ISSUE NO. 1

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 The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

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

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PROPOSAL NOTICE SECTION

BEFORE THE PETROLEUM TANK RELEASE COMPENSATION BOARD
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.58.201, 17.58.301, 17.58.311, 17.58.313, 17.58.323, 17.58.325, 17.58.326, 17.58.331, 17.58.332, 17.58.333, 17.58.334, 17.58.335, 17.58.336, 17.58.337, 17.58.340, 17.58.341, 17.58.342, and 17.58.343; the adoption of New Rule I; and the repeal of ARM 17.58.312 and 17.58.339 pertaining to procedural and substantive rules regarding petroleum tank release compensation	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT, ADOPTION, AND REPEAL (PETROLEUM BOARD)

TO: All Concerned Persons

1. On February 2, 2011, at 10:00 a.m., the Petroleum Tank Release Compensation Board will hold a public hearing in Room 122, 1100 North Last Chance Gulch, Helena, Montana, to consider the proposed amendment, adoption, and repeal of the above-stated rules.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact Elois Johnson, Paralegal, no later than 5:00 p.m., January 24, 2011, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

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

17.58.201 ~~ATTORNEY GENERAL'S~~ MODEL RULES~~--INCORPORATION AND SUPPLEMENTATION~~ (1) The board adopts and incorporates by reference the Attorney General's ~~Model Rules 1 through 28 and forms 1 through 23, as set forth in ARM 1.3.101 through 1.3.233 (with the addition noted in (2) of this rule)~~ Organizational and Procedural Rules, ARM 1.3.201, 1.3.202, 1.3.211 through 1.3.224, and 1.3.226 through 1.3.233, and the Secretary of State's Organizational and Procedural Rules, ARM 1.3.101, 1.3.102, 1.3.301, 1.3.302, 1.3.304, 1.3.305, 1.3.307 through 1.3.309, 1.3.311 through 1.3.313, including the sample forms that follow the Attorney General's model rules and the Secretary of State's online template forms referenced in ARM 1.3.301 and found at www.armtemplates.com/, depicting standard boilerplate language for model forms related to rulemaking.

(2) The Attorney General's Organizational and Procedural Rules and the Secretary of State's Organizational and Procedural Rules referenced in (1) may be found online at http:www.mtrules.org/.

AUTH: 2-4-201, MCA
IMP: 2-4-201, MCA

REASON: The board's procedural rule requires updating as a result of amendments to 2-4-202, MCA, and subsequent promulgation and amendment of the model procedural rules in 2008. The proposed amendments install the correct model procedural rules references and are consistent in most respects with the department's model procedural rules.

17.58.301 GUIDELINES FOR PUBLIC PARTICIPATION (1) remains the same.

(2) The board shall ~~maintain a mailing list~~ provide access to the interested parties e-mail list link on the board website for persons who wish to know ~~when~~ about the board's ~~is meeting~~ proposed rules and rulemaking proceedings. Any person may add their name and e-mail address to this list ~~by contacting~~ through the interested parties e-mail list link on the board web site.

(3) The board ~~will mail~~ shall post a copy of its preliminary or tentative agenda ~~to each person~~ on the ~~foregoing mailing list~~ board web site sufficiently in advance of each meeting.

(4) remains the same.

AUTH: 2-3-103, MCA
IMP: 2-3-103, MCA

REASON: The proposed amendment is necessary to update the public participation procedures made possible by current technology.

17.58.311 DEFINITIONS Unless the context clearly indicates otherwise, the following definitions, in addition to those in 75-11-302, MCA, apply throughout this chapter:

(1) remains the same.

(2) "Actually incurred~~"~~," for purposes of reimbursing ~~claims~~ eligible costs caused by a release from a petroleum storage tank, means:

(a) ~~invoiced charges for goods received or services performed in furtherance of a department-approved~~ costs actually expended to complete the work required to prepare or implement a corrective action plan, in an amount less than or equal to the corrective action plan budget, as shown by a dated invoice and receipt; or

(b) ~~payments~~ documented compensation made to a third party ~~in compensation~~ for bodily injury or property damage caused by a release.

(3) "Automobile~~"~~," for purposes of reimbursing ~~claims~~ eligible costs, means a light vehicle as defined at 61-1-139, MCA.

(4) through (5) remain the same.

(6) "Bodily injury," as defined in 75-11-302, MCA, ~~will be measured by the board to include detriment that is currently in existence or certain to occur in the future,~~ requires proof to a reasonable degree of medical certainty based on competent evidence as opposed to conjecture or speculation.

(7) and (8) remain the same.

(9) "Corrective action plan" means a written plan approved by the department specifying all corrective actions necessary to respond to a release. Each corrective action plan must include the cost of each corrective action specified in the plan.

(10) "Corrective action plan budget" means the costs listed in the corrective action plan and preliminarily approved in writing by the board staff for obligation by the board pursuant to 75-11-309(5), MCA.

(9) through (11) remain the same, but are renumbered (11) through (13).

~~(12)~~ (14) "Farm tank" ~~as~~ is defined at ARM 17.56.101.

(13) remains the same, but is renumbered (15).

(a) through (c) remain the same.

(16) "Heating oil" is defined at ARM 17.56.101.

(17) "Hydraulic lift tank" is defined at ARM 17.56.101.

(18) "Inactive tank" is defined at ARM 17.56.101.

(19) "Motor fuel" is defined at ARM 17.56.101.

~~(14)~~ (20) "Necessarily incurred~~"~~," for purposes of reimbursing ~~claims~~ eligible costs caused by a release from a petroleum storage tank, means:

(a) ~~the work contemplated under a department-approved~~ only those costs incurred that are needed to prepare or implement a corrective action plan, ~~when that work addresses a release from a petroleum storage tank~~ in an amount less than or equal to the costs listed in the corrective action plan budget;

(b) costs incurred to complete ~~the~~ work, approved by the department in writing, ~~not contemplated under an approved corrective action plan, but necessary~~ to respond to an emergency at the site of a release, in order to prevent ~~greater damages~~ more extensive damage or injury than would have occurred without such approval; ~~and~~ or

(c) remains the same.

~~(15) "Property damage," as defined in 75-11-302, MCA, will be measured by the board in terms of diminution of market value, unless the cost of repairing damage is less than the diminution of market value.~~

(21) "Noncommercial purposes" is defined at ARM 17.56.101.

(22) "Oil/water separator" is defined at ARM 17.56.101.

(23) "Out of service" is defined at ARM 17.56.101.

~~(16)~~ (24) "Reasonably incurred~~"~~," for purposes of reimbursing ~~claims~~ eligible costs caused by a release from a petroleum storage tank, means: ~~work required under an approved corrective action plan or necessary to respond to an emergency; or provide compensation to third parties for bodily injury or property damage caused by a release.~~

(a) the costs incurred:

(i) to complete the work required to prepare or implement an approved corrective action plan, in an amount less than or equal to the costs listed in the corrective action plan budget;

(ii) to complete work, approved by the department in writing, to respond to an emergency at the site of a release in order to prevent more extensive damage or injury than would have occurred without such approval; or

(iii) in accordance with ARM 17.58.341 and 17.58.342 and that are not presumed to be unreasonable by those rules; or

(b) compensation paid to third parties for bodily injury or property damage when it is more likely than not that such injury or damage was caused by a release.

(25) "Release discovery date" means the earliest of:

(a) the date of discovery by an owner or an operator of any of the conditions set forth in ARM 17.58.502(1), provided that a release is confirmed in any manner provided in ARM 17.58.504 or 17.58.506 after the condition is discovered;

(b) the date that the owner or operator had actual knowledge of a release; or

(c) the date that the release is confirmed in any manner provided in ARM 17.58.504.

~~(17)~~ (26) "Residential tank" ~~as~~ is defined at ARM 17.56.101.

(18) through (19)(b) remain the same, but are renumbered (27) through (28)(b).

~~(20)~~ (29) "Subcontractor" ~~is~~ means a person who performs billable labor in association with a corrective action at the release site when that person is under contract with the contractor/consultant. Subcontractor services do not include delivery or pickup services.

~~(21)~~ (30) "Tank," ~~is~~ as used in 75-11-302(21), MCA, means a fully enclosed stationary device designed to contain an accumulation of petroleum or petroleum products of more than 60 gallons (227L) and constructed of non-earthen materials (e.g., concrete, steel, plastic) that provide structural support.

~~(22)~~ (31) "Vendor" ~~is~~ means a person who provides materials necessary for corrective action at the release site or services away from the release site.

AUTH: 75-11-318, MCA
IMP: 75-11-318, MCA

REASON: The board is proposing to add the definitions of "heating oil," "hydraulic lift tank," "inactive tank," "motor fuel," "noncommercial purposes," "oil/water separator," and "out of service" because it is called on from time to time to interpret those terms in administering the board's program, and to be consistent with the department's underground storage tank definitions.

The board proposes to amend the definition of "actually incurred," "necessarily incurred," and "reasonably incurred" to better reflect statutory intent, to conform the definition to current board practice, and for clarity.

The board is proposing to add the definition of "corrective action plan" because the term is used in several of the board's principal statutes governing costs and reimbursement, and yet it is undefined. The term "corrective action plan budget" is proposed as an addition to the definitions because it is consistent with current board practice, and to facilitate clear communication between the board, owner and operators, consultants, and the department pertaining to allowable costs for corrective actions approved by the department and listed in a department-approved corrective action plan.

The board is proposing to move the definition of "property damage" to ARM 17.58.337 because the board believes that this is a substantive rule and more than a definition. Moving the definition will provide clarity to the rules governing third-party damages.

The board is proposing to add the definition of "release discovery date" because the term is undefined and because the discovery date of a release is a pivotal date with respect to the board's determination of eligibility, and also for gauging compliance with time of release cleanup requirements per statute. The proposed definition will provide owners and operators, the department, and the board a clear, fair, and easily applied definition of a concept that heretofore has been somewhat nebulous. The board intends that the adoption of this definition will provide for more fair, consistent, and evenhanded eligibility determinations.

The definition of "tank" was proposed for amendment to make clear that a tank must be an enclosed device, as opposed to an open device, used for storage or temporary storage of petroleum products. As an example, a device designed to contain petroleum product in which the stored petroleum product is completely surrounded by a steel wall would qualify as a "tank" under this definition, while appurtenances to a petroleum storage tank system such as spill berms or other forms of "open" containment would not qualify as "tanks," even though they may be designed to "contain an accumulation of petroleum products." This amendment is consistent with board practice and precedent, and would also establish a minimum tank size based upon the limitation in the International Fire Code 2009, Chapter 2, which defines a "tank" in part as a vessel containing more than 60 gallons. The proposed amendment to the definition of "tank" is intended to clarify the definition of petroleum storage tank in 75-11-302(21), MCA, and not to conflict with that definition.

The amendments to the definitions of "actually incurred," "necessarily incurred," and "reasonably incurred," and the new definition of "corrective action plan budget," are all proposed in an effort to formalize a board business practice that will ensure that all eligible costs are actually, reasonably, and necessarily incurred for preparation or implementation of department-approved corrective action plans before a reimbursement payment from the fund is approved, as required by 75-11-309(3)(a), MCA. See also 75-11-309(1)(g)(ii), MCA, ("The board shall review each claim and determine if the claims are actual, reasonable, and necessary costs of responding to the release and implementing the corrective action plan.").

17.58.313 APPLICABLE COPAYMENTS FOR COMMINGLED PETROLEUM STORAGE TANK RELEASES (1) An owner or operator of a site with more than one eligible release from separate petroleum storage tanks ~~and~~ whose plumes have commingled shall be reimbursed for eligible ~~expenses~~ costs caused by each release, as specified in 75-11-307(4)(b)~~(i)~~, MCA. The provisions of 75-11-307(4)(b), MCA, shall be applied separately to each release. If there are costs that are incurred when an ineligible release from a petroleum storage tank has commingled with an eligible release from a separate petroleum storage tank, the owner or operator may not be reimbursed without evidence establishing that it is more likely than not that the costs were caused by the eligible release.

