river. Furthermore, the commission concluded that because the restriction applies only to nonresident float fishing two days per week on short, specified reaches of each river, nonresidents still have reasonable and equitable opportunities to recreate on these two rivers. The commission concluded that nonresident float restrictions are an effective way to moderately regulate nonresident use and ensure that it does not rise to a level that would warrant additional restrictions.

COMMENT 28: The Fishing Outfitter's Association of Montana commented that the environmental assessment could not address the repeal of nonresident float-angling restrictions as a single issue. The organization wrote that the environmental assessment states the department's prediction that, with Alternative D, "in the absence of any rules, the nonresident

fishing use would increase on the Big Hole river, particularly in the reaches of the river where there are currently nonresident float restrictions." The organization commented that prior department summer surveys have shown that nonresident float angling in these stretches was never a majority-of-use issue in the first place; there is no reason to expect it would be in the future. Consequently, this organization does not believe that repealing this single restriction would have any impact on the fishery. The organization also commented that since there is no clear correlation between nonresident proportion of use and increased total use, much less between nonresident float angling and overall use, only future data will identify a problem and its "primary contributor." Until that data is available, the organization recommended that no restrictions should be levied on nonresident float anglers. The organization commented that proposed language allows for review of these rules within five years of their adoption, and if sufficient data exists suggesting any particular user group is a primary contributor to an identified problem, appropriate measures could be applied at the time of that review.

RESPONSE: The department does not have data on the number of nonresidents float fishing on the Big Hole River. The angling pressure surveys estimate overall nonresident angling use on the river. The user surveys conducted in 1999, 2000, and 2002 estimate the proportion of use on the river. It was the overall amount of use that factored into the decision to retain the nonresident float restrictions. If the rules were repealed altogether (Alternative D), the department predicted that there would be an increase in use on the Big Hole River, and the additional angling pressure would negatively impact the quality of the experience and could have significant impacts on the drought-stressed fishery. There would probably be less of an impact to the fishery if the commission eliminated the nonresident float fishing restrictions and retained the rest of the rules. There would, however, be a greater likelihood that boat traffic would increase on the Big Hole River if the nonresident float restriction was eliminated. Boat congestion is one of the single biggest reasons for the rules in the first place, and the presence of more boats on the water could incite more social conflicts and lead to more restrictive measures being taken. Ultimately the commission considered all of the variables and concluded that nonresident float restrictions are warranted and are a reasonable and effective way to moderately regulate nonresident use and ensure that it does not rise to a level that would warrant additional restrictions.

COMMENT 29: One person commented that current rules have set aside sections of the rivers for the exclusive use of resident anglers and noncommercial users, which is not consistent with the statewide rules.



RESPONSE: The Beaverhead and Big Hole rules do not set aside a section of either river for the exclusive use of non-guided, resident anglers. Outfitters and their clients can still wade the restricted sections of the river or go to sections where there are no restrictions in effect. Furthermore, nonresidents are not prohibited from wading the river on days when nonresident float restrictions are in effect.

COMMENT 30: One person wrote that the establishment of an exclusive use section for resident anglers should have encouraged residents to use those sections thus showing an increase in resident angler numbers. According to this person, that did not happen. Instead, resident angler numbers declined over the past four years of the current rules.

RESPONSE: Resident use declined on both rivers in 2001 and increased in 2003. The rules are only one of a number of variables that can influence a person's decision to recreate on the Beaverhead and Big Hole rivers, including drought, low flows, fires, and the economy.

COMMENT 31: One person wants to know when a nonresident relative comes to Montana, why the people who live here can't take them on the restricted sections of the river. Instead they have to float where the outfitters float.

RESPONSE: The rules do not distinguish between nonresidents who have relatives in Montana and nonresidents who do not have relatives in Montana. The rules do, however, allow nonresidents to wade any section of the river at all times. The nonresident float restrictions only apply to a small percentage of the overall angling opportunities.

COMMENT 32: FOAM commented that if, as suggested in the CAC's charter, the group was to "evaluate the effectiveness" of the Beaverhead and Big Hole river recreation rules, the citizens spent little or no time evaluating the effectiveness of current weekend restrictions on nonresident float angling on the Big Hole. Nor did the committee discuss whether these current restrictions are consistent with the statewide river recreation rules, and they failed to develop recommendations that reflected the interests of the nonresident public that is affected by river recreation management decisions on the Big Hole.

RESPONSE: The CAC considered all elements of the rules when making its recommendations to the commission. The committee members spent more time on elements of the rules that they believed needed changing, and less time on elements of the rules that they believed should stay the same. The department advised the committee of its charter but the department did not dictate to the committee how to conduct its assignment. The committee also made a conscious choice to complete its recommendations prior to the commission's rulemaking process,

which in turn determined the amount of time the committee had to do its work.

COMMENT 33: Some people expressed support for retaining the nonresident float restrictions. One person commented that he strongly supports Resident's Day on reaches of the rivers on Saturdays and Sundays and pointed out that the 2003 department pressure data on the Beaverhead River estimated nonresident use to be 73%. He also commented that in 2001, nonresident use was 70%, and that this data supports the need for Resident's Day on the river and the preferred alternative.

RESPONSE: The commission took into account the department's user surveys that estimated proportion of use when adopting these rules.

COMMENT 34: One person wrote that the data from the 2002 Angler Satisfaction surveys contradicts claims by outfitters and some businesses that nonresidents object to limitations placed on them. This person pointed out that more than half the nonresidents surveyed expressed positive reflections of the experience despite commercial assertions to the contrary.

RESPONSE: The commission took into account the 2002 Angler Satisfaction survey and noted the overall public satisfaction with the rules.

COMMENT 35: One person said it is important to note that while total use has declined on the Big Hole River due to the ongoing drought conditions, the proportion of nonresident to resident anglers has remained relatively constant. For example, in 1997 nonresident anglers accounted for 47% of total use on the Big Hole River. In 2003, nonresident anglers accounted for 50% of total use. According to this person, arguments that the rules have displaced nonresidents are simply not supported by the data provided in the environmental assessment. One organization commented that if there is a limiting factor for resident and nonresident anglers alike, it is stream flow, and not river recreation regulations. This organization went on to say that when drought conditions depress stream flow, angler use declines as conditions worsen and flow drops. This organization has every expectation that nonresident angler days will approach record levels once normal stream flow patterns return.

RESPONSE: The estimates on proportion of use aid in understanding the composition of the use occurring on the rivers. This information also helps to predict trends in use in the future. If the proportion of use stays relatively stable and data indicates that overall use is on the rise, it is possible to make some general predictions on future trends in use by individual sectors. For example, if the proportion of use remains fairly stable and overall use declines under drought conditions, it is possible to predict that when

drought conditions subside and overall use increases, the proportion of use will still be similar.

COMMENT 36: One person commented that resident anglers are the individuals that work to conserve and protect these streams, and that the commission must provide reasonable rules to control the growth in nonresident angler days, and maintain the resident anglers' connection with this resource.

RESPONSE: The commission consulted the statewide river recreation rules and its guiding principles when considering resident and nonresident interests.

#### Comments on Economic Impacts

COMMENT 37: Some people commented on the economic/financial aspects of the rules. One person commented that the rules would decrease the value of their business, making it difficult for resale. According to this person, one of the biggest questions is how the rules affect a person's business. If these rules continue, this person said he would probably have to close his business in a couple of years.

RESPONSE: The statewide rules say that, "River service providers are an important industry in Montana and should be regulated." The statewide rules also say, "Management processes should encourage viable and diverse types of commercial services." The Beaverhead and Big Hole rules provide opportunities for the public to hire the services of a guide, and the rules are designed to maintain outfitting services on these two rivers. Due to the number of factors that influence the outfitting industry, it is impossible for the commission to guarantee that every single outfitter will have all of his or her interests provided for.

COMMENT 38: One person commented that a lot of conservation groups say that the reason the business is down is because of the drought and stock market. This person stated that this is a factor but not the sole reason. According to this person, fishermen don't want to come to the Big Hole and Beaverhead Rivers and have to fight the regulations when they can go to the Madison and Missouri and not have these problems. One organization commented that it is their belief that there was an extensive decline in angling-based tourism specific to our area, especially in the time just after the rules were implemented. This person thought that the primary reason for the decline was due to the publicity surrounding the rules and not due to other circumstances including: the smoke and fires the previous year, the drought, national economic conditions, and security concerns.

RESPONSE: The number of variables influencing a person's decision to recreate on the Beaverhead or Big Hole rivers is extensive. The commission did not rule out the possibility

that the rules have influenced people's choices, but it also did not conclude that the rules are the sole or overriding factor in a person's decision.

COMMENT 39: One person commented that he considered the net economic value of fishing in Montana according to department data and looked at some of the angler use numbers over the years. He used this information to quantify what the combined Beaverhead and Big Hole economic value would be. According to this person, in 1997, the Beaverhead and Big Hole combined would be worth 15 million dollars, in 1999 it would be worth 13 million dollars, in 2001 it would be worth 6.6 million dollars, and in 2003 it would be worth 10.9 million dollars.

RESPONSE: The tourism industry, including outfitting, is important to the state's economy. Likewise, river recreation on the Beaverhead and Big Hole rivers by residents and nonresidents is important to the economy of southwest Montana. Its importance was one of the factors considered in the rulemaking process.

Comments on the Beaverhead and Big Hole CAC

COMMENT 40: Some people provided comments on the Beaverhead and Big Hole CAC. One person commented that Montana residents were not fairly represented on the Citizens Advisory Committee, for the Beaverhead River. Another person wrote that nonresident interest representation/participation in river recreation management decisions (work of the CAC) was insufficient. This person also expressed concern that the timeline and administrative budget provided by the department made it nearly impossible to apply ARM 12.11.430, "River Recreation Management Plans and Rules: CAC Responsibilities," specifically (2)(b) - (2)(g) regarding specific analysis and identification of conditions that may warrant restrictions. This person commented that since nonresidents are affected by these recommendations and no time was spent considering the above rules when developing recommendations for the new five-year rules, nonresident interests were sidelined.