(2) An owner or operator of a site with more than one eligible release from the same petroleum storage tank whose plumes have commingled shall be reimbursed for eligible costs caused by each release, as specified in 75-11-307(4)(b), MCA. The provisions of 75-11-307(4)(b), MCA, shall be applied separately to each such release. If there are costs that are incurred when an ineligible release has commingled with an eligible release from the same petroleum storage tank, the owner or operator may not be reimbursed without evidence establishing that it is more likely than not that the costs were caused by the eligible release.

(3) A person who seeks reimbursement from the fund at a rate different than that provided in 75-11-307(4)(b)(i), MCA, must prove that it is more likely than not that no leaking petroleum storage tank at the site is eligible under that section.

AUTH: 75-11-318, MCA
IMP: 75-11-307, MCA

REASON: These proposed amendments are consistent with current board practice and precedent, and are also consistent with statutory authority governing eligibility, which requires that in making eligibility determinations and reimbursing claims, the board must first determine that there has been "a release from a petroleum storage tank[.]" Section 75-11-308(1), MCA; see also 75-11-307(1) and 75-11-309(3)(b)(i), MCA. In other words, eligibility and reimbursement analyses must be conducted on a tank-by-tank basis. The proposed amendments provide much-needed clarity to the board's eligibility analyses in those cases where mixed plumes from differing releases are discovered at a facility or site for which the owner or operator has claimed eligibility. The proposed definition would make explicitly clear that when a commingled plume involves two or more eligible releases, each such release is treated as a separate release with respect to the reimbursement cap and co-pay requirement set forth in 75-11-307(4)(b), MCA. The definition additionally clarifies that when an ineligible release has commingled with an eligible one, no cleanup costs will be reimbursed unless the owner or operator can establish that it is more likely than not that the claimed costs were caused by the eligible release.

17.58.323 VOLUNTARY REGISTRATION (1) and (2) remain the same.

(3) The board may investigate and consult with other regulatory agencies concerning the information submitted in the forms to confirm the accuracy of the information submitted by the owner or operator. If a regulatory agency has information or the board discovers information that indicates the owner or operator submitted false or inaccurate information, the board may ~~find that the owner or operator is ineligible for reimbursement~~ deny the application.

(4) If a regulatory agency has reported noncompliance regarding the operation and management of the petroleum storage tank, the board may ~~find that the owner or operator is ineligible for reimbursement~~ deny the application.

(5) remains the same.

(6) The board may delegate to the board staff the authority to issue determinations of potential eligibility for reimbursement when that determination is

based on prior board decisions and similar material facts, subject to the owner or operator's right to be heard by the board.

AUTH: 75-11-318, MCA
IMP: 75-11-318, MCA

REASON: The proposed amendments are offered to clarify existing provisions in the rule.

17.58.325 ELIGIBILITY DETERMINATION ~~(1) When a person notifies the department of a release from a petroleum storage tank, the board shall ensure the owner or operator receives the appropriate forms necessary for a determination of eligibility or to receive reimbursement from the board.~~

~~(2)~~ (1) Upon receipt of ~~the~~ a completed application for eligibility ~~form~~, the board shall determine eligibility ~~by following the procedures under ARM 17.58.323(3) through (6)~~ in accordance with 75-11-308 and 75-11-309, MCA.

AUTH: 75-11-318, MCA
IMP: 75-11-309, MCA

REASON: The proposed amendments are offered to make the rule consistent with the board's statutory authority (see 75-11-309(1)(g), (h), and (3), MCA), to clarify existing provisions in the rule, and to make the rule consistent with current practice.

17.58.326 APPLICABLE RULES GOVERNING THE OPERATION AND MANAGEMENT OF PETROLEUM STORAGE TANKS (1) The applicable state rules referenced in 75-11-308(1)(b)(ii) and 75-11-309(1)(b), MCA, are:

~~(a) the following provisions of the National Fire Protection Association 1 Uniform Fire Code, (NFPA1/UFC) (2003), a copy of which may be obtained from the National Fire Protection Association, 1 Batterymarch Park, Quincy, MA 02169, or online without cost at www.nfpa.org:~~

~~(i) Section 42.2.3.4.4.3, which states that means must be provided to sound an audible alarm when the liquid level in the tank reaches 90% capacity. Means must be provided either to automatically stop the flow of liquid into the tank when the liquid level in the tank reaches 98% capacity, or to restrict the flow of liquid into the tank to a maximum flow rate of 2.5 gpm when the liquid in the tank reaches 95% of capacity;~~

~~(ii) Section 42.2.3.4.5.2, which states that guard posts or other approved means must be provided to protect tanks that are subject to vehicular damage;~~

~~(iii) Section 42.2.4.2.1, which states that the design, fabrication, assembly, test and inspection of the piping system must meet the requirement of chapter 5 of NFPA1/UFC 30, Flammable and Combustible Liquids Code;~~

~~(iv) Section 42.2.4.2.3, which states that any portion of a piping system that is in contact with the soil must be protected from corrosion in accordance with good engineering practice;~~

~~(v) Section 42.2.5.3.4, which states that dispensing devices must be mounted on a concrete island or must otherwise be protected against collision damage by means acceptable to the authority having jurisdiction. Dispensing devices must be bolted securely in place;~~

~~(vi) Section 42.2.5.5.2, which states that a listed emergency breakaway device designed to retain liquid on both sides of the breakaway point must be installed on each hose dispensing Class I liquids. Such devices must be installed and maintained in accordance with the manufacturers' instructions;~~

~~(vii) Section 42.2.5.7, which states that fuel dispensing systems must be provided with one or more clearly identified emergency shutoff devices or electrical disconnects;~~

~~(viii) Section 66.2.2.1, which states that tanks may be of any shape, size, or type consistent with sound engineering design. Metal tanks must be welded, riveted and caulked, or bolted, or constructed using a combination of these methods; and~~

~~(ix) Section 66.2.3.1.1, which states that tanks must rest on the ground or on foundations made of concrete, masonry, piling or steel. Tank foundations must be designed to minimize the possibility of uneven settling of the tank and to minimize corrosion in any part of the tank resting on the foundation.~~

(a) the following provisions of the International Fire Code (IFC 2009) are applicable to aboveground storage tanks. A copy of the code may be obtained from the International Code Council, 4051 West Flossmoor Road, Country Club Hills, IL 60478-5795, or online with cost at www.iccsafe.org:

(i) 312.1 Vehicle impact protection shall be provided by posts that comply with Section 312.2 or by other approved physical barriers that comply with Section 312.3;

(ii) 2203.2 An approved, clearly identified, and readily accessible emergency disconnect switch shall be provided at an approved location to stop the transfer of fuel to the fuel dispensers in the event of a fuel spill or other emergency. An emergency disconnect switch for exterior fuel dispensers shall be located within 100 feet of, but not less than 20 feet from, the fuel dispensers;

(iii) 2206.7.3 Dispensing devices, except those installed on top of a protected aboveground tank that qualifies as vehicle-impact resistant, shall be protected against physical damage by mounting on a concrete island six inches or more in height;

(iv) 2206.7.5.1 Dispensing hoses for Class I and II liquids shall be equipped with a listed emergency breakaway device designed to retain liquid on both sides of a breakaway point. Such devices shall be installed and maintained in accordance with the manufacturer's instructions. Where hoses are attached to hose-retrieving mechanisms, the emergency breakaway device shall be located between the hose nozzle and the point of attachment of the hose-retrieval mechanism to the hose;

(v) 2704.2.2.4 Secondary containment for outdoor storage areas shall be designed to contain a spill from the largest vessel. If the area is open to rainfall, secondary containment shall be designed to include the volume of a 24-hour rainfall as determined by a 25-year storm and provisions shall be made to drain accumulations of ground water and rain water. (In Montana the volume of a 24-hour rainfall as determined by a 25-year storm does not exceed 4.6 inches of freeboard.); and

(vi) 3404.2.9.7.6 Aboveground storage tanks shall not be filled in excess of 95 percent their capacity. No later than December 31, 2013, tanks must comply with one of the following requirements:

(A) an overfill prevention system shall be provided for each tank. During tank-filling operations, the system shall provide an independent means of notifying the person filling the tank that the fluid level has reached 90 percent of tank capacity or by providing an audible or visual alarm signal, or providing a tank level gauge marked at 90 percent of tank capacity; or

(B) an impermeable secondary containment shall be provided for each tank. The tank shall have secondary containment, designed in accordance with 2704.2.2.4 of International Fire Code that is impermeable to petroleum;

(b) the following provisions of the National Fire Protection Association Uniform Fire Code, Flammable and Combustible Liquids code (NFPA 30) (2008) are applicable to aboveground storage tanks. A copy of the Code may be obtained from the National Fire Protection Association, 1 Batterymarch Park, Quincy, MA 02169, or online at www.nfpa.org:

(i) 21.3.1 Tanks shall be permitted to be of any shape, size, or type consistent with recognized engineering standards. Metal tanks shall be welded, riveted and caulked, bolted, or constructed using a combination of these methods;

(ii) 22.5.2.1 Tanks shall rest on the ground or on foundations made of concrete, masonry, piling, or steel;

(iii) 22.5.2.2 Tank foundations shall be designed to minimize the possibility of uneven settling of the tank and to minimize corrosion in any part of the tank resting on the foundation;

(iv) 27.3.2 Piping systems shall be maintained liquidtight. A piping system that has leaks that constitute a hazard shall be emptied of liquid or repaired in a manner acceptable to the authority having jurisdiction;

(v) 27.5.1.1 Joints shall be made liquidtight and shall be welded, flanged, threaded, or mechanically attached;

(vi) 27.5.1.3 Threaded joints shall be made with a suitable thread sealant or lubricant; and

(vii) 27.6.4 Aboveground piping systems that are subject to external corrosion shall be suitably protected;

(c) the following provisions of the National Fire Protection Association Uniform Fire code, Code for Motor Fuel Dispensing Facilities and Repair Garages (NFPA 30A) (2008) are applicable to aboveground storage tanks. A copy of the Code may be obtained from the National Fire Protection Association, 1 Batterymarch Park, Quincy, MCA 02169, or online with cost at www.nfpa.org:

(i) 4.3.8 Any portion of a tank or its piping that is in contact with the soil shall have properly engineered, installed and maintained corrosion protection that meets the requirements of 21.4.5 of NFPA 30;

(ii) 5.2.3 Any portion of a piping system that is in contact with the soil shall be protected from corrosion in accordance with good engineering practice; and

(iii) 6.3.4 Dispensing devices shall be mounted on a concrete island or shall otherwise be protected against collision damage by means acceptable to the authority having jurisdiction. Dispensing devices shall be securely bolted in place.

Dispensing devices shall be installed in accordance with the manufacturers' instructions;

(d) the following provisions of the National Fire Protection Association Uniform Fire Code, Standard for the Installation of Oil-burning Equipment (NFPA 31) (2006) are applicable to aboveground storage tanks attached to burners. A copy of the Code may be obtained from the National Fire Protection Association, 1 Batterymarch Park Quincy, MA 02169, or online at www.nfpa.org:

(i) 7.2.7.1 Metal tanks shall be welded or brazed or constructed using a combination of these methods;

(ii) 7.3.1 Tanks shall rest on the ground or on foundations made of concrete, masonry, piling, or steel;

(iii) 7.3.2 Tank foundations shall be designed to minimize the possibility of uneven settling and to minimize corrosion in any part of the tank resting on the foundation;

(iv) 7.3.3.1 Single wood timber supports (not cribbing), laid horizontally, shall be permitted to be used for outside aboveground tanks if the supports are less than 12 inches high at their lowest point;

(v) 7.9.4 Outside aboveground tanks and their appurtenances and supports shall be protected from external corrosion;

(vi) 7.9.7 Each oil burner supply line connected to the gravity feed connection of the supply tank shall be provided with a shutoff valve at the tank;

(vii) 7.12.5 Each tank shall be maintained liquidtight;

(viii) 7.13.1 If an oil storage tank is permanently removed from service, for whatever reason, it shall be emptied of all contents;

(ix) 7.13.2 If an oil storage tank is temporarily removed from service, for whatever reason, it shall be emptied of all contents;

(x) 8.2.9 Piping shall meet the following criteria:

(A) Piping shall be substantially supported and protected against physical damage; and

(B) Piping shall be protected against corrosion; and

(xi) 8.2.12 Piping shall be maintained liquidtight;

(e) 40 CFR Section 112.3, to the extent that this regulation requires an owner or operator to prepare and implement a Spill Prevention, Control, and Countermeasure Plan, is applicable to all petroleum storage tanks; and

~~(b)~~ (f) the following requirements in ARM Title 17, chapter 56 are applicable to underground storage tanks:

(i) through (iii) remain the same.

(iv) the testing, monitoring, and recordkeeping requirements ~~identified~~ contained in ~~(1)(b)(ii)~~ subchapter 3 and ~~(iii)~~ subchapter 4;

(v) the release reporting, initial response, and corrective action requirements ~~identified~~ contained in subchapters 5 and 6; and

(vi) remains the same.

(2) An owner or operator shall be considered in compliance with the requirements of (1)~~(b)~~(f)(i) through (iv), if the owner's underground storage tank, as defined in 75-11-503, MCA, has one of the following permits issued by the department in accordance with 75-11-509, MCA:

(a) a valid operating permit as provided in 75-11-509(8), MCA; or

(b) a valid conditional permit, one-time fill, or emergency operating permit as provided in ARM 17.56.310.

AUTH: 75-11-318, 75-11-319, MCA
IMP: 75-11-308, MCA

REASON: The proposed amendments to ARM 17.58.326(1)(a) through (d) are necessary because of the adoption by the Department of Justice, Fire Prevention and Investigation Section (State Fire Marshal) of the 2009 International Fire Code, the National Fire Protection Association Uniform Fire Code, Flammable and Combustible Liquids Code, the National Fire Protection Association Uniform Fire Code, Code for Motor Fuel Dispensing Facilities and Repair Garages, and the National Fire Protection Association Uniform Fire Code, Standard for the Installation of Oil-burning Equipment, and because of the repeal by the State Fire Marshal of the referenced sections of the Uniform Fire Code.

The proposed amendments also change the structure of ARM 17.58.326 to make explicitly clear which state and federal rules apply to each of several kinds of petroleum storage tanks involved in the reimbursement program administered by the board: aboveground storage tanks, underground storage tanks, and aboveground storage tanks attached to burners.

The proposed addition of (1)(e) relating to compliance with 40 CFR 112.3 is made to ensure that those owners and operators required by 40 CFR Part 112 to have and implement a Spill Prevention Control and Countermeasures Plan have done so. Under this proposed amendment, an owner or operator who does not comply with all of the requirements of 40 CFR 112.3 would not be eligible. The proposed addition is consistent with the board's regulatory authority to determine which federal rules pertain to the prevention and mitigation of a petroleum release from a petroleum storage tank.

17.58.331 ASSENT TO AUDIT (1) remains the same.

(2) The owner or operator shall ~~obtain~~ submit the assent on a form provided by the board. The form ~~may~~ must be executed by the contractor, consultant, subcontractor, or vendor before ~~or after the work is completed~~ the board approves reimbursement.

AUTH: 75-11-318, MCA
IMP: 75-11-309, MCA

REASON: The proposed amendments are offered to clarify existing provisions in the rule.

17.58.332 INSURANCE COVERAGE; THIRD-PARTY LIABILITY; INVESTIGATION; DISCLOSURE; SUBROGATION; COORDINATION OF BENEFITS (1) Prior to receiving payment for any claim for reimbursement, an owner or operator who is determined to be eligible under 75-11-308, MCA shall thoroughly investigate the existence of any policy of insurance or other similar instrument or document ~~which~~ that may indicate insurance coverage for some or all

of the eligible costs arising from a release. At a minimum, this investigation must include:

(a) complete review of the present owner's and operator's records; ~~and~~

(b) the insurance records of the owner or operator in the possession of the insurance company or its agents or brokers; ~~and~~

(c) where available, the records of prior owners or operators and others who may have information ~~(if not policies)~~ concerning insurance coverage, including insurance policies; and

(d) any insurance records, including policies, in the possession or control of the owner or operator that belong to third parties identified pursuant to (2).

(2) and (3) remain the same.

(4) Owners or operators seeking reimbursement for eligible costs shall disclose to the board, on a form provided by the board, ~~when the first claim for reimbursement is submitted~~ the results of the owner's or operator's investigations undertaken pursuant to (1) and (2). Together with the completed form, the owner or operator ~~must~~ may be requested to provide copies of any policy of insurance, or any other evidence that may indicate insurance coverage for some or all of the eligible costs, including any documents identified or discovered as a result of the investigations undertaken pursuant to (1) and (2). Such evidence of insurance includes, but is not limited to, cancelled checks from or to insurance companies, letters to and from insurance companies or their agents or brokers, or policies or declaration sheets indicating extent of coverage. Narrative information from previous owners or operators concerning possible coverage ~~shall~~ must be submitted in writing along with the form. The disclosure must contain current information as of the date of the release as well as all available historic insurance information from the date of the facility's first use of petroleum storage tanks. Where applicable, this disclosure must also contain the identity of any third party who may be liable for the eligible costs sought to be reimbursed together with an explanation of the basis of liability and any supporting documentation indicating insurance coverage that third parties may have.

(5) To the extent the board may reimburse or has reimbursed owners or operators for eligible costs, the board has a subrogation claim against insurance carriers whose policies cover the reimbursed costs and against other third parties whose acts or omissions render them otherwise liable for the reimbursed costs. An owner or operator who accepts reimbursement for costs subrogates his rights to the board as against such insurance carriers and other third parties to the extent of the accepted reimbursed costs. An owner or operator, prior to receiving any reimbursement of eligible costs, must agree on a form provided by the board~~,~~ to subrogate its claims to the board to the extent of the accepted reimbursed costs.

(6) remains the same.

(7) Reimbursement of claims by the board may be delayed by the board pending submission of any form or information referenced in this rule. If it appears to the board that a party has previously reimbursed an owner or operator for eligible costs, the board may withhold reimbursement of claims from that owner or operator pending a determination by the board of what eligible costs, if any, remain to be reimbursed.

AUTH: 75-11-318, MCA
IMP: 75-11-309, MCA

REASON: The proposed amendments are offered to clarify existing provisions in the rule and to advance the board's adopted policy of seeking payment or subrogation with respect to eligible costs that are covered by an owner or operator's policy of insurance.

17.58.333 DESIGNATION OF REPRESENTATIVE (1) Owners or operators desiring to designate another person to receive reimbursement in their stead under the Act may do so by submitting the appropriate form provided by the board.

AUTH: 75-11-318, MCA
IMP: 75-11-307, ~~75-11-307(3)~~, MCA

REASON: The proposed amendments are offered to clarify that there is an assignment of rights to the designee and the designee can stand in no better position than an owner or operator.

17.58.334 ~~APPLICATION FOR REIMBURSEMENT OF~~ CLAIM~~S~~ FOR REIMBURSEMENT (1) Upon completion of any ~~aspect of~~ task or subtask identified in a~~n approved~~ corrective action plan, the owner or operator, or a remediation contractor acting on behalf of ~~an~~ the owner or operator, may submit the claim to the board on a form provided by the board.

(2) ~~If the claim is submitted by a person other than the owner or operator, t~~The claim ~~form~~ must include all the information required by the board's claim form, and a certification~~,~~ verified by a notary public~~,~~ that the individual signing the claim form is the owner or operator or is authorized to represent the owner or operator and that the statements in the claim form are true to the best of the signer's knowledge.

(3) remains the same.

(4) The individual that signed the claim can request in writing that any incomplete or insufficiently documented costs be withdrawn from the claim. Withdrawn costs may be submitted at a later date on a new claim form. Costs that are withdrawn and later submitted will be processed as a new claim.

(5) The minimum claim value may not be less than $500 except:

(a) when a claim includes only utility bills or laboratory invoices the minimum is reduced to $100;

(b) when the five-year limitation period set forth in 75-11-307(2)(i), MCA, will expire before a total of $500 in cleanup costs will be accrued;

(c) when the claim is the final claim for a resolved release; and

(d) when specific circumstances warrant, additional exceptions may be permitted.

(6) When submitting an invoice to be divided among multiple releases, the invoice must be equal to or in excess of $500.

AUTH: 75-11-318, MCA
IMP: 75-11-309, MCA

REASON: The proposed amendment is necessary to clarify existing provisions in the rule, and to make explicit that owners and operators must submit all information required by the board relating to a claim for reimbursement. The minimum claim value amendment is proposed by the board to lower the administrative costs associated with processing claims for reimbursement. The board has imposed minimum claim limits since April 1998, and the $500 dollar limit has been a public board policy since January 1, 2009.

17.58.335 APPLICATION FOR GUARANTEE OF REIMBURSEMENT OF FUTURE OR UNAPPROVED EXPENDITURES (1) Whenever an owner or operator requests the board to guarantee reimbursement for eligible costs not yet approved by the board, ~~or~~ including estimated costs not yet incurred, the board ~~will~~ may issue the requested guarantee, ~~with no specific dollar amount,~~ if it is able to make the necessary findings under (2).

(2) The board must find, before guaranteeing reimbursement ~~of future or unapproved expenditures~~, that the ~~release, the petroleum storage tank, and the~~ owner or operator ~~are each~~ is eligible for reimbursement pursuant to 75-11-308(1), MCA, and that ~~the expenditure or proposed expenditure would be of a type necessary in order to implement an approved corrective action plan or to pay eligible third-party damage claims~~ any estimated eligible cost not yet incurred is one that is reasonably certain to occur.

(3) In guaranteeing reimbursement of an estimated eligible cost not yet incurred, the board shall include a provision within the guarantee that the reimbursement is subject to adjustment in conformity with 75-11-309(3), MCA, after the cost has been incurred.

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

AUTH: 75-11-318, MCA
IMP: 75-11-309, MCA

REASON: The proposed amendment is necessary to clarify procedures pertaining to the guarantee of reimbursement of future expenditures not yet incurred, and to make explicit that the rule does not affect the board's duty to make the determinations required by 75-11-309(3), MCA.

17.58.336 REVIEW AND DETERMINATION OF CLAIMS FOR REIMBURSEMENT (1) The board ~~must~~ may not approve a claim for reimbursement unless the owner or operator has submitted a completed application for eligibility and the board has determined that the owner or operator is eligible in accordance with 75-11-308, MCA.

(2) Upon receipt of a claim for reimbursement for corrective action costs the board staff shall determine if the claim form is complete. The board staff shall promptly advise the owner or operator, or a remediation contractor acting on behalf of an owner or operator, of any incompleteness or deficiency ~~which~~ that appears on the claim form. The final review may be suspended pending the submission of additional information by the owner or operator, or a remediation contractor acting on behalf of an owner or operator.

(3) Claim forms that have been reviewed as complete at least 60 days prior to a scheduled board meeting will normally be considered by the board at that meeting. The reimbursement of claims for which authority to reimburse has been delegated under (4), is not subject to this procedure. The agenda for consideration of claims at board meetings must follow the order in which claim forms were reviewed as complete and ~~which~~ that are not reimbursed under (4).

(4) remains the same.