RESPONSE: The commission believes that the CAC fairly represented the interests of those affected by river recreation management decisions on the Beaverhead and Big Hole rivers, including the interests of residents, nonresidents, outfitters, landowners, business owners, anglers and non-anglers. In a CAC process, the appointment of committee members is a critical step in determining the credibility of the committee's recommendations. The department put considerable effort into appointing a committee and sought representation for both rivers and a mixture of people who served on previous advisory committees and people who would bring a fresh look to the process. Lastly, the department and the facilitator made it clear at the onset of the process that it was the responsibility of the committee members to also

recognize the interests of those people not sitting at the table.

COMMENT 41: FOAM commented that the CAC selection did not include a nonresident, and that instead the committee relied on outfitter members and one member to represent nonresident interests. According to this organization, the forced dual-duty and multiple interests of the various outfitters specific to their representation (industry-wide concerns, individual businesses, previous participation in recreational rulemaking, etc.) took precedence over nonresident interests, and that nonresident issues were not sufficiently pursued within the CAC process, as admitted by the outfitters and other committee members to Commissioner Mulligan, both at the time and since they disbanded. This organization commented that nonresident interests should be considered before any management rules are adopted or re-adopted, particularly one which restricts their activity, in light of their shared preference to recreate on rivers without controls on their recreational experience.

RESPONSE: This comment illustrates that despite the department's best efforts to appoint a committee that fairly represents the interests of the public, it is not uncommon to hear from some people who are critical of the composition of an advisory committee. It is the commission's perspective that criticism sometimes arises after a committee has completed its work, and those people dissatisfied with the end product are quick to find fault with the committee itself. As stated previously, the department put considerable effort into appointing a committee that could fairly represent the interests of anglers and non-anglers, residents and nonresidents, guided and non-guided, landowners, and tourism. The department also sought representation for both rivers and a mixture of people who served on previous advisory committees and people who would bring a fresh look to the process. Lastly, the department and the facilitator made it clear at the onset of the process that it was the responsibility of the committee members to also recognize the interests of those people not sitting at the table.

Specific to the concern that the advisory committee did not include a nonresident, the commission points out that the department publicized on its web site and via press releases that it was seeking people to serve on the committee. There were no nonresidents that applied to serve on the committee. Similar to the statewide River Recreation Advisory Council, the Beaverhead and Big Hole CAC members were asked to represent the interests of all those who recreate on the river, including nonresidents. No member of the CAC voiced a concern that the nonresident interests were not fairly represented or sufficiently pursued during the tenure of the committee.

COMMENT 42: One person commented that the CAC wasn't given enough time to do a thorough investigation of the whole biennial rule, and there are still many questions that, when asked, they do not have an answer for, or they are unaware of the problem that might exist.

RESPONSE: At the CAC's first meeting the department explained the rulemaking timeline, including the language in the current rules that states that the commission shall repeal or amend the rules on or before May 1, 2005. The department also explained that if the CAC was unable to complete its assignment in time for the commission to make a rule decision on or before May 1, 2005, the commission could choose to continue the existing rules until the committee completed its work. The committee chose to pursue its assignment aggressively in order to submit its recommendations to the commission before it had to make a decision.

As for the concern that committee members did not have an answer for some problems, or that the committee members were unaware of some of the problems, the department presented information packets to the committee members to help them evaluate the rules and address common problems. A citizen advisory committee cannot be expected to have all the answers to every problem or situation that arises but the department attempt to prepare them as best as possible for their assignment.

COMMENT 43: The Beaverhead and Big Hole Outfitter and Guide Association (BBHOGA) and the Montana Outfitter and Guide Association both commented that the environmental assessment and the preferred alternative are counter to the recommendations of the Beaverhead and Big Hole Citizens Advisory Committee and that the committee's recommendations are better than the alternative provided by the department.

RESPONSE: The commission tried to adhere to the CAC's recommendations as much as possible. The commission also based its decision on the public comments and the department's environmental analysis. The final rulemaking decisions rest with the commission.

#### Comments on Enforcement

COMMENT 44: One person commented on the enforcement of the river rules. He asked if the department is monitoring the guides on the day they should not be on a stretch of the river. He also commented that outfitter boats are supposed to be tagged or marked, and he has never witnessed a checkpoint regarding this rule.

RESPONSE: Outfitters and guides authorized to conduct use on the Beaverhead and/or Big Hole rivers are required to display a tag on their boat that signifies that they are authorized.

The department's enforcement division does check for compliance with all aspects of the rules. In 2004, for example, the department estimates that it checked 132 outfitters or guides on the Beaverhead and 94 outfitters or guides on the Big Hole.

Comments on Data

COMMENT 45: Some people commented on river recreation data. One person commented that most or all of the river use statistics numbers given to the public by the department in the environmental assessment are inaccurate. He commented that as an example, during the survey years on both rivers a surveyor was placed at random boat ramps during pre-set time periods. Based on his own personal experience, he was not surveyed more days than he was surveyed. This person does not think this was the fault of the surveyor, nor did this person attempt to avoid them. Instead this person thinks they simply missed each other. According to this person, the surveyor was not able to survey everyone getting off the river at some sites at key times (e.g., 5 - 6 p.m. when outfitters are getting off the river in order to get their clients home at a specified time). This person commented that he was using these examples only to illustrate his point that the numbers are inaccurate and inadequate for the purpose of fairly assessing and managing this conflict.

RESPONSE: There are staff members within the department who have expertise in designing surveys and conducting statistical analyses. The department strives to conduct objective, accurate, and informative surveys, and the department believes the surveys on the Beaverhead and the Big Hole rivers met this objective.

COMMENT 46: One person wrote that the two survey methods used to collect data on anglers and users are not directly comparable due to the differences in survey methods. This individual commented that the user surveys used to determine percentage of nonresidents included all river users, not just anglers, and therefore the restrictions on anglers might not be fully justified.

RESPONSE: The department's environmental assessment explains that there were two survey instruments referenced in document. The commission considered all of the data when making its decision.

COMMENT 47: One person wrote that based on the data available, particularly for the Big Hole River, angling pressure trends are unclear and variable.

RESPONSE: The angling pressure data shows use on the Big Hole peaked in 1997, decreased in 1999 and 2001, then increased in 2003 (four data points). No matter how much data is

available, there is always the possibility that someone will argue that the data is unclear or variable. The department and the commission will continue to monitor use over time and make decisions based on the best available data.

COMMENT 48: One person recommended that the department create a restricted river floaters license that would be purchased in addition to a fishing license. This person recommended that the license operate in the following way:

- (1) A resident and non-resident floater would pay a separate rate. A non-fishing float license would be free.
- (2) Require floaters to sign in at a boat ramp collection box and retain a stub for proof.
- (3) Collect user data such as date, time, put in, take out, Automated Licensing System number, guided, nonguided, outfitter's license number, guide's license number, etc.
- (4) Once you can establish specific information on a user group, you can manage growth of resident and nonresident floaters through fee increases.

RESPONSE: The commission asked the department to consider this recommendation in the future when discussing methods for collecting data. Collecting data can be expensive, and the department does not currently have the funds to implement all of the requests for information. As for managing growth of resident and nonresident floaters through fee increases, the commission does not want to use fees as a way of discouraging people from recreating on rivers.

COMMENT 49: One person recommended that the department put sign-in boxes at all the access sites and make it a requirement that individuals floating the river sign in. That way people could look to see how many people are floating the river ahead of them.

RESPONSE: This method is already used at some Block Management sites and can be an effective way to inform the public on conditions the public might encounter. The department does not have the funds at this time to install and maintain sign-in boxes on the Beaverhead and Big Hole rivers but this suggestion could be considered if resources become available.

COMMENT 50: One person commented that the department should keep good statistics on use changes to see how effective the rules have been.

RESPONSE: The department has conducted four surveys specific to the Beaverhead and Big Hole rivers since the rules were first adopted in 1999. The department's angling pressure survey also provides information on the amount of angling



occurring on these two rivers. The department's ability to collect additional survey data specific to these rivers is contingent upon the availability of funding for this purpose. The department does not have the resources at this time to initiate any new surveys.

COMMENT 51: One person was confused about graphs one and two in the environmental assessment. He thought the same data set was used in both graphs. If this was so, there was a 20% margin of error in graph 2.

RESPONSE: Graphs one and two in the environmental assessment were derived from two data sets, the angling pressure estimates and the user surveys. The environmental assessment explains the difference between the two data sets, and the graphs are clearly labeled.

#### Comments on the Need for a Management Plan

COMMENT 52: One person commented it is in everybody's best interest to create a lasting framework for use management. This person believes alternatives A-D fall short of a comprehensive management plan.

RESPONSE: The commission and the department are also interested in establishing a lasting framework for use management and are hopeful that the commission's decisions will meet this objective.

#### Comments on Launch Restrictions

COMMENT 53: Some people commented on the launch restrictions. One person observed that the two boats per launch restriction not only applies to commercial but to private use as well. They commented that the private sector is not complying with the law and that they have seen a lot of times that noncommercial floaters have put in more than 2 boats per landing.

RESPONSE: The commission shall pass this information to the department's enforcement division.

COMMENT 54: Some people provided suggestions for regulating float parties. One person recommended a change to ARM 12.11.210 Big Hole River Use Restrictions. He would like this to say "all float parties", not just users. He recommended that the commission define parties as a group of users, and that then it would apply to everyone on the river. So basically, a group would be two boats going down the river. One organization recommended that the department slightly adjust the language in the section dealing with the limit on two-boat launches per access point per day. The organization pointed out that this language was initially intended to limit the size of parties to two boats. Under the current language,

a party can launch any number of boats, but each individual user is limited to two launches. The organization commented that this does nothing to control party size and it urged the commission to change the language to say a "floating party is limited to two boat launches per day plus each outfitter would be limited to two launches per access point per day as would private parties."