(5) The recommendations of the board staff ~~shall~~ must be mailed to each board member ~~and to the person submitting the claim~~ at least seven days prior to a board meeting ~~which~~ that is scheduled to consider the claim.

(6) The owner or operator may appear before the board and make a statement regarding the claim and the board staff's recommendations. Any other interested party may also make a statement. The board may establish a fair and reasonable limit on the time allowed for oral presentations. The board shall thereafter consider the claim and, upon making the determinations required by 75-11-309(3), MCA, may grant it in whole, in such part as may to the board seem proper, or may deny the claim. Reasons for partial or total denials or disallowed expenses must be stated in the claim reimbursement summary contained in the file~~, and must be mailed to the owner or operator within ten days of the board's decision~~. The minutes of a board meeting must reflect the sequence of actions taken on claims.

(7) through (7)(e)(v) remain the same.

~~(8) An owner or operator dissatisfied with the denial or disallowance of all or any part of the claim may request a formal hearing. This request, with a specification of the grounds for disagreement with the board's decision, must be filed in writing with the board within 15 days of the date upon which the board provides written notice to the owner or operator of the board's decision. Upon receiving such request, the presiding officer of the board may appoint a hearing examiner to supervise any discovery and prehearing matters and to conduct the hearing, in accordance with ARM 17.58.201.~~

(9) remains the same, but is renumbered (8).

AUTH: 75-11-318, MCA
IMP: 75-11-309, MCA

REASON: The proposed amendments are offered for clarity, and because the procedures for notice and hearing have been superseded by 75-11-309(4), MCA (2009).

17.58.337 THIRD-PARTY DAMAGES: PARTICIPATION IN ACTIONS AND REVIEW OF SETTLEMENTS (1) Any owner or operator who is sued for damages resulting from a release shall notify the board of the suit in writing within ~~one week~~ 15 days of being served with a summons and complaint. Within 45 days of being served by the summons and complaint, ~~T~~the owner or operator shall also:

(a) advise the board in writing if any insurer is defending ~~him~~ the owner or operator, and if so the name of such insurer;

(b) provide the board with a complete copy of any insurance policy covering any part of the release or the damages resulting from the release, including all addendums, riders, and endorsements; and

(c) provide the board with a copy of the summons, complaint, and any answer or answers to the complaint.

(2) Any owner or operator who, prior to litigation, is advised of a claim by a third party, or enters into negotiations with a third party who claims to have been damaged by a release, or who receives a demand for payment of damages to a third party who claims to have been damaged by a release, shall notify the board of such claim, demand, or negotiations within 30 days, and at that time shall provide the board with a copy of any such claim, demand, or negotiations that have been reduced to writing.

(3) In addition to the notice requirements of (1) and (2), the owner or operator shall provide the board with status reports once every three months after the notice is given, setting forth the status of investigation, discovery, motion practice, and negotiations for settlement.

~~(3)~~ (4) The board may review the conduct of any such ~~litigation~~ lawsuit or claim, and any negotiation to settle the lawsuit or claim, and may review any pleadings, discovery, investigation, and papers documenting settlement, or negotiations for settlement, of the suit. The owner or operator shall provide copies of any record or document requested by the board to assist the board in its review pursuant to this section. The board will not assume any legal costs incurred by the ~~defendant~~ owner or operator, but may appear and participate in discovery or trial proceedings or settlement negotiations ~~which~~ that bear on the determination of a third party's claim for plaintiff's damages caused by the release. If the parties wish to employ a judge pro tempore under the provisions of 3-5-113, MCA, or a settlement mediator, and consult with the board in the selection process, the board ~~will consider~~ may ~~participating~~ participate in the compensation of the judge pro tempore or settlement mediator.

(5) Unless the board has been provided with a judgment or an executed settlement agreement that has finally determined an owner or operator's liability to a third party for payment of damages caused by a release, the board may require that a third party claiming such injury to property or person obtain at their own expense and provide to the board in writing a property appraisal or report of medical examination. Such appraisals or examinations are more likely to be required if the owner or operator has not kept the board apprised of the course of litigation or settlement negotiations as required under this rule. If the owner or operator does not keep the board apprised of the course of litigation or settlement negotiations as required by this rule, the board may refuse to reimburse any portion of a settlement or judgment pursuant to this section, and the board may deduct from any reimbursement owed its costs for hiring an independent physician, property appraiser, or claims adjuster under this rule.

~~(4)~~ (6) The board may review any settlement papers or negotiations, including confidential settlement mediations or conferences, for the purpose of determining the dollar amount of bodily injury or property damages actually, necessarily, and reasonably incurred by third parties which, if required to be paid by the ~~defendant~~ owner or operator, would be considered eligible costs caused by a

release, provided that the board shall comply with any confidentiality requirements imposed by the court or the mediator, unless there is a compelling state interest to do otherwise.

(7) "Property damage," as defined in 75-11-302, MCA, will be measured by the board in terms of diminution of market value, unless the costs of repairing damage are less than the diminution of market value.

(8) Failure to comply with any provision of this rule shall be considered noncompliance subject to 75-11-309(3)(b)(ii), MCA.

AUTH: 75-11-318, MCA
IMP: 75-11-309(1)(g), MCA

REASON: The amendments are required to clarify the board's procedure with respect to third-party claims, particularly with respect to prompt and early notice of claims to the board, which experience has shown is critical to meaningful participation by the board. The amendments also clarify requirements relating to claim documentation and verification. None of the proposed amendments affect the board's subrogation rights. See Reason for amendment to ARM 17.58.311 for addition of new (7).

17.58.340 THIRD-PARTY DAMAGES: REIMBURSEMENT DOCUMENTATION (1) For cases in which the board received notice as required in ARM 17.58.337, ~~A~~an owner or operator's claim for reimbursement of payments for third-party damages pursuant to a judgment entered in a court shall include copies of the notice of entry of judgment, abstract of costs, and a declaration:

(a) that the case has been concluded, including appeal, if any; and

(b) of the fees paid by the ~~defendant~~ owner or operator to each attorney who appeared in the proceeding.

(2) For cases in which the board received notice as required in ARM 17.58.337, ~~A~~an owner or operator's claim for reimbursement of payments for third-party damages made by agreement in settlement of litigation or a claim shall include copies of the fully executed settlement agreement and such supporting documents as may be required under ~~(4)~~ ARM 17.58.337.

~~(3) An owner or operator's payments for third-party damages made by agreement without reference to litigation shall include copies of the settlement agreement and such supporting documents as may be required under (4).~~

~~(4) The board may require a third party claiming bodily injuries to be examined by a physician and the physician's report submitted to the board. The board may require a third party claiming property damage to allow a property appraiser or claims adjuster retained by the board to enter upon the property, inspect it, and report to the board. Such examinations are more likely to be required if the owner or operator has not kept the board apprised of the course of litigation or settlement negotiations as required under ARM 17.58.337. If the owner or operator does not keep the board apprised of the course of litigation or settlement negotiations as required under ARM 17.58.337, the board may refuse to reimburse any portion of a settlement or judgment under the actual, necessary and reasonable standards applied by the board to all expenditures.~~

~~(5)~~ (3) The board shall require a listing of amounts attributed to compensation for property damage, bodily injury, ~~or~~ fees, costs, and any other aspect of damage ~~resulting from~~ paid to a third part pursuant to a settlement or judgment described in (1) or (2).

AUTH: 75-11-318, MCA
IMP: 75-11-309, MCA

REASON: The proposed amendments provide much-needed clarification with respect to the board's administration of third-party claims pursuant to 75-11-307(1) and (2), MCA. The amendments emphasize and complement the early notice and documentation requirements of ARM 17.58.337. The proposed amendment to (3) makes clear that the owner or operator must provide the board with a list of the kinds of damages paid to a third party, and the dollar amount for each such kind of damage. For example, in the case of a third-party property damage claim that was reduced to a judgment, the owner or operator would be required to list each specific payment made to the third party for the property damage, for attorney fees (if any), and for costs (if any). None of the proposed amendments affect the board's subrogation rights.

17.58.341 ~~CONSULTANT LABOR CODES, TITLES, AND DUTIES~~ REIMBURSABLE COSTS (1) Claims by an owner or operator for services provided by a consultant/contractor, or subcontractor, including services of its employees, must be categorized ~~by labor~~ into standard codes according to the list of codes maintained by the board. This requirement does not apply to any service provided by an individual or remediation activity that does not closely approximate one of the standard categories in the board's list of codes.

(2) A consultant/contractor/subcontractor may file with the board, and amend, not more than once a year (unless further amendment is approved by the board staff), the labor and equipment hourly rates ~~at which~~ and remediation supply costs it bills clients in Montana for the remediation services ~~described in the board's fee schedule list~~ reimbursed from the fund. The ~~R~~rate schedules and amendments must be maintained in confidence by and accessible only to the board staff, as the consultant's expectation of privacy is reasonable and outweighs the merits of public disclosure.

(3)~~(a)~~ The board staff shall calculate the industry standard once a year after receipt of ~~rate~~ labor, equipment, and material schedules from companies whose invoices the board frequently reviews and ~~which~~ that have been filed in a number sufficient for a meaningful statistical analysis. In calculating the industry standard, the board staff shall compute a range of allowable rates for each code listed in the board's consultant/contractor code list, which will be the mean rate for each code plus the standard deviation, not to exceed 10% of that mean. The board staff shall then notify each filing firm whether its rates exceed the range of allowable rates, and if so, by how much. The amount by which a consultant's rate for a particular code exceeds the range of allowable rates will be presumed unreasonable.

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

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

~~(5)~~ (6) ~~An owner or operator or consultant/contractor, or subcontractor may overcome the~~ Any presumption ~~that a rate is unreasonable~~ in this rule may be overcome by presenting clear and convincing evidence to the board ~~as provided under~~ that the presumption should not apply, in accordance with the procedure set forth in ARM 17.58.336(6).

~~(6)~~ (7) Copies of the list, which establishes categories and codes of consultant/contractor/subcontractor services, may be obtained from the board. The list must explain the typical duties to be performed. The consultant/contractor/subcontractor must be reimbursed labor costs billed on a time basis, and hourly labor costs for personnel time may not be for more than the minimum appropriate level of skill needed to perform a particular task.

(8) The board staff shall calculate the reasonable cost for department standard plans and standard reports and board standard remediation tasks once a year from requested costs received from companies in a quantity sufficient for a meaningful statistical analysis. The calculation must use the requested costs from the prior five years. In calculating the reasonable costs, the board staff shall compute a range of allowable costs for each standard document in the department's standard corrective action plans and reports lists and board tasks, which will be the mean rate for each standard plus the standard deviation, not to exceed 10% of that mean. The board staff shall then publish the reasonable cost reimbursement for the standard plans and reports on the board web site. The amount by which a consultant claim for a particular standard document exceeds the range of allowable rates will be presumed unreasonable.

AUTH: 75-11-318, MCA
IMP: 75-11-318, MCA

REASON: The proposed rule amendments make several changes to existing rule sections to bring the rule into accordance with current board practice. The most substantive of these are the amendments to (5) and (6).

The amendment to (5) creates a legal standard for overcoming the presumptions created in this rule that particular rates will be deemed unreasonable. The board believes the clear and convincing evidence standard is justified in cases where a presumption established by rule that was promulgated in accordance with MAPA is being challenged. The "clear and convincing evidence standard" will provide the board with an articulable means of judging whether an owner or operator has produced sufficient cause to overcome these presumptions of unreasonableness embedded in the board's rules. The clear and convincing evidence standard is a familiar and well-established standard in Montana law, which should provide the board with explicit guidance in applying it. See, for example, 27-1-221(5), MCA: clear and convincing evidence is that "in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is more than a preponderance of evidence but less than beyond a reasonable doubt." The Montana Supreme Court has also articulated the boundaries of this evidentiary standard on numerous occasions:

> Clear and convincing evidence is simply a requirement that a preponderance of the evidence be definite, clear, and convincing, or that a particular issue must be established by a preponderance of the evidence or by a clear preponderance of the proof. This requirement does not call for unanswerable or conclusive evidence. The quantity of proof, to be clear and convincing, is somewhere between the rule in ordinary civil cases and the requirement of criminal procedure--that is, it must be more than a mere preponderance but not beyond a reasonable doubt.
>
> In re A.J.W., 2010 MT 42, ¶ 15 (Mont. 2010)

The proposed changes to (6) will make explicit the board's current business process of reimbursing consultant and contractor labor costs in accordance with the appropriate level of skill needed to perform a particular task, rather than by the education and experience level of the particular person that completed the task. In other words, (6) is intended to provide an objective standard for labor costs, regardless of title, position, education, training, or experience of the particular individual that did the work. The amendment of (6) is needed in order to avoid having to pay from the fund for inappropriately high skill levels or educational levels that are not needed to perform a particular corrective action task.

Proposed new (7) establishes a method of determining reasonable cost levels for standard department work plans, reports, and standard board remediation tasks that is consistent with the board's current business process.

Both the amendments to (6) and proposed new (7) are intended to formalize procedures by which the board may discharge its duty to ensure that eligible costs are reasonably incurred for preparation or implementation of department-approved corrective action plans before approving a reimbursement payment from the fund, as required by 75-11-309(3)(a), MCA. See also, 75-11-309(1)(g)(ii), MCA. ("The board shall review each claim and determine if the claims are actual, reasonable, and necessary costs of responding to the release and implementing the corrective action plan.")

17.58.342 OTHER CHARGES ALLOWED OR DISALLOWED (1) The following ~~types of charges are presumed eligible for reimbursement~~ costs incurred in implementing a corrective action plan are presumed to be reasonably incurred:

(a) through (e) remain the same.

(f) lodging at actual cost unless excessive. Documentation supporting the cost (lodging invoice) is required. If no lodging invoice is provided, the reimbursement shall be at the rate of non-receiptable lodging facilities in accordance with 2-18-501(5), MCA;

(g) through (i) remain the same.

(j) sampling fees at $10 per sample, which includes ~~bottle,~~ ice, cooler, packing, and office-related handling charges.

(2) The following list indicates, by way of example and not limitation, types of charges that are presumed not ~~eligible for reimbursement~~ to be reasonably incurred:

(a) miscellaneous office postage, such as mailing of applications, reports, and correspondence;

(b) through (i) remain the same.

(j) markups by a person who serves the sole function of providing funding for a corrective action; ~~and~~

(k) charges incurred prior to release discovery date;

(l) charges for preparation of board forms;

(m) charges for preparation of department 30-day release report;

(n) removal and disposal of petroleum, petroleum sludge, and other liquids from tanks;

(o) removal of petroleum storage tanks required by underground storage tank rules or the International Fire Code; and

(p) state permit fees for tank removal or system modifications.

(3) The following ~~may be eligible for reimbursement~~ costs for implementing a corrective action plan are presumed to be reasonably incurred, only if approved by the board staff prior to claim submission:

(a) remains the same.

(b) access or trespass fees;

(c) markups, not to exceed 7%, on subcontractor invoices when the subcontractor is furnishing labor (and incidental goods or supplies) on a project as part of the cleanup. Proof of payment by the contractor to the subcontractor must be submitted prior to board approval or director approval, authorized under ARM 17.58.336(3). The subcontractor markup may be reimbursable when the subcontractor's invoice and the evidence of subcontractor payment is on the same claim form as the markup. Subcontractor markup is allowed only when the subcontracted work was preapproved in a corrective action plan; and

(d) shipping of samples and equipment.

(4) ~~The~~ Any presumption~~s made~~ in ~~(1) and (2)~~ this rule may be overcome ~~if specific circumstances warrant~~ by presenting clear and convincing evidence to the board that the presumption should not apply, in accordance with the procedure set forth in ARM 17.58.336(6).

AUTH: 75-11-318, MCA
IMP: 75-11-318, MCA

REASON: The proposed amendments are consistent with current board practice and coordinate this rule with the proposed amended definition of "reasonably incurred." The proposed amendments are generally intended to formalize procedures by which the board may discharge its duty to ensure that eligible costs are reasonably incurred for preparation or implementation of department-approved corrective action plans before approving a reimbursement payment from the fund, as required by 75-11-309(3)(a), MCA. See also, 75-11-309(1)(g)(ii), MCA. ("The board shall review each claim and determine if the claims are actual, reasonable, and necessary costs of responding to the release and implementing the corrective action plan.")

The board proposes to amend ARM 17.58.342(1)(f) to establish what rate will be reimbursed for lodging when no receipt is provided.

The board proposes to amend (3)(c) in order to establish that the markup is to be requested concurrently with the subcontractor work. The board does not and should not reimburse the subcontractor markup if it provides all or partial funding to the contractor before the contractor pays the subcontractors. The program administered by the board is exclusively a reimbursement program. The statutes authorizing the board to make payments for eligible costs of implementing corrective action plans do not allow for prospective payment, only reimbursement of costs incurred.

The proposed amendment to (4) creates a legal standard for overcoming the presumptions created in this rule that particular rates will be deemed reasonable or unreasonable. See Reason for amendments to ARM 17.58.341.

17.58.343 REVIEW AND DETERMINATION OF THIRD-PARTY DAMAGE COSTS (1) through (4) remain the same.

~~(5) An owner or operator dissatisfied with the denial or disallowance of all or any part of the claim may request a formal hearing. This request, with a specification of the grounds for disagreement with the board's decision, must be filed in writing with the board within 15 days of the receipt of the board's determination by the owner or operator. Upon receiving such request, the presiding officer of the board may appoint a hearing examiner to supervise any discovery and prehearing matters and to conduct the hearing, either at a subsequent meeting of the board or outside a board meeting, subject to 2-4-621, MCA, as the appointment may specify.~~

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

AUTH: 75-11-318, MCA
IMP: 75-11-309, MCA

REASON: This rule is proposed for amendment because (5) has been superseded by 75-11-309(4)(b), MCA (2009).

4. The proposed new rule provides as follows:

NEW RULE I REVIEW OF CORRECTIVE ACTION PLAN (1) The board staff shall review each corrective action plan and establish the allowable reimbursement for each corrective action in a corrective action plan budget.

(2) Owners or operators or their representatives shall solicit at least three competitive bids for subcontractor corrective action work costing over $2500. The owner or operator shall submit documentation showing that at least three bids were solicited for the corrective action. Owners and operators must be reimbursed a reasonable amount for the time to prepare, solicit, and evaluate bids.

(3) Corrective action plans that require the removal of petroleum storage tanks, dispensers, or product piping must be shown to be the most cost effective corrective action and the costs must be approved by the board in writing before the action is performed.

(4) Corrective action plans that require the removal, repair, or replacement of building(s), sign(s), or canopies must be shown to be the most cost effective

corrective action and the costs must be approved by the board in writing before the action is performed.

(5) Owners or operators are responsible for determining whether it is more cost effective to purchase or lease remediation equipment necessary to remediate a petroleum release. Board staff may assist owners or operators in this evaluation.

(6) Purchased remediation equipment, when no longer required to remediate the release, may be:

(a) used on another site that the owner or operator owns, or for the owner's or operator's own purpose;

(b) donated to the state of Montana. The state will then sell the equipment as surplus property. The proceeds of the sale will return to the fund; or

(c) sold with the owner or operator retaining 50% of the sale price and 50% returning to the fund.

AUTH: 75-11-318, MCA
IMP: 75-11-318, MCA

REASON: The new rule is consistent with current practices and clarifies other proposed rule amendments in this notice including, for example, a proposed new definition of "corrective action plan budget" and amended definitions of "actually incurred," "reasonably incurred," and "necessarily incurred."

Section (2) is proposed because the board's current policy and practice is to require owners and operators, or authorized representatives of owners and operators, to obtain multiple bids for subcontractor work greater than or equal to $2500. The proposed rule formalizes policy and practice that has been in effect since November of 2002. In addition, (2) is proposed to establish that owners or operators may be reimbursed reasonable consultant costs for the preparation, solicitation, and evaluation of competitive bids that are an essential component of a corrective action plan.

Proposed (3) and (4) reflect written policies of the board since January of 2000 and proposed (5) and (6) reflect written policies of the board since 1995.

The new rule is necessary to formalize and simplify the board's procedure for discharging its duty to ensure that all eligible costs are actually, reasonably, and necessarily incurred for preparation of department-approved corrective action plans before approving a reimbursement payment from the fund, as required by 75-11-309(3)(a), MCA. See also 75-11-309(1)(g)(ii), MCA. ("The board shall review each claim and determine if the claims are actual, reasonable, and necessary costs of responding to the release and implementing the corrective action plan".)

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

17.58.312 ELIGIBILITY REQUIREMENTS (AUTH: 75-11-318, MCA; IMP: 75-11-308, MCA), located at page 17-7038, Administrative Rules of Montana. This rule is being repealed because various legislative changes have simplified eligibility requirements in recent years, and the board was faced with the need to make substantial revisions to the rule to accommodate those changes or eliminate the rule altogether. Upon review, the board feels that the statutory provisions for eligibility

are sufficiently clear at this point in time that no rule is needed to explicate them. The sole requirements for eligibility are set forth in 75-11-308, MCA, and the board feels that current definitions and ARM 17.58.326 provide sufficient guidance with respect to those requirements at this time.

17.58.339 CORRECTIVE ACTION EXPENDITURES: DOCUMENTATION (AUTH: 75-11-318, MCA; IMP, 75-11-309, MCA), located at page 17-7057, Administrative Rules of Montana. This rule is proposed for repeal because the language has been replaced with proposed language in ARM 17.58.334.

6. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to ejohnson@mt.gov, no later than 5:00 p.m., February 10, 2011. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

7. Paul Johnson, attorney, has been designated to preside over and conduct the hearing.

8. The board maintains electronic mail list-service system lists 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 electronic mail list-service system list may subscribe to one or more of the board interested parties lists using the link PETROstep1.mcpx and following the directions. If electronic mail is unavailable, persons who wish to receive notices by U.S. Postal Service mail shall make a written request that includes the name and mailing address of the person to receive rulemaking notices. Such written request may be mailed or delivered to Terry Wadsworth, Executive Director, Petroleum Tank Release Compensation Board, P.O. Box 200902, Helena, Montana 59620-0902; faxed to (406) 841-5091; or e-mailed to Terry Wadsworth at twadsworth@mt.gov or may be made by completing a request form at any rules hearing held by the board. Further information concerning the electronic mail list-service system can be found at http://deq.mt.gov/pet/OldNews/February 2008News.mcpx.

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted on January 28, 2010, by telephone.

Reviewed by: PETROLEUM TANK RELEASE COMPENSATION BOARD

/s/ James M. Madden BY: */s/ Roger Noble*
JAMES M. MADDEN ROGER NOBLE, Presiding Officer

Certified to the Secretary of State January 3, 2011.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.53.706, 17.56.502, 17.56.505, and 17.56.506 pertaining to emergency preparedness, prevention, and response at transfer facilities, reporting of suspected releases, reporting and cleanup of spills and overfills, and reporting of confirmed releases	)	NOTICE OF PROPOSED AMENDMENT (HAZARDOUS WASTE AND UNDERGROUND STORAGE TANKS) (NO PUBLIC HEARING CONTEMPLATED)

TO: All Concerned Persons

1. On February 14, 2011, the Department of Environmental Quality proposes to amend the above-stated rules.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, please contact Elois Johnson, Paralegal, no later than 5:00 p.m., January 31, 2011, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

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

<u>17.53.706 EMERGENCY PREPAREDNESS, PREVENTION, AND RESPONSE AT TRANSFER FACILITIES</u> (1) Transfer facility owners and operators shall comply with the emergency preparedness and prevention requirements set forth in 40 CFR 265, subpart C.