RESPONSE: The rules say that all float users, including each float outfitter, are limited to a total of two launches at or near each official access site per day on the Big Hole River. The rule is aimed at restricting launches in an effort to regulate the number of watercraft using a particular reach of the river. The rule does not, however, affect the size of a group or party once people are on the water. People can comply with the restriction on launches and still join together in one group once they are floating down the river. It is the commission's understanding that some people object to the occurrence of large groups of people and boats on the river. From an enforcement perspective, it would be difficult to apply the launch restriction to parties and enforce a rule that prohibits people from joining together once they have departed from the launch site. The commission points out that it recently adopted a special recreation permit program on the Blackfoot River and that program identifies maximum group size guidelines for commercial use, competitive events, and organized group activities. The permittees are required to register with the department. Management of group sizes can be an effective tool to prevent conflicts on the water. The commission plans to monitor the effectiveness of the Blackfoot River special recreation permit program. It might be of value in the future to require large groups on the Big Hole River to register with the department. The Blackfoot River should provide the commission insight on how best to accomplish this.

#### General Comments

COMMENT 55: Some people provided general comments on the river rules. One person recommended that the commission should somehow put a mandated control on float numbers and limit the out-of-state outfitters on certain river systems such as the Beaverhead, Big Hole and Ruby rivers.

RESPONSE: Comment noted.

COMMENT 56: Some people noted that the Beaverhead and Big Hole rules survived challenges from FOAM and BBHOGA, challenges in the legislature, and the rules have been before the Environmental Quality Council, and in the courts. They observed that throughout all the challenges the rules have been upheld, and this should be significant to the commission in determining which alternative is chosen.

RESPONSE: Comment noted.

COMMENT 57: One person wrote that he strongly believes that the department must license outfitters and guides. This person stated that it is very hard to regulate outfitter and guide use when the department has no control over who is licensed and the number of licenses that are issued.

RESPONSE: The legislature would have to make this type of change.

COMMENT 58: One person asked the commission, "Would we have the current rules in place had the original CAC had the statewide rules as a guideline?" This person thought the answer would be "no".

RESPONSE: Comment noted.

COMMENT 59: One person commented that river use has decreased in recent years, especially 2001 and 2002, but to claim that the implementation of the rules has caused the decline would be a gross oversimplification. This individual noted that rivers on other parts of Montana such as the Ruby, the Blackfoot and Big Horn Rivers, which lack similar restrictions, have also seen a decline in use in 2002. He commented that factors such as the profound drought, a sluggish economy, high gas prices, and a change of attitude since September 11, 2001. This individual stated that there is little evidence to imply a cause and effect relationship that has been attributed to the biennial rule.

RESPONSE: The commission recognizes there are many factors that influence a person's travel and river recreation plans.

COMMENT 60: One person commented that guides and outfitters work closely together, but they are quite distant when it comes to business. He stated that outfitters have everything to gain in situations like the Beaverhead and Big Hole, while guides are left with big hurdles to jump if they want to move up in the industry. This person stated that any river management that involves giving future use to those with historical use is debilitating for guides in many ways and in general promotes poor business. This person asked the commission to be aware of this as it moves on with its work.

RESPONSE: Comment noted.

COMMENT 61: One person wrote that the rules should be separate on each river because the rivers are of different sizes and structure.

RESPONSE: There are two sets of rules, one for each river.

COMMENT 62: One person commented that Montana doesn't want logging, mining, or any other industry in the state, and that

in their opinion, Montana doesn't want out of state tourism. This person commented that the rivers in Montana are not private rivers, they are public and belong to everyone. He stated that if we are not going to allow tourism in Montana, we might as well close the gates at the border and not let anyone in.

RESPONSE: Comment noted.

COMMENT 63: One organization commented that loosening the regulations would result in increased levels of angler use and greater impacts on the already depressed fish populations, particularly during the current drought. This organization thought that there is ample justification to continue the current modest rules.

RESPONSE: Comment noted.

COMMENT 64: Some people recommended that the commission review the rules in ten years, not five. Some people recommended that the rules be in effect all year long. Others recommended shortening the time period the rules are in effect.

RESPONSE: The commission will review the rules within five years, which is the time period recommended by the CAC. This is a compromise between people who would like the commission to review the rules sooner and those who would like the rules to stay in place indefinitely without any review. As for when the rules are in effect, some people argue that the effect period should be shortened and others argue that the rules should be in effect year-round. The CAC did not recommend changing the date and the commission concurred.

COMMENT 65: One person wrote to express his thoughts about the use of petitions. This individual believes that many people who sign petitions don't have a clue about what they are signing. He would like a petition to count as only one vote. This person thought that if the person doesn't want to take the time to contact the commission or department, he/she should not be listened to.

RESPONSE: Typically the commission considers all forms of public comments without bias toward one form or another. The commission's final decision is not based on the number of comments or "votes" for a particular viewpoint or action.

COMMENT 66: One person commented that the commission needs to reestablish a true planning committee and get down to the root of the problems and try to solve them permanently so that the same mistakes are not repeated on the Beaverhead and Big Hole and on other rivers around the state.

RESPONSE: ARM 12.11.207 and 12.11.212 require the commission to reevaluate the rules within five years. At that time the

commission can assess the effectiveness of the rules and determine whether additional actions are necessary.

Comments on Beaverhead River Rules

Some people provided specific comments on the rules pertaining to the Beaverhead River.

COMMENT 67: Some people and organizations commented that they support the proposal to open the Tash Bridge to Selway Bridge section of the Beaverhead River to float outfitting (one boat per day). They pointed out that the Beaverhead County Resource Use Plan says "Strike a balance between the commercial (guides and outfitters) and recreational anglers." They believe that closing the Tash to Selway section completely to commercial use does not strike a balance, and instead it does just the opposite. They pointed out that the plan also says to "Encourage the designation of a section of the Beaverhead River for the exclusive use and enjoyment of the unguided and unoutfitted public." According to these people the Saturday and Sunday closure on the upper river does just that. They commented that nowhere in the Plan does it say this section should be closed to commercial use every day, it recommends striking a balance.

RESPONSE: The commission assessed all of the information and determined that the restriction on float outfitting on the Tash to Selway section of the Beaverhead struck a balance. The restriction does provide an opportunity for people who want to recreate in the absence of float outfitting. The restriction also allows outfitters to conduct wade trips on this section of the river, and, therefore, the rule does not close this section to outfitting every day.

COMMENT 68: One person commented that the CAC voted 9 to 1 to open the Tash to Selway section to float outfitting. He commented that this was the recommendation of the committee, and it should carry forward in a new rule. If it does not, this person believes that the future of any consensus planning concerning Fish, Wildlife and Parks matters will be seriously jeopardized.

RESPONSE: A decision-making body like the commission is vulnerable to criticism any time it deviates from the recommendations of a CAC. This is why at the beginning of the Beaverhead and Big Hole CAC process the committee was reminded that the commission would make its final decision based on the recommendations of the committee, public comments, and input from the department. By law, the commission cannot assign its decision-making authority to an advisory committee. The commission carefully considered the Beaverhead and Big Hole CAC's recommendation to open the Tash to Selway section to float outfitting. The commission also took into account the Beaverhead County Resource Use Plan, the large volume of

comments from the public requesting that the rule stay the same on this section of the Beaverhead River, and the status of the fishery.

COMMENT 69: One person recommended opening Tash to Selway to float outfitting on Saturdays. This would help spread traffic.

RESPONSE: The commission determined that retaining the existing restriction is a reasonable solution that strikes a balance among the various users of the river.

COMMENT 70: One person noted that the float outfitting restriction on the Tash to Selway reach has resulted in more pressure than before the rule was in place. According to this person, because of the restriction, as well as the nature of outfitting, there are two ranches on that stretch of the river that are currently doing a lease-rod fee type of operation where they have clients come in, and through an outfitter, the clients pay a rod fee to access the river through the private land. According to this person, the restriction has created an exclusive opportunity to sell and this commentor now sees more commercial wade fishing on that stretch of the river than ever before. The pressure of increased commercial wade fishing is compounded by more float fishing by residents. This person talked to residents in Dillon who said they never floated that section of the river before the restriction and now they float that section all the time.

RESPONSE: Comment noted.

COMMENT 71: One person commented that it is important that the function of the rules is clear, and that there is a distinction between rules that address a social issue and rules that address the health of the fishery. This person has observed that issues often become mixed together. According to this person, the closure of the Tash to Selway section on the Beaverhead is an example of a social desire: there is a group of people there who say they want to be able to recreate in that area without competition from outfitters. This person commented that this is very different from saying that the rules are necessary to protect the health of the fishery between Tash and Selway, and therefore the rules restrict a small segment of the pie represented by outfitters in the hope that by restricting them, the health of the fishery will be preserved. This person commented that he wants to highlight that if the commission is addressing a social issue with a rule, that it's addressing the social purpose: lets not blend it and think the commission is addressing the health of the fishery.

RESPONSE: When first adopted, the Beaverhead and Big Hole rules were directed at social issues and the status of the fishery was not a prominent factor. After several years of

drought and associated impacts to the fishery, the commission must also consider angling pressure when contemplating the river rules. The decision to retain the prohibition on float outfitting on the Tash Bridge to Selway Bridge section of the Beaverhead was made after consideration of the Beaverhead County Resource Use Plan, public comments, and the status of the fishery.

COMMENT 72: Some people commented that they want to guard against making rules because the commission or department is envisioning unrealistic worst-case scenarios. The environmental assessment says that theoretically, if the prohibition on float outfitting on the Tash to Selway section of the river was lifted, all 84 outfitters could launch a boat there. One person commented that it is fantastic to think that anything close to this worst-case scenario would happen. This person stated that it is highly unlikely that 10-12 people would want to launch at the same time. According to this person, talking about worst-case scenarios draws attention away from the realistic things that can happen in a situation. Another person commented that he is tired of the worst-case scenario numbers that could not realistically happen.