(2) Transfer facility owner and operators shall also comply with the following additional emergency planning and response requirements:

(a) through (b)(iv) remain the same.

(c) The emergency coordinator or the coordinator's designee shall respond to any emergencies that arise by formulating a contingency plan under the guidelines of 40 CFR 265, subpart D, and by making appropriate responses. Appropriate responses include the following:

(i) and (ii) remain the same.

(iii) In the event of a fire, explosion, spill or other release event that could threaten human health or when the emergency coordinator has knowledge that a spill has reached surface water, the emergency coordinator shall immediately notify the national response center (800-424-8802) and the department (using the 24-hour

telephone number, ~~406-841-3911~~ (406) 324-4777). The notifications must include the following information:

(A) through (E) remain the same.

AUTH: 75-10-405, MCA
IMP: 75-10-405, MCA

17.56.502 REPORTING OF SUSPECTED RELEASES (1) Owners and operators, any person who installs or removes an UST, or who performs subsurface investigations for the presence of regulated substances, and any person who performs a tank tightness or line tightness test pursuant to ARM 17.56.407 or 17.56.408, must report suspected releases to a person within the Remediation Division of the department and the implementing agency or to the 24-hour Disaster and Emergency Services officer available at telephone number (406) ~~841-3911~~ 324-4777 within 24 hours of discovery of the existence of any of the following conditions:

(a) through (2) remain the same.

AUTH: 75-11-319, 75-11-505, MCA
IMP: 75-11-309, 75-11-505, MCA

17.56.505 REPORTING AND CLEANUP OF SPILLS AND OVERFILLS

(1) through (2) remain the same.

(3) Telephone notification required in (1) or (2) must be made to a person in the Remediation Division of the department or to the 24-hour Disaster and Emergency Services duty officer at (406) ~~841-3911~~ 324-4777. Messages left on answering machines, received by facsimile, e-mail, voice mail or other messaging device are not adequate 24-hour notice. For further assistance, the department's release reporting hotline may be reached at 1 (800) 457-0568.

AUTH: 75-11-319, 75-11-505, MCA
IMP: 75-11-309, 75-11-505, MCA

17.56.506 REPORTING OF CONFIRMED RELEASES (1) Upon confirmation of a release in accordance with ARM 17.56.504, or after a release from the PST or UST system is identified in any other manner, owners and operators, any person who installs or removes an UST, or who performs subsurface investigations for the presence of regulated substances, and any person who performs a tank tightness or line tightness test pursuant to ARM 17.56.407 or 17.56.408, must report releases to the department and the implementing agency within the specified timeframes and in the following manner:

(a) Except as provided in (1)(b), all confirmed releases must be reported to a person within the remediation division of the department, the implementing agency, or the 24-hour disaster and emergency services duty officer available at telephone number (406) ~~841-3911~~ 324-4777 within 24 hours of confirming the release. Messages left on answering machines, received by facsimile, e-mail or voice mail, or other messaging device are not adequate 24-hour notice. For further assistance, the department's release reporting hotline may be reached at 1 (800) 457-0568.

(b) through (iii) remain the same.

AUTH: 75-11-319, 75-11-505, MCA
IMP: 75-11-309, 75-11-505, MCA

REASON: The Department of Emergency Services at Fort Harrison has changed the phone number for reporting of suspected releases, reporting and cleanup of spills and overfills, and the reporting of confirmed releases. The current number will be effective only until March 31, 2011.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov, no later than February 10, 2011. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

5. If persons who are directly affected by the proposed action wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments they have to Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov, no later than February 10, 2011.

6. If the department receives requests for a public hearing on the proposed action from either 10 percent or 25, whichever is less, of the persons who are directly affected by the proposed action; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 130 based on the 1288 permitted facilities and the 11 hazardous waste facility permits in Montana.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name 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. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Elois Johnson,

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

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

Reviewed by: DEPARTMENT OF ENVIRONMENTAL QUALITY

/s/ John F. North BY: */s/ Richard H. Opper*
JOHN F. NORTH RICHARD H. OPPER, Director
Rule Reviewer

Certified to the Secretary of State, January 3, 2011.

BEFORE THE DEPARTMENT OF CORRECTIONS
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I and II pertaining to a day reporting program	)))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

TO: All Concerned Persons

1. On February 8, 2011, at 10:00 a.m., the Department of Corrections will hold a public hearing in Room 4-65 at 5 South Last Chance Gulch, at Helena, Montana, to consider the proposed adoption of the above-stated rules.

2. The Department of Corrections will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Corrections no later than 5:00 p.m. on January 21, 2011, to advise us of the nature of the accommodation that you need. Please contact Cheryl Waits, Department of Corrections, 5 South Last Chance Gulch, Helena, Montana, 59620; telephone (406) 444-4906; fax (406) 444-7909; or e-mail cwaits@mt.gov.

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

NEW RULE I DEFINITIONS For the purposes of this chapter, these definitions apply:

(1) "Board" means the Board of Pardons and Parole as authorized in 2-15-2302 and 46-23-104, MCA.

(2) "Conditional Release" means the placement by the department of an offender into the community under the jurisdiction of the department and subject to the department's rules.

(3) "Department" means Department of Corrections as authorized in 2-15-230, MCA.

(4) "Offender" means a person convicted and sentenced for a felony offense.

(5) "Parole" means the release from incarceration by the Board of Pardons and Parole prior to the completion of an offender's sentence of incarceration.

(6) "Probation" means the district court's release of an offender into the community, subject to supervision by the department.

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

STATEMENT OF REASONABLE NECESSITY: The department proposes to adopt NEW RULE I to define terms that are used in NEW RULE II.

NEW RULE II DAY REPORTING PROGRAM (1) The department may establish and administer a day reporting program in any geographic region deemed appropriate by the department. The department may also contract with a Montana

corporation to operate a day reporting program in a Montana community deemed appropriate by the department.

(2) The purposes of the day reporting program are to:

(a) provide an alternative sentencing option as a condition of a deferred or suspended sentence;

(b) provide a structured program for closer supervision of offenders on probation, parole, or conditional release;

(c) provide a sanction for offenders who violate the rules of probation, parole, or conditional release; and

(d) provide a program that can be used to transition offenders from secure facilities into the community.

(3) Pursuant to 46-18-201, MCA, a court may make participation in the day reporting program a condition of a deferred or suspended sentence. Additionally, the department may, in its sole discretion, place an offender in the program if the department determines that the offender requires that level of supervision.

(4) While in a day reporting program the offender must abide by all the standard probation and parole conditions, any special conditions imposed by the court or the board, and at a minimum, the following program rules:

(a) The offender must, at the direction of the day reporting officer, maintain a telephone land-line or other means of electronic monitoring.

(b) The offender must maintain and abide by a written weekly schedule that includes the specific times the offender will be at work, counseling or treatment, or other significant events.

(c) The offender must complete a life skills program as directed by the day reporting officer.

(d) The offender must abide by the curfew set by the day reporting program officer.

(e) The day reporting program shall have zero tolerance for alcohol and drug use. To assure compliance with the zero tolerance rule, the offender shall be subject to regular and random urinalysis and breath tests.

(f) While in the program, the offender must check-in daily by phone or other means as directed by the day reporting officer and must abide by the following face-to-face meeting schedule with the day reporting officer or designee:

(i) in Phase I, the offender is required to meet daily;

(ii) for the first 30 days of Phase II, the offender is required to meet twice a week; and

(iii) for the final 30 days of Phase II, the offender is required to meet once a week.

(5) An offender who violates program rules is subject to the following:

(a) arrest;

(b) revocation of probation, parole, or conditional release;

(c) imposition of statutory and department disciplinary sanctions;

(d) imposition of new program rules;

(e) lowering of the offender's program phase; and

(f) a requirement of more time in the program.

AUTH: 53-1-203, MCA

IMP: 46-18-201, 46-18-225, 46-23-1015, 53-1-203, MCA

STATEMENT OF REASONABLE NECESSITY: The 59th Montana Legislature enacted House Bill 726 which authorizes the department to establish a day reporting program. The main provisions of House Bill 726 are codified in 53-1-203, MCA. 53-1-203, MCA also contains the authority to adopt administrative rules to implement a day reporting program. The department proposes to adopt NEW RULE II to set the minimum requirements for a day reporting program.

4. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Cheryl Waits, Department of Corrections, 5 South Last Chance Gulch, Helena, Montana, 59620; telephone (406) 444-4906; fax (406) 444-7909; or e-mail cwaits@mt.gov, and must be received no later than 5:00 p.m., February 10, 2011.

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

6. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Myrna Omholt-Mason, 5 South Last Chance Gulch, Helena, Montana, 59620 or may be made by completing a request form at any rules hearing held by the department.

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

8. The bill sponsor contact requirements of 2-4-302, MCA apply and have been fulfilled. The primary bill sponsor of HB 726 was contacted by phone on October 7, 2010.

/s/ Diana Koch
Diana Koch
Rule Reviewer

/s/ Mike Ferriter
Mike Ferriter
Director
Department of Corrections

Certified to the Secretary of State January 3, 2011.

BEFORE THE DEPARTMENT OF CORRECTIONS
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I and II pertaining to the satellite-based monitoring program	)))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

TO: All Concerned Persons

1. On February 8, 2011, at 10:00 a.m., the Department of Corrections will hold a public hearing in Room 4-65 at 5 South Last Chance Gulch, at Helena, Montana, to consider the proposed adoption of the above-stated rules.

2. The Department of Corrections will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Corrections no later than 5:00 p.m. on January 21, 2011, to advise us of the nature of the accommodation that you need. Please contact Cheryl Waits, Department of Corrections, 5 South Last Chance Gulch, Helena, Montana, 59620; telephone (406) 444-4906; fax (406) 444-7909; or e-mail cwaits@mt.gov.

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

NEW RULE I DEFINITIONS For the purposes of this chapter, these definitions apply:

(1) "Board" means the Board of Pardons and Parole as authorized in 2-15-2302 and 46-23-104, MCA.

(2) "Conditional Release" means the placement by the department of an offender into the community under the jurisdiction of the department and subject to the department's rules.

(3) "Department" means Department of Corrections as authorized in 2-15-230, MCA.

(4) "Level 3 sex offender" means an offender who a judge has designated as having a high probability of committing a repeat sexual offense.

(5) "Offender" means a person convicted and sentenced for a felony offense.

(6) "Parole" means the release from incarceration by the Board of Pardons and Parole prior to the completion of an offender's sentence of incarceration.

(7) "Probation" means the district court's release of an offender into the community, subject to supervision by the department.

(8) "Sexual offender" means a person who has been convicted of or, in youth court, found to have committed or been adjudicated for a sexual offense as defined in 46-23-502(9), MCA.

(9) "Zone" means an area where the offender is supposed to be located or an area where the offender is prohibited from being located.

AUTH: 46-23-1010, MCA
IMP: 46-23-1010, MCA

STATEMENT OF REASONABLE NECESSITY: The department proposes to adopt NEW RULE I to define terms that are used in NEW RULE II.

NEW RULE II SATELLITE-BASED MONITORING PROGRAM (1) The department shall establish and administer a program for the continuous satellite-based monitoring of sexual and other offenders.

(2) All offenders supervised by the department are eligible to participate in the satellite-based monitoring program, including offenders ordered by the court and the board to participate in the program.

(3) An offender convicted under 45-5-503(4), 45-5-507(5), 45-5-601(3), 45-5-602(3), or 45-5-603(2)(c), MCA and released from imprisonment must participate in the program.

(4) An offender designated a level 3 sex offender who is on probation, parole, or conditional release must participate in the program.