RESPONSE: The department's environmental assessment said that, "in theory, there could be eighty-four boats launched if every authorized outfitter launched one boat on this reach at the same time and place." The department then predicted that, "in reality, this situation would probably not occur." The environmental assessment was intended to provide a thorough and objective analysis and did not focus on worst-case scenarios.

COMMENT 73: One person commented that outside of any rules governing human behavior, there's something to be said for self-governance. This person thought that people, after seeing the realities of a situation, are going to self regulate and adjust their behavior. This person illustrated his point with the following example: if anglers see five vehicles parked at the Tash Bridge, they are probably not going to fish there because they would realize the area already has the maximum number of anglers.

RESPONSE: Comment noted.

COMMENT 74: Some people and organizations commented that they want the commission to retain the restriction on float outfitting from Tash Bridge to Selway Bridge on the Beaverhead River. One person wrote that biological data was not used to evaluate the proposal to allow float outfitting on this section of the river and commented that this section of river has done better than other sections during the past 4 years of drought. According to this person, this circumstance supports

keeping Tash to Selway closed to float outfitting and supports the preferred alternative.

RESPONSE: The department's environmental analysis on the proposed rules, including the proposal to allow outfitters to launch one boat per day on the section of the Beaverhead River from Tash Bridge to Selway Bridge, assessed potential impacts to the fishery. The department predicted that negative effects of increasing pressure on declining trout populations in the Barretts to Selway Bridge reach would be moderate due to the potential of the reach to suffer low flows and high water temperatures during the spring and summer, the potential for an increase in outfitted use, the lack of a winter angling closure, and the current condition of trout populations which had avoided drought based declines until the past two years. The primary reason for the commission's decision to retain the prohibition on float outfitting on this section of the river was based on consideration of the Beaverhead County Resource Use Plan, which includes an objective to "Encourage the designation of a section of the Beaverhead River for the exclusive use and enjoyment of the unguided and unoutfitted public." The commission's decision was influenced to a lesser degree by the condition of the fishery in this section of the river due to ongoing drought conditions and a concern that an increase in angling pressure could be detrimental to fish populations. The commission also took into account the popularity of the restriction on float outfitting on this reach of the Beaverhead River, as indicated in the large number of public comments requesting that this restriction be continued.

COMMENT 75: One person wrote that private anglers in the Dillon area wish to maintain the old reaches including the closure on the reach through town. He believes this makes sense, as management for local residents should take priority on a community reach of the river. He commented that this is particularly important if the department wishes to encourage children to partake in the great sport of angling.

RESPONSE: Comment noted.

COMMENT 76: Another person observed that the Tash to Selway section of the Beaverhead River is very accessible for the residents of the area and offers a relatively high quality (not crowded) walk-in fishing experience from the state-owned property on Poindexter Slough.

RESPONSE: Comment noted.

COMMENT 77: One organization commented that it believes that resident sportsmen and women were rapidly losing access to some of Montana's highest valued public resources, the Beaverhead and Big Hole rivers, before the biennial rule restricted nonresident and commercial use on these rivers.



The organization noted that those rules were enthusiastically supported and encouraged through two renewal processes and that the existence of a stretch of river where non-commercial use can take place without impact from commercial venues had high value then and continues to have elevated value for Montana's anglers. The organization asked that the stretch from Tash Bridge to Selway Bridge on the Beaverhead and the stretch from Notch Bottom Fishing Access Site (FAS) to High Bridge FAS be retained for non-commercial angling opportunities.

RESPONSE: The commission decision to retain the restriction on float outfitting from Tash Bridge to Selway Bridge was influenced by the objectives of the Beaverhead County Resource Use Plan. The commission received some comments opposed to removing the restriction on float outfitting on the Notch Bottom to High Bridge section of the Big Hole River. The commission took into account the fact that the CAC recommended eliminating this restriction and noted that there shouldn't be a significant increase in float outfitting on this section.

COMMENT 78: One person wrote that Montana residents have been pushed off the upper Beaverhead River because of crowding and conflict and that they deserve a day on the river in a section closed to float outfitting. This individual noted that residents live here, pay taxes, support local businesses all year long, and support their communities.

RESPONSE: Comment noted.

COMMENT 79: One person commented that he is in favor of the restriction on float outfitting on the Tash to Selway section of the Beaverhead, but this individual thinks the restriction has some problems that should be corrected. According to this person, by closing that section to float outfitting, that part of the river is now advertised as a private, special area where outfitters can take their clients wade-fishing. This person has observed as many as five different outfitters on a single day, really hammering out all the runs. This person is also concerned about the use of kick boats in this section of the river clogging the up area. According to this person, most of the Beaverhead gets filled up with kick boats and nobody has really addressed that situation. This person recommended that the Beaverhead rules need to be like the Big Hole rules where regulations limit launches to one craft, one launch per day on a section of river. He would like to see kick boats eliminated from the Beaverhead, and if not eliminated, regulated in some way.

RESPONSE: The commission will reevaluate the rules within five years and can assess the wade angling use on the Beaverhead River. Thus far there have not been many complaints about the amount of wade angling occurring on the Tash Bridge to Selway Bridge section of the Beaverhead. The

department considers an oar or paddle propelled pontoon boat to be a vessel, or boat. Therefore, the float and launch restrictions for the Beaverhead and Big Hole apply to these types of craft. The commission decided that it was not necessary to implement a general launch restriction on the Beaverhead River at this time. The commission could consider this issue the next time it evaluates the rules.

COMMENT 80: Some people provided comments on the Henneberry to Pipe Organ section of the Beaverhead River. The Beaverhead and Big Hole Outfitter and Guide Association recommended that the commission should stay true to the findings of the CAC and decide to drop the Sunday closure on the Henneberry to Pipe Organ section and open up the Tash section to one boat outfitting on Wednesday, Thursday, and Friday, while leaving the Tash section closed to float outfitting on Saturday, Sunday, Monday, and Tuesday.

RESPONSE: The CAC did not recommend that the commission drop the Sunday closure on the Henneberry to Pipe Organ section. The committee did recommend that the commission remove the restriction on float outfitting from Tash Bridge to Selway Bridge on the Beaverhead River and allow outfitters to operate one boat per day on this reach. The decision to retain this restriction was largely due to the objectives stated in the Beaverhead County Resource Use Plan and the public comments. The commission also took into consideration the status of the fisheries in this reach of the river.

COMMENT 81: One person wrote that Henneberry to Pipe Organ is an important stretch to spread traffic, and he recommended that the commission remove the Sunday closure.

RESPONSE: The restrictions that apply to the Henneberry to Pipe Organ section of the Beaverhead River help to alleviate social conflicts on this popular section of the river.

COMMENT 82: According to one person, the only section of the Beaverhead River that statistically shows there actually was a crowding problem was the section from High Bridge to Henneberry, and the only section that showed there was a high percentage of outfitted use was from High Bridge to Henneberry. This person commented that the rules have compounded the use on this section due to the closure of Henneberry to Pipe Organ on Sundays and the float outfitting closure in the section from Tash to Selway.

RESPONSE: Not everyone agrees that the High Bridge to Henneberry section of the Beaverhead was the only place where there was a crowding problem. The restrictions on other sections of the river help to address overall concerns about crowding on the river.

COMMENT 83: One person commented on the relationship between irrigation and angling interests, stating that before the Clark Canyon Reservoir was created (1963), there were periods of time when there wasn't enough water in the Beaverhead to run from one puddle to another. According to this person, there were serious consequences to the fisheries as a result of low water, not to mention the adverse effect this had on those who were dependent on that water for irrigation. This person commented that irrigation and angling can be compatible and don't need to be competing uses. He recommended that irrigators and recreators work this out together, during drought years. This individual believes that people can address user conflicts much more effectively working together in a collaborative way, rather than working against each other in a combative way.

RESPONSE: Comment noted.

Comments on Big Hole River Rules

COMMENT 84: Some people provided specific comments on the rules pertaining to the Big Hole River. One person in favor of the restrictions on the Big Hole wrote that the best impact the department has made in recent years was to close a different section of the Big Hole River on a given day of the week, to let the average guy have a day on the river without stepping from boat to boat of the outfitters.

RESPONSE: Comment noted.

COMMENT 85: A person opposed to the Big Hole restrictions wrote that the rules are in effect for just one reason on the Big Hole: that is to have a private river for the people who dislike outfitters. This person commented that outfitter use is about 10% of overall angler's use on the Big Hole River, and that the hours of commercial use on the Big Hole are from 9:00 a.m. to 4:00 p.m., whereas most of the resident fishing takes place in the early morning or the late evening.

RESPONSE: According to records maintained by the Board of Outfitters, there are 122 outfitters licensed to conduct use on the Big Hole River. Outfitters are allocated 4,678 client days for the time period June 1 to July 31. These figures illustrate that the Big Hole River is not managed as a private river for those people who dislike outfitters. As for the time of day when people use the river, it is an oversimplification to state that all outfitters use the river from 9:00 a.m. to 4:00 p.m., and that most of the non-guided public fishes before or after these times. However, awareness of general patterns of use can help people decide when to visit the river.

COMMENT 86: According to one person, the only time the Big Hole River is crowded is in June during the salmon fly hatch.

RESPONSE: The commission hears from people who believe the crowding problem on the Big Hole River only occurs during the salmon fly hatch and thus the rules should only apply during this time period. The commission also hears from people who believe the rules are needed year-round. The CAC that evaluated the rules did not recommend changing the effect time period, and the commission concurred with this recommendation.

COMMENT 87: Another person wrote that one of the unforeseen results of this rule is that it has created pressure where there wasn't pressure before the rules. He commented that during the salmon fly hatch, if the epicenter of the hatch is somewhere in the canyon on the day the canyon is closed, everyone is going to be above it. According to this person, anglers can go to Jerry Creek Bridge some days and cars are four deep off the side of the highway. This person believes this situation is a direct result of having the stretch from Jerry Creek down closed that day.

RESPONSE: The commission decided to adopt the proposed changes to the reach restrictions on the Big Hole River. The decision is consistent with the recommendations of the CAC. The changes should allow more flexibility for float outfitting, retain opportunities for non-guided users, and alleviate some of the congestion that occurs during the salmon fly hatch.

COMMENT 88: Some people commented on the proposal to restrict float outfitting seven days a week on the Big Hole River from its headwaters to Mudd Creek. One person wrote that closing the upper portion of the Big Hole to float outfitting is a crock, as no one floats it in the first place due to fences, access points, and low water flows. Another person commented that closing the Big Hole River to float outfitting from the river's headwaters to Mudd Creek FAS is necessary to reduce fishing pressure, especially during years of drought and low-flow regimes. This person thought this restriction will preserve the unique fluvial grayling populations in the headwater reaches of the Big Hole.

RESPONSE: The decision to restrict float outfitting on the Big Hole River from its headwaters to the Mudd Creek Bridge fishing Access Site was based on the recommendations of the CAC. Closing this section of the river should not have a significant impact on the outfitters but would provide an opportunity for those people who want to recreate on the river without additional pressure from outfitted float trips. Although the potential decrease in angling pressure on this reach of the river might not be significant and the closure is largely for social reasons, fluvial grayling populations are found in this reach, and the commission and the department carefully consider all management actions that might impact grayling.

COMMENT 89: Some people commented that they are opposed to the proposal to eliminate the restriction on float outfitting from Notch Bottom FAS to High Bridge FAS on the Big Hole River. They opposed this proposal due to concern about potential impacts to the fishery from increased angling pressure. Other people commented that they support the proposal to eliminate the restriction on float outfitting from Notch Bottom FAS to High Bridge FAS on the Big Hole. These individuals thought that eliminating this restriction would allow more flexibility for outfitters and that there would be minimal impact other users of the river.

RESPONSE: The commission decided to repeal the Wednesday closure on float outfitting on the Notch Bottom to High Bridge section of the Big Hole River. The decision is consistent with the CAC's recommendation. The commission took into account the status of the fisheries in this reach of the river and concerns about potential impacts due to increased angling pressure. The commission concluded that eliminating the closure on float outfitting for this reach of the river would only result in one additional day of opportunity each week for float outfitting and that the potential increase in use would not have a significant impact on the fishery and other users of the river.

/s/ M. Jeff Hagener  
M. Jeff Hagener  
Secretary  
Fish, Wildlife and Parks  
Commission

/s/ Robert N. Lane  
Robert N. Lane  
Rule Reviewer

Certified to the Secretary of State June 6, 2005

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

In the matter of the amendment )	NOTICE OF AMENDMENT
of ARM 17.8.102, 17.8.103, )	
17.8.202, 17.8.302, 17.8.602, )	
17.8.767, 17.8.802, 17.8.902, )	(AIR QUALITY)
17.8.1002, 17.8.1102, )	
17.8.1202, 17.8.1302, )	
17.8.1305, 17.8.1310, )	
17.8.1402, and 17.8.1502 )	
pertaining to incorporation by )	
reference of current federal )	
regulations and other )	
materials into air quality )	
rules )	

TO: All Concerned Persons

1. On February 24, 2005, the Board of Environmental Review published MAR Notice No. 17-225 regarding a notice of public hearing on the proposed amendment of the above-stated rules at page 291, 2005 Montana Administrative Register, issue number 4.

2. The Board has amended ARM 17.8.1305 and 17.8.1310 exactly as proposed and has amended ARM 17.8.102, 17.8.103, 17.8.202, 17.8.302, 17.8.602, 17.8.767, 17.8.802, 17.8.902, 17.8.1002, 17.8.1102, 17.8.1202, 17.8.1302, 17.8.1402 and 17.8.1502 as proposed, but with the following changes:

17.8.102 INCORPORATION BY REFERENCE--PUBLICATION DATES

(1) Unless expressly provided otherwise, in this chapter where the board has:

(a) remains as proposed.

(b) adopted a section of the United States Code (USC) by reference, the reference is to the 2000 edition of the USC and Supplement I (2001);

(c) and (d) remain as proposed.

17.8.103 INCORPORATION BY REFERENCE AND AVAILABILITY OF REFERENCED DOCUMENTS (1) through (2) remain as proposed.

(3) Copies of federal materials also may be obtained from:

(a) and (b) remain as proposed.

(c) U.S. Government Printing Office, Information Dissemination (Superintendent of Documents), P.O. Box 371954, Pittsburgh, PA 15250-7954; phone: (866) 512-1800 or (202) 512-1800; fax: (202) 512-2104; email: orders@gpo.gov; web: <http://www.gpoaccess.gov>; and

(d) and (4) remain as proposed.

17.8.202 INCORPORATION BY REFERENCE (1) through (2) remain as proposed.

(3) Copies of federal materials also may be obtained from:

(a) and (b) remain as proposed.

(c) U.S. Government Printing Office, Information Dissemination (Superintendent of Documents), P.O. Box 371954, Pittsburgh, PA 15250-7954; phone: (866) 512-1800 or (202) 512-1800; fax: (202) 512-2104; email: orders@gpo.gov; web: <http://www.gpoaccess.gov>; and

(d) and (4) remain as proposed.

17.8.302 INCORPORATION BY REFERENCE (1) through (2) remain as proposed.

(3) Copies of federal materials also may be obtained from:

(a) and (b) remain as proposed.

(c) U.S. Government Printing Office, Information Dissemination (Superintendent of Documents), P.O. Box 371954, Pittsburgh, PA 15250-7954; phone: (866) 512-1800 or (202) 512-1800; fax: (202) 512-2104; email: orders@gpo.gov; web: <http://www.gpoaccess.gov>; and

(d) and (4) remain as proposed.

17.8.602 INCORPORATION BY REFERENCE (1) and (2) remain as proposed.

(3) Copies of federal materials also may be obtained from:

(a) and (b) remain as proposed.

(c) U.S. Government Printing Office, Information Dissemination (Superintendent of Documents), P.O. Box 371954, Pittsburgh, PA 15250-7954; phone: (866) 512-1800 or (202) 512-1800; fax: (202) 512-2104; email: orders@gpo.gov; web: <http://www.gpoaccess.gov>; and

(d) and (4) remain as proposed.

17.8.767 INCORPORATION BY REFERENCE (1) through (2) remain as proposed.

(3) Copies of federal materials also may be obtained from:

(a) and (b) remain as proposed.

(c) U.S. Government Printing Office, Information Dissemination (Superintendent of Documents), P.O. Box 371954, Pittsburgh, PA 15250-7954; phone: (866) 512-1800 or (202) 512-1800; fax: (202) 512-2104; email: orders@gpo.gov; web: <http://www.gpoaccess.gov>; and

(d) and (4) remain as proposed.

17.8.802 INCORPORATION BY REFERENCE (1) and (1)(a) remain as proposed.

(b) 40 CFR Part 51, Appendix W, pertaining to the Guidelines on Air Quality Models;

(c) through (2) remain as proposed.

(3) Copies of federal materials also may be obtained from:

(a) and (b) remain as proposed.

(c) U.S. Government Printing Office, Information Dissemination (Superintendent of Documents), P.O. Box 371954, Pittsburgh, PA 15250-7954; phone: (866) 512-1800 or (202) 512-1800; fax: (202) 512-2104; email: orders@gpo.gov; web: <http://www.gpoaccess.gov>; and

(d) and (4) remain as proposed.

(5) ~~The Standard Industrial Classification Manual (1987) and the guidelines on air quality models (revised) (1993) (order number PB93-213213) and supplement C (1995) (order number PB95-246401)~~ may be obtained from the NTIS, as described in (3)(a).

17.8.902 INCORPORATION BY REFERENCE (1) through (2) remain as proposed.

(3) Copies of federal materials also may be obtained from:

(a) and (b) remain as proposed.

(c) U.S. Government Printing Office, Information Dissemination (Superintendent of Documents), P.O. Box 371954, Pittsburgh, PA 15250-7954; phone: (866) 512-1800 or (202) 512-1800; fax: (202) 512-2104; email: orders@gpo.gov; web: <http://www.gpoaccess.gov>; and

(d) through (5) remain as proposed.

17.8.1002 INCORPORATION BY REFERENCE (1) through (2) remain as proposed.

(3) Copies of federal materials also may be obtained from:  
(a) and (b) remain as proposed.

(c) U.S. Government Printing Office, Information Dissemination (Superintendent of Documents), P.O. Box 371954, Pittsburgh, PA 15250-7954; phone: (866) 512-1800 or (202) 512-1800; fax: (202) 512-2104; email: orders@gpo.gov; web: <http://www.gpoaccess.gov>; and

(d) through (5) remain as proposed.

17.8.1102 INCORPORATION BY REFERENCE (1) through (2) remain as proposed.

(3) Copies of federal materials also may be obtained from:  
(a) and (b) remain as proposed.

(c) U.S. Government Printing Office, Information Dissemination (Superintendent of Documents), P.O. Box 371954, Pittsburgh, PA 15250-7954; phone: (866) 512-1800 or (202) 512-1800; fax: (202) 512-2104; email: orders@gpo.gov; web: <http://www.gpoaccess.gov>; and

(d) and (4) remain as proposed.

17.8.1202 INCORPORATION BY REFERENCE (1) through (2) remain as proposed.

(3) Copies of federal materials also may be obtained from:  
(a) and (b) remain as proposed.