(5) The department may establish procedures for the day-to-day operation of the program, which will include, at a minimum, the following:

(a) a time-correlated passive system of tracking of the offender's geographic location at least every five minutes using a global positioning system based on satellite and other location-tracking technology;

(b) reporting once a day of the offender's locations the previous day; and

(c) immediate notification of a zone violation.

(6) The satellite-based monitoring program shall share offender location data with local and state law enforcement officials upon request.

(7) An offender in the satellite-based monitoring program shall pay a monthly fee to the department for his/her participation in the program. The fee the department assesses shall include the actual monthly cost of equipment and services needed to operate the program and a fee to supervise the offender on the program. The total amount of the fee may not exceed $4,000.00 per year.

(8) The department shall contract with a single vendor for the equipment and services needed to monitor offenders in the program. The contract also may provide for the collection and disposition of the monthly fees provided for in (7) including the reasonable cost of collection of the fee.

AUTH: 46-23-1010, MCA
IMP: 45-5-503, 45-5-507, 45-5-601, 45-5-602, 45-5-603, 45-5-625, 46-18-206, 46-18-207, 46-23-1010, 46-23-1031, MCA

STATEMENT OF REASONABLE NECESSITY: The 59th Montana Legislature enacted Senate Bill 207 which authorizes the department to establish a satellite-based monitoring program for sexual offenders. The provisions of Senate Bill 207 are codified in 46-23-1010, MCA. 46-23-1010, MCA also contains the authority to adopt administrative rules to implement the satellite-based monitoring program. The department proposes to adopt NEW RULE II to establish the minimum requirements for a satellite-based monitoring program.

4. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Cheryl Waits, Department of Corrections, 5 South Last Chance Gulch, Helena, Montana, 59620; telephone (406) 444-4906; fax (406) 444-7909; or e-mail cwaits@mt.gov, and must be received no later than 5:00 p.m., February 10, 2011.

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

6. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Myrna Omholt-Mason, 5 South Last Chance Gulch, Helena, Montana, 59620 or may be made by completing a request form at any rules hearing held by the department.

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

8. The bill sponsor contact requirements of 2-4-302, MCA apply and have been fulfilled. The primary bill sponsor of SB 207 was contacted by phone on October 6, 2010.

/s/ Diana Koch	/s/ Mike Ferriter
Diana Koch	Mike Ferriter
Rule Reviewer	Director
	Department of Corrections

Certified to the Secretary of State January 3, 2011.

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

In the matter of the amendment of ARM 37.108.507 pertaining to Components of Quality Assessment Activities	)))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On February 14, 2011 the Department of Public Health and Human Services proposes to amend the above-stated rule.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on February 7, 2011 to advise us of the nature of the accommodation that you need. Please contact Gwen Knight, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena MT 59604-4210; telephone (406) 444-9503; fax (406) 444-1970; or e-mail dphhslegal@mt.gov.

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

37.108.507 COMPONENTS OF QUALITY ASSESSMENT ACTIVITIES

(1) Annually, the health carrier shall evaluate its quality assessment activities by using the following HEDIS year ~~2010~~ 2011 measures:

(a) childhood immunization;

(b) breast cancer screening;

(c) cervical cancer screening;

(d) comprehensive diabetes care; and

(e) HEDIS/Consumer Assessment of Health Plan Survey (CAHPS) for adults.

(2) The health carrier shall record organizational components that affect accessibility, availability, comprehensiveness, and continuity of care, including:

(a) referrals;

(b) case management;

(c) discharge planning;

(d) appointment scheduling and waiting periods for all types of health care services;

(e) second opinions, as applicable;

(f) prior authorizations, as applicable;

(g) provider reimbursement arrangements that contain financial incentives that may affect the care provided; and

(h) other systems, procedures, or administrative requirements used by the health carrier that affect the delivery of care.

(3) The health carrier may meet the requirements in (2) by submitting information to the department regarding network adequacy as specified in ARM 37.108.201, et seq., as long as the information is consistent with what is required in (2).

(4) The department adopts and incorporates by reference the HEDIS year ~~2010~~ 2011 measures for the categories listed in (1)(a) through (e). The HEDIS year ~~2010~~ 2011 measures are developed by the National Committee for Quality Assurance and provide a standardized mechanism for measuring and comparing the quality of services offered by managed care health plans. Copies of HEDIS ~~2010~~ 2011 measures are available from the National Committee for Quality Assurance, 1100 13th St. NW, Suite 1000, Washington, D.C. 20005 or on the internet at www.ncqa.org.

AUTH: 33-36-105, MCA
IMP: 33-36-105, 33-36-302, MCA

4. REASONABLE NECESSITY: The Managed Care Plan Network Adequacy and Quality Assurance Act (Title 33, chapter 36, MCA) establishes standards for health carriers offering managed care plans and for the implementation of quality assurance standards in administrative rules. ARM 37.108.501 et seq. were adopted in 2001 to establish mechanisms for the department to evaluate quality assurance activities of health carriers providing managed care plans in Montana. ARM 37.108.507 requires health carriers to report their quality assessment activities to the department using healthcare effectiveness data and information set (HEDIS) measures, nationally utilized measures that are updated annually. Since the HEDIS standards change somewhat every year, the rule must also be updated annually to reflect the current year's measures and ensure that national comparisons are possible, since the other states will also be using the same updated measures. The changes from adopted 2010 measures to the proposed 2011 measures are quoted below:

"Changes to HEDIS 2011

Childhood Immunization Status

a) Revised dosing requirements for HiB Rotavirus vaccines.
b) Defined 6 months of age for influenza as "180 days".
c) Clarified that the prior year's audited, product line-specific rate may be used for sample size reduction.

Breast Cancer Screening

a) Deleted CPT codes 76090-76092 from Table BCS-A

Cervical Cancer Screening

a) Added CPT codes 57540, 57545, 57550, 57555, 57556, 58548 to Table CCS-B

Comprehensive Diabetes Care

a) Clarified that the "HbA1c control (<7.0%) for a selected population" indicator will result in a different eligible population from all other indicators after the required exclusion criteria is applied.

b) Clarified Table CDC-1/2/3 for reporting "HbA1c Control (<7.0%) for a Selected Population" indicator.

c) Deleted UB Revenue code 022x, 077x from Table CDC-C.

d) Renamed Table CDC-P to Codes to Identify Required Exclusion for HbA1c Control <7% for a Selected Population.

e) Deleted CPT code 67038 from Table CDC-G.

f) Added LOINC codes 56553-1, 57369-1, 58448-2 to Table CDC-J.

g) Added LOINC code 57735-3 to Table CDC-K.

h) Clarified HbA1c Control (<7.0%) for a Selected Population required exclusion requirements under Note in the Hybrid Specification.

i) revised the Data Elements for Reporting table.

HEDIS/Consumer Assessment of Health Plan Survey (CAHPS) for Adults

a) This measure is collected using survey methodology. Detailed specifications and summary of changes are contained in HEDIS 2011, Volume 3: Specifications for Survey Measures.

<u>Corrections, policy changes and clarification to HEDIS 2011, Volume 2, Technical Specifications</u>

Updated Random Number Table for Measures Using the Hybrid Method

Comprehensive Diabetes Care

Throughout measure specification

(a) Replace "BP Control (<130/80 mm Hg)" with "BP Control (<140/80 mm Hg)". This indicator changed effective HEDIS 2011.

- Table CDC-P. Add CPT code 36147 to the CRF/ESRD description.
- Table CDC-D. Add LOINC code 59261-8.
- Table CDC-J. Add LOINC codes 58992-9, 59159-4.
- Table CDC-K. Add CPT code 36147 to the "Evidence of treatment for nephropathy" description.
- Table CDC-M. Delete CPT² Category II code 3075F from the Not numerator compliant (BP≥140/80 mm Hg) row under "Systolic" and add it to the Numerator compliant (BP<140/80 mm Hg) row under "Systolic."

- Hybrid Specification – Denominator. Add the following sentence to the end of the first paragraph. If the organization chooses not to report the HbA1c Control <7% for a Selected Population indicator, it may use a sample size of 411.
- Exclusions (optional).

Replace the Exclusion text with the following:

(a) Exclusionary evidence in the medical record must include a note indicating a diagnosis of polycystic ovaries at any time in the member's history, but must have occurred by December 31 of the measurement year. The member must not have a face-to-face encounter in any setting, with a diagnosis of diabetes, during the measurement year or year prior to the measurement year.

(b) Exclusionary evidence in the medical record must include a note indicating a diagnosis of gestational or steroid-induced diabetes during the measurement year or the year prior to the measurement year. The member must not have a face-to-face encounter in any setting, with a diagnosis of diabetes, during the measurement year or the year prior to the measurement year."

The option of not updating the HEDIS measure was considered and rejected because these are national quality measures which allow comparison among health plans. If the measures are not kept current, this function is lost.

5. The department intends the proposed rule amendments to be applied retroactively to January 1, 2011. There is no negative impact to the affected health insurance companies by applying the rule amendment retroactively.

6. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to: Gwen Knight, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena MT 59604-4210, no later than 5:00 p.m. on February 11, 2011. Comments may also be faxed to (406) 444-1970 or e-mailed to dphhslegal@mt.gov.

7. If persons who are directly affected by the proposed action wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments to Gwen Knight at the above address no later than 5:00 p.m., February 11, 2011.

8. If the agency receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of the persons directly affected by the proposed action; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative

Register. Ten percent of those directly affected has been determined to be one based on the two health insurance providers affected by this rule change.

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

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

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

/s/ Lisa A. Swanson
Rule Reviewer

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

Certified to the Secretary of State January 3, 2011.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 42.14.1002 and 42.14.1102 relating to rental vehicle tax	)	NOTICE OF PROPOSED AMENDMENT
	)	NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On February 25, 2011 the department proposes to amend the above-stated rules.

2. The Department of Revenue 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 Department of Revenue no later than 5:00 p.m. on January 24, 2011, to advise us of the nature of the accommodation that you need. Please contact Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-5825; fax (406) 444-4375; e-mail canderson@mt.gov.

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

42.14.1002 REGISTRATION AND PERMIT (1) Every seller required to collect the rental vehicle sales and use tax must register and file Form GenReg, provided by the department or available on the department's web site at ~~http://www.mt.gov/revenue~~ http://www.revenue.mt.gov and apply for a state account identification number for each location operating in Montana.

(2) through (7) remain the same.

AUTH: 15-68-801, MCA
IMP: 15-68-401, 15-68-402, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.14.1002 to correct the web site reference which was inadvertently missed when this rule was adopted in December 2010.

42.14.1102 QUARTERLY RETURNS AND PAYMENTS (1) Every seller, except for a seller identified in (3), is required to complete and file Form RVT or RVT-C with the Department of Revenue, P.O. Box 5835, Helena, MT 59604-5835, for each calendar quarter or portion of a quarter in operations.

(2) The seller shall remit the amount of the tax with Form ~~LFT~~ RVT or ~~LFT-C~~ RVT-C. The report will cover quarterly periods ending March 31, June 30,

September 30, and December 31, and is due on or before the last day of the month following the close of the quarter.

(3) and (4) remains the same.

(5) A seller who is required to file Form RVT or RVT-C may electronically file and pay their quarterly return through the department's web site at ~~https:/tap.dor.mt.gov~~ https://tap.dor.mt.gov. When filing electronically the return and payment is considered filed on the confirmation date provided upon submitting the return.

AUTH: 15-68-502, 15-68-801, MCA
IMP: 15-68-502, 15-68-513, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.14.1102 to correct the name of the form. The forms LFT and LFT-C are used for the lodging facilities tax.

The department is also correcting the web site for the taxpayer assistance program referenced in (5) of the rule because it was missing a character in the address string.

4. Concerned persons may submit their data, views, or arguments in writing. Written data, views, or arguments may be submitted to: Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-5828; fax (406) 444-4375; or e-mail canderson@mt.gov and must be received no later than 5:00 p.m., February 10, 2011.