(c) U.S. Government Printing Office, Information Dissemination (Superintendent of Documents), P.O. Box 371954, Pittsburgh, PA 15250-7954; phone: (866) 512-1800 or (202) 512-1800; fax: (202) 512-2104; email: orders@gpo.gov; web: <http://www.gpoaccess.gov>; and

(d) through (5) remain as proposed.

17.8.1302 INCORPORATION BY REFERENCE (1) remains as proposed.

(2) Copies of federal materials incorporated by reference in this subchapter may be obtained from:

(a) and (b) remain as proposed.



(c) U.S. Government Printing Office, Information Dissemination (Superintendent of Documents), P.O. Box 371954, Pittsburgh, PA 15250-7954; phone: (866) 512-1800 or (202) 512-1800; fax: (202) 512-2104; email: orders@gpo.gov; web: <http://www.gpoaccess.gov>; and

(d) and (3) remain as proposed.

17.8.1402 INCORPORATION BY REFERENCE (1) through (1)(a)(iv) remain as proposed.

(2) Copies of federal materials incorporated by reference in this subchapter may be obtained from:

(a) and (b) remain as proposed.

(c) U.S. Government Printing Office, Information Dissemination (Superintendent of Documents), P.O. Box 371954, Pittsburgh, PA 15250-7954, phone: (866) 512-1800 or (202) 512-1800; fax: (202) 512-2104; email: orders@gpo.gov; web: <http://www.gpoaccess.gov>; and

(d) and (3) remain as proposed.

17.8.1502 INCORPORATION BY REFERENCE (1) through (2) remain as proposed.

(3) Copies of federal materials also may be obtained from:

(a) and (b) remain as proposed.

(c) U.S. Government Printing Office, Information Dissemination (Superintendent of Documents), P.O. Box 371954, Pittsburgh, PA 15250-7954; phone: (866) 512-1800 or (202) 512-1800; fax: (202) 512-2104; email: orders@gpo.gov; web: <http://www.gpoaccess.gov>; and

(d) and (4) remain as proposed.

3. The following comments were received and appear with the Board's responses:

COMMENT NO. 1: The U.S. Environmental Protection Agency (EPA) suggested revising the reference to the United States Code (USC), in ARM 17.8.102(1)(b) to read as follows:

"(b) adopted a section of the United States Code (USC) by reference, the reference is to the 2000 edition of the USC and Supplement I (2001);"

RESPONSE: The Board agrees with the comment and has amended the rule as shown above to correct the reference. The Government Printing Office (GPO) publishes the official version of the USC every six years, and the latest edition was published in 2000. They also publish an annual cumulative supplement containing laws passed since the 2000 edition. Supplement I contains laws passed in 2001 that affect all titles of the USC. Supplement II contains laws passed in 2002 that affect Titles 1 through 18. The rest of Supplement II, which will include Title 42, Chapter 85, "Air Pollution Prevention and Control," has not yet been published.

COMMENT NO. 2: The EPA identified a new address for the U.S. Government Printing Office referenced in (3)(c) of ARM 17.8.103, 17.8.202, 17.8.302, 17.8.602, 17.8.767, 17.8.802, 17.8.902, 17.8.1002, 17.8.1102, 17.8.1202, and 17.8.1502, and in (2)(c) of ARM 17.8.1302 and 17.8.1402 to read as follows:

"U.S. Government Printing Office, Information Dissemination (Superintendent of Documents), P.O. Box 371954, Pittsburgh, PA 15250-7954; phone: (866) 512-1800 or (202) 512-1800; fax: (202) 512-2104; email: orders@gop.gov; web: http://www.gpoaccess.gov;"

RESPONSE: The Board believes that addresses for obtaining documents referenced in the administrative rules should be as current and complete as possible and has amended the rule as shown above to add the information suggested by the EPA.

COMMENT NO. 3: The EPA suggested that since the most current version of the Guideline on Air Quality Models is contained in 40 CFR Part 51, Appendix W, which is incorporated by reference in ARM 17.8.802(1)(b), ARM 17.8.802(5) could be revised as follows:

"(5) The Standard Industrial Classification Manual (1987) ~~and the guidelines on air quality models (revised) (1993) (order number PB93-213213) and supplement C (1995) (order number PB95-245401)~~ may be obtained from the NTIS, as described in (3)(a)."

RESPONSE: The Board agrees with the comment and has amended the rule as shown above to delete the language suggested for deletion by the EPA. The "s" on the word "Guidelines" in the rule is also being deleted to correct the title of 40 CFR Part 51, Appendix W.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

David Rusoff  
DAVID RUSOFF  
Rule Reviewer

By: Joseph W. Russell  
JOSEPH W. RUSSELL, M.P.H.  
Chairman

Certified to the Secretary of State, June 6, 2005.

BEFORE THE DEPARTMENT OF JUSTICE  
OF THE STATE OF MONTANA

In the matter of the amendment ) NOTICE OF AMENDMENT  
of ARM 23.16.1823 concerning )  
permit fee restrictions )

TO: All Concerned Persons

1. On April 28, 2005, the Department of Justice published MAR Notice No. 23-16-163 regarding the public hearing on the proposed amendment of the above-stated rule concerning permit fee restrictions at page 602 of the 2005 Montana Administrative Register, Issue Number 8.

2. The Department of Justice has amended ARM 23.16.1823 exactly as proposed.

3. The following comments were received and appear with the Department of Justice's responses.

Comment: At the public hearing Mark Staples, Montana Tavern Association, commented on the proposed amendment. The Department of Justice also received written comments from Rich Miller, Executive Director, Gaming Industry Association of Montana, Inc. Mr. Staples and Mr. Miller suggested the proposed rules could ameliorate the effects of the anti-stacking regulation in 23-5-629, MCA, on related licensees by letting them share the maximum 20 video gambling machines. The suggestion was that the Division has the discretion to allocate 20 video gambling machine permits between the related licensees if the licensees were unable to reach an agreement as to the distribution.

Response: Nothing in 23-5-629, MCA, grants the Division discretion to apportion, by lot or agreement, video gambling machine permits between affected licensees. The statute specifically directs that "a licensee may not be granted a permit" for a video gambling machine if the premise is within 150 feet of a premise under common ownership that at the time of application has been permitted for video gambling machines.

Consequently, the Division will not renew video gambling machine permits to either of the related licensees unless it receives written consent and authorization from the related licenses to issue permits to one of them. Temporary permits granted to the other licensee will be valid until September 30, 2005, but it may re-apply for video gambling permits upon satisfying the conditions in 23-5-629, MCA.

By: /s/ Mike McGrath  
MIKE McGRATH, Attorney General  
Department of Justice

/s/ Ali Bovington  
ALI BOVINGDON, Rule Reviewer

Certified to the Secretary of State June 6, 2005.

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

In the matter of the transfer ) NOTICE OF TRANSFER  
of ARM 8.94.3001 through )  
8.94.3003, pertaining to the )  
board of professional engineers )  
and land surveyors and uniform )  
standards for monumentation, )  
certificates of survey and )  
final subdivision plats )

TO: All Concerned Persons

1. Pursuant to Chapter 483, Laws of Montana 2001, effective July 1, 2001, the Board of Professional Engineers and Land Surveyors was transferred from the Department of Commerce to the Department of Labor and Industry, ARM Title 24, Chapter 183. Section 76-3-403, MCA designates that the Board of Professional Engineers and Land Surveyors prescribe uniform standards for monumentation and for the form, accuracy, and descriptive content of records of survey. Therefore, ARM 8.94.3001 through 8.94.3003 are being transferred to ARM Title 24, Chapter 183.

2. The Department of Labor and Industry has determined that the transferred rules will be numbered as follows:

<u>OLD</u>	<u>NEW</u>	
8.94.3001	24.183.1101	Uniform Standards For Monumentation
8.94.3002	24.183.1104	Uniform Standards For Certificates Of Survey
8.94.3003	24.183.1107	Uniform Standards For Final Subdivision Plats

3. The transfer of rules is necessary because this board was transferred from the Department of Commerce to the Department of Labor and Industry by the 2001 legislature by Chapter 483, Laws of Montana 2001.

BOARD OF PROFESSIONAL ENGINEERS  
AND LAND SURVEYORS  
PAULETTE FERGUSON, PRESIDING  
OFFICER

/s/ MARK CADWALLADER  
Mark Cadwallader  
Rule Reviewer

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

Certified to the Secretary of State June 6, 2005

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

In the matter of the ) NOTICE OF AMENDMENT  
amendment of ARM 24.35.121 )  
regarding the fee for )  
independent contractor )  
exemption certificates and )  
ARM 24.33.121 regarding )  
the fee for construction )  
contractor registration )

TO: All Concerned Persons

1. On April 14, 2005, the Department of Labor and Industry published MAR Notice No. 24-35-193 regarding the public hearing on the proposed amendment of the above-stated rules relating to independent contractors and construction contractors at page 525 of the 2005 Montana Administrative Register, Issue No. 7.

2. On May 10, 2005, the Department held a public hearing in Helena regarding the above-stated rules at which oral and written comments were received. Additional written comments were received prior to the closing date of May 17, 2005.

3. The Department has thoroughly considered the comments and testimony received. The following is a summary of the comments received and the Department's response to those comments:

Comment 1: An independent building construction contractor commented in support of the proposed rule changes saying that as one who works as an independent contractor and one who employs independent contractors, he supports a meaningful exemption from workers' compensation coverage. He stated he believes the proposed fee for an independent contractor exemption certificate is reasonable and that the benefit of a conclusive certificate fully justifies the fee.

Response 1: The Department acknowledges the comments in support of the fee change and notes that the fee may be changed again in the future after the Department gathers more information on the costs of administering the program.

Comment 2: A representative of the American Insurance Association commented in support of the amendments. The Association also recommended that the Department affirmatively advise or notice present independent contractor certificate holders and their hiring agents of the changes resulting from the passage of Chap. 448, L. of 2005. The Association also suggested that present certificate holders apply for a new exemption certificate.

Response 2: The Department has sent a mailing to the last known address of all exemption certificate holders advising them of the passage of and requirements contained in Chap. 448, L. of 2005. Also, in cooperation with the largest insurer in the state, a notice to hiring agents has been drafted and is being distributed explaining the requirements contained in Chap. 448, L. of 2005. The Department agrees with the suggestion that persons with an "old" (pre-April 28, 2005) exemption apply for the "new" version pursuant to Chap. 448, L. of 2005.

Comment 3: The Montana State Fund commented in support of the amendments as proposed, stating that as a result of its participation in the study committee, which in turn recommended the new legislation, it agrees the proposed fee is necessary to appropriately administer Chap. 448, L. of 2005.

Response 3: The Department acknowledges the comments of the Montana State Fund.

Comment 4: At the public hearing, representatives of the Montana Self Insurers Association, the Montana Municipal Insurance Authority, the Montana Building Industry Association, and the United Brotherhood of Carpenters, all testified in favor of the proposed fee increase for the independent contractor exemption certificate because each supports the new program to establish a conclusive presumption of independent contractor status. Also at the public hearing, representatives of the National Federation of Independent Businesses, the Montana Chamber of Commerce, and the Montana Motor Carriers Association checked the box indicating support for the proposed rule changes on public hearing registration forms distributed by the Department.

Response 4: The Department acknowledges the comments of the various organizations that commented on the proposed amendments.

4. After consideration of the comments, the Department has amended the rules exactly as proposed.

5. As indicated in the proposal notice, the Department will apply the amendments to ARM 24.35.121 retroactively to the effective date of Chap. 448, L. of 2005. Therefore, although the amendments are effective as of June 17, 2005, the amendments apply to independent contractor exemption applications made on or after April 28, 2005.

/s/ MARK CADWALLADER  
Mark Cadwallader,  
Rule Reviewer

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

Certified to the Secretary of State June 6, 2005

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

In the matter of the amendment ) NOTICE OF AMENDMENT  
of ARM 37.40.311 pertaining to )  
medicaid payments to nursing )  
facilities )

TO: All Interested Persons

1. On March 31, 2005, the Department of Public Health and Human Services published MAR Notice No. 37-343 pertaining to the public hearing on the proposed amendment of the above-stated rule relating to medicaid payments to nursing facilities at page 411 of the 2005 Montana Administrative Register, issue number 6.

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

37.40.311 RATE ADJUSTMENT FOR COUNTY FUNDED RURAL NURSING FACILITIES (1) through (5)(a) remain as proposed.

(6) "Normal operating expenses" and "costs" include, but are not limited to:

(a) through (e) remain as proposed.

(f) human resources management;

(g) management services;

(f) through (k) remain as proposed but are renumbered (h) through (m).

(7) and (7)(a) remain as proposed.

AUTH: Sec. 53-6-113, MCA

IMP: Sec. 53-6-101, 53-6-111 and 53-6-113, MCA

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

COMMENT #1: A county affiliated facility should be allowed to make the intergovernmental transfer (IGT) payment itself, rather than relying on the county to supply the funds to the State. This additional flexibility might allow some facilities to continue their participation when the county is not able or willing to participate.

RESPONSE: The Department is not able to assure the commentor that funds transferred from a county affiliated nursing facility would be eligible for federal financial participation (FFP) and enhanced Medicaid reimbursement under ARM 37.40.311. Section 1903(w)(6)(a) of the Social Security Act provides that "the Secretary [of the U.S. Department of Health and Human Services] may not restrict States' use of funds where such funds are



derived from State or local taxes . . . transferred from or certified by units of government within a State as the non-Federal share of expenditures under this title, regardless of whether the unit of government is also a health care provider, . . . ."

The federal regulation at 42 CFR 433.51(b) provides that funds may be considered as the state's share in claiming FFP if the "funds are appropriated directly to the State or local Medicaid agency, or transferred from other public agencies (including Indian tribes) to the State or local agency . . . ."

While the Department concedes it is possible that some county affiliated nursing facilities may be classified as "units of government" and might be able to demonstrate that the transferred funds were derived from state or local taxes, it is reluctant to change the process by which the state implements the "at risk" payment program. IGT programs are under increased scrutiny by the federal government. Montana's IGT payment methodology has been approved through the state plan process by the Centers for Medicare and Medicaid Services and any change would require additional federal approval.

COMMENT #2: The proposed rule amendments may cause some counties to choose not to participate in the IGT program. A county affiliated nursing facility that does not participate in the IGT program as an "at risk" facility should be treated as a noncounty affiliated facility for the purpose of receiving "at risk" payment adjustments. ARM 37.40.311(4) appears to define all facilities that are not supplying IGT funding as "other nursing facilities not participating in the funding". If this interpretation is not correct, the rule should be amended to provide that a county affiliated facility that chooses not to enter into an agreement to provide IGT funds is treated as an "other at risk facility". This also seems to be covered in ARM 37.40.311(3), but is this the Department's intent?

RESPONSE: Yes. A county affiliated facility that chooses not to participate in the IGT funding for "at risk" providers will be eligible to receive a payment computed using the same methodology applied to facilities not determined to be "at risk", as a per day add-on based upon the funding available. The State will gather this information prior to the actual calculation of amounts that will be paid through the "at risk" and other facility lump sum payments to ensure that adequate funding is available to meet the State's requirements for matching and to compute the total funding that is available for the lump sum payment process.

COMMENT #3: What is the meaning of the term "local county funds" used in this rule? May a portion of the funds paid by the county be paid by the county affiliated nursing facility?

RESPONSE: The Department intends the term "local county funds"

in ARM 37.40.311 to mean funds that are "derived from a general mill levy or other legally authorized mill levy or other source for which the expenditure of the monies generated by the mill levy or other source are not limited in purpose or are for purposes that encompass the matching of federal Medicaid monies". This is the same restriction used in the written agreement required under (1)(c) of the rule.

Funds to be used as Medicaid matching funds by the Department may not be transferred directly from the nursing facility. Section 1903(w)(6)(a) of the Social Security Act requires the funds to be "derived from state or local taxes transferred from or certified by units of government within a State as the non federal share". Please see the response to Comment #1 for a more detailed discussion explaining why matching funds cannot come directly from a county affiliated nursing facility.

COMMENT #4: The Department should add human resources and management services to ARM 37.40.311(6)(k) as an example of in-kind services that are "[n]ormal operating expenses" and "costs" that do not return or redirect a portion of the lump sum nursing facility payment to the county. To continue their participation in the IGT program, counties must be certain that the specific transactions they engage in are allowed.

RESPONSE: The Department agrees and has added human resources management and management services to the ARM 37.40.311(6)(k) list as an allowable example of in-kind services. However, the list in ARM 37.40.311(6) is not intended to be all inclusive but was only intended to provide a few examples of the types of services that could be treated as in-kind services. As explained in ARM 37.40.311(7) charges for in-kind services must be reasonable and the services must be documented.

COMMENT #5: Will county affiliated nursing facilities be allowed to participate at levels below the maximum amount? If so, how will it affect their "at risk" lump sum payment? A facility that is able to participate at a level that generates a lump sum "at risk" payment that is larger than the lump sum payments provided to nonparticipating facilities should be allowed to do so.

RESPONSE: If a county chooses to participate at an amount less than the maximum amount identified as the upper payment limit (UPL) for their affiliated nursing facility, the Department will apply the same methodology for computing the "at risk" payment as it uses to compute other participating counties' "at risk" payments. The total payment to that county affiliated facility would be adjusted and computed based on the amount of local county funding that the county is able or willing to provide.

COMMENT #6: Please clarify the meaning of proposed ARM 37.40.311(5)(a): "Payments or credits for normal operating expenses and costs are not considered a return or redirection of

a Medicaid payment." Assume a county writes a check for the IGT match and sends it to the Department. When the Department sends a lump sum "at risk" payment to the county affiliated nursing facility for the completed IGT transaction, the nursing facility writes a check to the county for the match. Would this transaction be considered a return or redirection of a Medicaid payment?

RESPONSE: Yes. The transaction between the nursing facility and the county would be a return or redirection if the funds were returned to the county solely for the purpose of reimbursing it for the IGT matching funds. One purpose of this rule is to define the types of transactions that can occur between the county and the county affiliated nursing facility that are not considered a return or a redirection of the Medicaid payment. The payments from a nursing facility to the county must meet the new rule requirements for normal operating expenses and costs in order to qualify.

COMMENT #7: Please clarify the meaning of proposed ARM 37.40.311(6) "Normal operating expenses" and "costs" include, but are not limited to:". Assume there is a hospital district which is a government entity operating within the county. The hospital district has its own elected five member hospital board of trustees. Would any of the following hospital district normal operating expenses and costs of this government entity be considered under (6) as allowable for the match process?

1. Taxes paid by the district.
2. Municipal finance consolidation act bonds (intercap revolving program) paid by the district.
3. Payments to federal loan programs, e.g., a USDA rural development loan program.
4. Payment of health insurance costs, unemployment insurance, workers' compensation paid by the district.

Can any of the preceding payments made by the hospital district be considered part of the nursing facility match amount? Also, since the hospital district pays the expenses, could the hospital district give the match amounts to the county commissioners and then retain the "at risk" lump sum payment to the nursing facility?

RESPONSE: The Department believes these would not be allowable transactions under the current "at risk" program for nursing facilities. There must be an ownership or operational relationship between the county and the nursing facility for the transaction to occur and for the rule to apply. From the facts stated in the question, the relationship between the hospital district and the nursing facility is not clear. Normal operating expenses or costs must have a relationship to the nursing facility in order to qualify for a lump sum "at risk" payment under this rule. The Department will provide an opinion on any questions about transactions that may be occurring and

are not specifically addressed by this rule if the county or the facility submits the questions for the Department to consider.

COMMENT #8: The Department should send out a precontract survey to find out which county affiliated facilities will participate in the IGT transaction. The survey would identify the IGT amount the county could provide for the fiscal year.

RESPONSE: The Department agrees that gathering information early in the process to determine the level of interest in continuing the "at risk" payment program and the level of interest by each county will be important in the coming year. We will be pursuing this information in light of the comments we received in response to this rule change.

Dawn Sliva  
Rule Reviewer

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

Certified to the Secretary of State June 6, 2005.

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

In the matter of the amendment        )       NOTICE OF AMENDMENT  
of ARM 37.85.212 pertaining to        )  
resource based relative value        )  
scale (RBRVS)                            )

TO: All Interested Persons

1. On April 28, 2005, the Department of Public Health and Human Services published MAR Notice No. 37-345 pertaining to the public hearing on the proposed amendment of the above-stated rule relating to resource based relative value scale (RBRVS) at page 625 of the 2005 Montana Administrative Register, issue number 8.
2. The Department has amended ARM 37.85.212 as proposed.
3. No comments or testimony were received.
4. This rule amendment will be effective July 1, 2005.

Ellie Parker  
Rule Reviewer

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

Certified to the Secretary of State June 6, 2005.

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

In the matter of the adoption	)	NOTICE OF ADOPTION AND
of Rule I and the amendment of	)	AMENDMENT
ARM 37.86.4401, 37.86.4406,	)	
37.86.4407, 37.86.4412 and	)	
37.86.4413 pertaining to	)	
reimbursement of rural health	)	
clinics and federally	)	
qualified health centers	)	

TO: All Interested Persons

1. On January 13, 2005, the Department of Public Health and Human Services published MAR Notice No. 37-341 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules pertaining to reimbursement of rural health clinics and federally qualified health centers at page 60 of the 2005 Montana Administrative Register, issue number 1.

2. The Department has adopted new rule I (37.86.4402) as proposed.

3. The Department has amended ARM 37.86.4407, 37.86.4412 and 37.86.4413 as proposed.

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

37.86.4401 RURAL HEALTH CLINICS AND FEDERALLY QUALIFIED HEALTH CENTERS, DEFINITIONS In this subchapter the following definitions apply:

(1) through (6) remain as proposed.

(7) "Increase or decrease in the scope of service" means the addition of or elimination of a category of service to the clinic or center or an increase or decrease in the intensity of a category of service. The increase or decrease in the scope of service must reasonably be expected to last at least one year. or deletion of a service or a change in the magnitude, intensity or character of services provided by an FOHC or RHC or one of their sites. The increase or decrease in the scope of service must reasonably be expected to last at least one year. The term includes but is not limited to:

(a) an increase or decrease in intensity attributable to changes in the types of patients served, including but not limited to HIV/AIDS, the homeless, elderly, migrant or other chronic diseases or special populations;

(b) any changes in services or provider mix provided by an FOHC or RHC or one or their sites;

(c) increases or decreases in operating costs that have

occurred during the fiscal year and that are attributable to capital expenditures, including new service facilities or regulatory compliance; and

(d) any approved changes in scope of project as defined by the health resources and service administration (HRSA).

(8) remains as proposed.

~~(9) "Intensity of service" means the level of medical care provided to the population served by the clinic or center.~~

(10) through (17) remain as proposed but are renumbered (9) through (16).

AUTH: Sec. 53-2-201 and 53-6-113, MCA

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

37.86.4406 RURAL HEALTH CLINICS AND FEDERALLY QUALIFIED HEALTH CENTERS, SERVICE REQUIREMENTS (1) through (5)(f) remain as proposed.

(6) A provider must notify the department, in writing, of an increase or decrease in the scope of service offered by the RHC or FQHC to medicaid recipients. Upon the request of a provider, the department will determine if a change qualifies as an increase or decrease in the scope of service, and if so, the amount and effective date of any rate increase or decrease.

(a) As a condition of approval, the department may require the provider to submit documentation and information necessary to demonstrate compliance with requirements applicable to the category of service and/or documentation and information necessary to determine the increase or decrease in the reimbursement rate due to an increase or decrease in the scope of service including any increase or decrease in the costs of the service and any increase or decrease in the number of visits.

(b) Medicaid coverage and reimbursement of an additional category of service will not be available to a provider unless department approval was requested prior to provision of the services and unless the services comply with all applicable requirements. ~~Department approval of any increase in the rate of reimbursement due to the addition or elimination of a category of service will be from the date the department was notified by the provider. Any decrease in the rate of reimbursement due to the addition or elimination of a category of service shall be effective from the date the department was notified by the provider or the date the department determines the category of service was added or eliminated, whichever is first.~~

(c) Any increase in the rate of reimbursement due to an increase or decrease in the intensity scope of service shall be from the date of notification by the provider to the department. Any decrease in the rate of reimbursement due to an increase or decrease in the intensity scope of service shall be from the date the department was notified by the provider or the date the department determines the increase or decrease in the intensity scope of services occurred, whichever is first.

(d) and (7) remain as proposed.

AUTH: Sec. 53-2-201 and 53-6-113, MCA  
IMP: Sec. 53-2-201, 53-6-101, 53-6-111 and 53-6-113, MCA

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

COMMENT #1: The methodology for computing 2001 rates should be retained in ARM 37.86.4412 so there will be a historical record showing the basis for determination of reimbursement rates for RHCs and FQHCs in existence prior to 2001.

RESPONSE: The Department does not agree and declines the suggestion that it retain the obsolete rate computation methodology in ARM 37.86.4412. The 1995 Legislature mandates that the Department should reduce unnecessary rule language with the goal of reducing administrative rules by 5%. The language is obsolete so there is no longer a need to retain it in the rule. The deleted text will be available from the Secretary of State's Administrative Rules Bureau, the repository of historical information about Montana administrative rules. Alternatively, a provider could retain a copy of the previous rule for historical reference.

COMMENT #2: The proposed formula for determining a new rate when there has been a change in scope of service may constitute rebasing.

RESPONSE: The Department believes the proposed formula does not constitute rebasing. The purpose of rebasing is to correct rates for all providers due to insufficient or excessive periodic adjustments. The purpose of the adjustment resulting from application of the formula is to determine a fair rate of compensation for a facility that has had an increase or decrease in the scope of service. It is to be applied only at the request of a provider. Unlike rebasing, only one provider's rate is changed. The Department believes the formula fairly accounts for the present level of services a facility experiences and takes into consideration the effects of an increase or decrease in scope of service.

COMMENT #3: The formula presently reads "The prospective payment per visit rate may be adjusted by a percentage of the total cost increase or decrease due to changes in scope of services as reported in ARM 37.86.4406(6)."

The Department proposes the formula be changed to read:

$$NR = \frac{(R \times PV) + C}{(PV + CV)}$$

where: (i) "NR" represents the new reimbursement rate adjusted for the increase or decrease in the scope of service;



(ii) "R" represents the present outpatient prospective payment system (OPPS) medicaid rate;

(iii) "PV" represents the present number of total visits which is the total number of visits for the RHC or FQHC during the 12-month time period prior to the change in scope of service;

(iv) "C" represents the expected change in costs due to the change in scope of service; and

(v) "CV" represents the expected change in the number of visits due to the change in scope of service.

The formula should read:

$$NR = (R \times P) + \frac{C}{(PV + CV)}$$

RESPONSE: After publication of the proposed notice, MAR Notice No. 37-341, a workgroup composed of RHC and FQHC providers, associations and Department staff was formed to review the formula. The group determined that when there is a change in scope of service the formula must accommodate six possible combinations of cost and visit data. The proposed formula worked in all six scenarios. The Department believes this formula acts to clarify the present rule.

Furthermore, the work group reviewed the suggested formula. It did not successfully accommodate all six scenarios. Accordingly, the Department has adopted the formula as proposed.

COMMENT #4: The definition of intensity of service falls short of giving providers adequate direction or understanding of what a change in the scope of service is or when a change would necessitate notification of DPHHS. Is intensity of service related to volume or is it related to variety of services? The rules give examples of changes in scope and changes in intensity. The Department should send a notice to all providers giving more examples.

RESPONSE: The workgroup described in the response to comment #3 discussed whether the definition of intensity of service was adequate. It obtained information from other state Medicaid programs to see how they defined the terms scope and intensity of service. It reviewed and discussed the information. The definition agreed on by the workgroup is being incorporated into ARM 37.86.4401(7) with minor changes. In addition, the department will issue a provider notice to further clarify this rule amendment with examples.

Dawn Sliva  
Rule Reviewer

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

Certified to the Secretary of State June 6, 2005.

11-6/16/05

Montana Administrative Register

**NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE**

**Interim Committees and the Environmental Quality Council**

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

**Economic Affairs Interim Committee:**

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

and

- ▶ Office of Economic Development.

**Education and Local Government Interim Committee:**

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

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

- ▶ Department of Public Health and Human Services.

**Law and Justice Interim Committee:**

- ▶ Department of Corrections; and
- ▶ Department of Justice.

**Energy and Telecommunications Interim Committee:**

- ▶ Department of Public Service Regulation.

**Revenue and Transportation Interim Committee:**

- ▶ Department of Revenue; and
- ▶ Department of Transportation.

**State Administration, and Veterans' Affairs Interim Committee:**

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

**Environmental Quality Council:**

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

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

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

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

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

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

Use of the Administrative Rules of Montana (ARM):

- |                                     |   |
|-------------------------------------|---|
| Known<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<br>Number and<br>Department | 2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers.   |

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through March 31, 2005. This table includes those rules adopted during the period April 1, 2005 through June 30, 2005 and any proposed rule action that was pending during the past six-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through March 31, 2005, this table, and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule, and the page number at which the action is published in the 2004 and 2005 Montana Administrative Registers.

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