5. If persons who are directly affected by the proposed amendments 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 Cleo Anderson at the above address no later than 5:00 p.m., February 10, 2011.

6. If the department receives requests for a public hearing on the proposed action from either 10 percent or 25, whichever is less, of the persons who are directly affected by the proposed action; from the appropriate administrative rule review committee; from a governmental subdivision or agency; or from an association having no 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 is approximately 30 based on approximately 300 taxpayers registered with the department who file rental vehicle taxes with the department as of December 1, 2010.

7. The Department of Revenue maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and e-mail or mailing address of the person to receive notices and specifies that the person wishes to receive notice regarding particular subject

matter or matters. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the person in 4 above or faxed to the office at (406) 444-4375, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

8. An electronic copy of this notice is available on the department's web site at www.revenue.mt.gov. Locate "Legal Resources" in the left hand column, select the "Rules" link and view the options under the "Notice of Proposed Rulemaking" heading. The department strives to make the electronic copy of this notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

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

Certified to Secretary of State January 3, 2011

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 42.14.101 and 42.14.203 relating to lodging facility use tax	)))))	NOTICE OF PROPOSED AMENDMENT NO PUBLIC HEARING CONTEMPLATED

TO: All Concerned Persons

1. On February 25, 2011, the department proposes to amend the above-state rules.

2. The Department of Revenue 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 Department of Revenue no later than 5:00 p.m. on January 24, 2011, to advise us of the nature of the accommodation that you need. Please contact Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-5825; fax (406) 444-4375; e-mail canderson@mt.gov.

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

42.14.101 DEFINITIONS The following definitions apply to this subchapter:

(1) through (7) remain the same.

(8) "Nontaxable receipts" means exempt sales as defined in ARM ~~42.14.103~~ 42.14.303. Also included are sales deemed uncollectible and written off during a specific quarterly period, and any discounts which may have been included in gross receipts but not part of the taxable sales charge to the user.

(9) through (17) remain the same.

AUTH: 15-65-102, 15-68-801, MCA
IMP: 15-65-101, 15-68-101, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.14.101(8) to correct the rule reference of ARM 42.14.103, which was transferred to ARM 42.14.303 with the last amendment to the rule in this chapter and this internal reference was missed.

42.14.203 COLLECTING, REPORTING, AND PAYING THE TAX (1) A seller of a lodging unit located in Montana must collect the lodging facility sales and use tax~~, rounded to the nearest dollar,~~ from the user and file a return with the department as required in this rule, except for a seller exempt under ARM 42.14.303 and for sales exempt under ARM 42.14.304.

(2) Every seller, except for a seller identified in (4), is required to complete and file Form LFT ~~or LFT-C~~ with the Department of Revenue, P.O. Box 5835, Helena, MT~~,~~ 59604-5835, for each calendar quarter or portion of a quarter in operation.

(3) The seller shall remit the amount of the tax with Form LFT ~~or LFT-C~~. The report will cover quarterly periods ending March 31, June 30, September 30, and December 31, and is due on or before the last day of the month following the close of the quarter.

(4) A seller who has obtained a seasonal permit is required to only complete and file ~~form~~ Form LFT ~~or LFT-C~~ for the quarters they are opened for business.

(5) If a seller has no revenue to report for a quarter, and the seller does not have a seasonal permit, the seller must file a quarter return reporting zero revenue and tax for the quarter.

(6) A seller who is required to file Form LFT ~~or LFT-C~~ may file and pay electronically their quarterly return through the department's web site at ~~https:/tap.dor.mt.gov~~ https://tap.dor.mt.gov. When filing electronically the return and payment is considered filed on the confirmation date provided upon submitting the return.

AUTH: 15-65-102, 15-68-502, 15-68-801, MCA
IMP: 15-1-208, 15-65-112, 15-65-115, 15-68-502, 15-68-513, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.14.203 to remove the rounded to the nearest dollar statement and the reference to form LFT-C. At this time, the department does not have a policy or practice of allowing taxes to be rounded to the nearest dollar. If and when such a policy or practice is developed the department will implement that policy or practice for all appropriate tax types. The department currently does not have a form LFT-C. If and when this form is developed the department will make the appropriate changes to the administrative rules.

The department is also correcting the web site for the taxpayer assistance program referenced in (6) of the rule because it was missing a character in the address string.

4. Concerned persons may submit their data, views, or arguments in writing. Written data, views, or arguments may be submitted to: Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-5828; fax (406) 444-4375; or e-mail canderson@mt.gov and must be received no later than February 10, 2011.

5. If persons who are directly affected by the proposed action 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 Cleo Anderson at the above address no later than 5:00 p.m., February 10, 2011.

6. If the agency receives requests for a public hearing on the proposed action from either 10 percent or 25, whichever is less, of the persons who are directly affected by the proposed action; from the appropriate administrative rule review committee; from a governmental subdivision or agency; or from an association having no 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 is approximately 250 based on approximately 2,500 taxpayers registered with the department who file lodging facilities use taxes as of December 1, 2010.

7. The Department of Revenue maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and e-mail or mailing address of the person to receive notices and specifies that the person wishes to receive notice regarding particular subject matter or matters. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the person in 4 above or faxed to the office at (406) 444-4375, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

8. An electronic copy of this notice is available on the department's web site at www.revenue.mt.gov. Locate "Legal Resources" in the left hand column, select the "Rules" link and view the options under the "Notice of Proposed Rulemaking" heading. The department strives to make the electronic copy of this notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

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

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

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

Certified to Secretary of State January 3, 2011

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
AND THE BOARD OF PERSONNEL APPEALS
STATE OF MONTANA

In the matter of the amendment of ARM 24.16.7506, 24.16.7541, 24.16.7544, 24.16.7547, 24.25.101, 24.25.102, 24.25.103, 24.25.104, 24.25.105, 24.25.107, 24.25.201, 24.25.203, 24.25.204, 24.25.206, 24.25.301, 24.25.302, 24.25.303, 24.25.304, 24.25.305, 24.25.306, 24.25.307, 24.25.308, 24.25.401, 24.25.501, 24.25.502, 24.25.503, 24.25.504, 24.25.505, 24.25.601, 24.25.701, 24.25.702, 24.25.703, 24.25.704, 24.25.801, 24.25.802, 24.25.803, 24.25.804, 24.26.102, 24.26.201, 24.26.202, 24.26.203, 24.26.206, 24.26.212, 24.26.215, 24.26.501, 24.26.502, 24.26.503, 24.26.508, 24.26.518, 24.26.614, 24.26.620, 24.26.630, 24.26.644, 24.26.655, 24.26.666, 24.26.680, 24.26.680B, 24.26.681, 24.26.682, 24.26.684, 24.26.685, the adoption of NEW RULES I through IX, and the repeal of 24.25.106, 24.25.108, 24.25.109, 24.25.120, 24.25.202, 24.25.602, 24.25.603, 24.25.604, 24.25.605, 24.25.606, 24.25.607, 24.25.608, 24.25.609, 24.25.610, 24.25.611, 24.25.612, 24.26.213, 24.26.216, 24.26.217, 24.26.701, 24.26.702, 24.26.705, 24.26.706, 24.26.707, 24.26.710, 24.26.711, 24.26.712, all related to collective bargaining proceedings heard by the Board of Personnel Appeals	)	CORRECTED NOTICE OF ADOPTION

TO: All Concerned Persons

1. On July 29, 2010, the Department of Labor and Industry (department) and the Board of Personnel Appeals (board) published MAR Notice No. 24-16-248 regarding the public hearing on the amendment, adoption, and repeal of the above-stated rules at page 1652 of the 2010 Montana Administrative Register, Issue Number 14. On December 9, 2010, the department published the notice of

amendment, adoption, and repeal of the above-stated rules at page 2841 of the 2010 Montana Administrative Register, Issue No. 23.

2. In preparation of submission of the fourth quarter replacement pages pertaining to MAR Notice No. 24-16-248, the department became aware that there was a clerical error made with the numbering of paragraphs within NEW RULE II [ARM 24.26.207].

3. The board has amended the following rule as proposed, but with the following changes from the original proposal, stricken matter interlined, new matter underlined:

24.26.207 DEFINITIONS (1) through (8) remain as proposed.

~~(10)~~ (9) "Respondent" means a party who is required to respond to a complaint, petition, or charge.

AUTH: 2-4-201, 39-31-104, MCA
IMP: 2-4-201, MCA

4. The replacement pages for this corrected notice were submitted to the Secretary of State on December 30, 2010.

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

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

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

/s/ JACK HOLSTROM
Jack Holstrom, Chair
BOARD OF PERSONNEL APPEALS

Certified to the Secretary of State on January 3, 2011.

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

In the matter of the adoption of New Rules I through VII, amendment of ARM 37.86.2206, 37.86.2207, 37.87.702, 37.87.703, 37.87.901, and 37.87.903, and repeal of ARM 37.86.2219 and 37.86.2221 pertaining to provider requirements and reimbursement for therapeutic group homes (TGH), therapeutic family care (TFC), and therapeutic foster care (TFOC)	))))))))))	NOTICE OF ADOPTION, AMENDMENT, AND REPEAL

TO: All Concerned Persons

1. On September 23, 2010, the Department of Public Health and Human Services published MAR Notice No. 37-518 pertaining to the public hearing on the proposed adoption, amendment, and repeal of the above-stated rules at page 2085 of the 2010 Montana Administrative Register, Issue Number 18.

2. The department has adopted New Rule I (37.87.1011), III (37.87.1015), IV (37.87.1017), V (37.87.1021), VI (37.87.1023), and VII (37.87.1025) as proposed.

3. The department has amended ARM 37.86.2207 and repealed ARM 37.86.2219 and 37.86.2221 as proposed.

4. The department has adopted 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.

NEW RULE II (ARM 37.87.1013) THERAPEUTIC GROUP HOME (TGH), REIMBURSEMENT (1) through (1)(b) remain as proposed.

(2) The therapeutic ~~and rehabilitative portion of TGH services are therapeutic~~ services provided by the lead clinical staff (LCS) and the program manager (PM) are "therapy" and "therapeutic intervention" defined as ~~follows~~:

(a) "~~Therapeutic services~~ Therapy" means the provision of psychotherapy and rehabilitative ~~remedial~~ services provided by the ~~lead clinical staff~~ LCS acting within the scope of the professional's license or same services provided by an in-training mental health professional in a TGH. ~~The purpose of these services is for maximum reduction of mental disability and restoration of a youth's best possible functional level, to alleviate the emotional disturbances, reverse or change maladaptive patterns of behavior and encourage personal growth and development.~~ ~~A~~ These services include a combination of supportive interactions, cognitive therapy, interactive psychotherapy, and behavior modification techniques which are used to

~~provide~~ induce therapeutic change for youth in TGH. (Interactive psychotherapy means using play equipment, physical devices, language interpreter, or other mechanisms of nonverbal communication.)

(b) "Therapeutic intervention" means interventions provided by the LCS or the PM under the supervision of the LCS to provide youth with activities and opportunities to improve social, emotional, and/or behavioral skill development and reduce symptoms of the youth's serious emotional disturbance. Interventions include implementing behavior modification techniques and offering psycho-educational groups and activities. Interventions may be provided to the youth individually, in a group setting or with the youth and family.

(3) The purpose of the therapeutic services in (2) is:

(a) to reduce the impairment of the youth's mental disability and to improve the youth's functional level;

(b) to alleviate the emotional disturbances;

(c) to reverse or change maladaptive patterns of behavior; and

(d) to encourage personal growth and development.

(3) through (6)(c) remain as proposed but are renumbered (4) through (7)(c).

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

5. The department has amended the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

37.86.2206 EARLY AND PERIODIC SCREENING, DIAGNOSTIC AND TREATMENT SERVICES (EPSDT), MEDICAL AND OTHER SERVICES

(1) through (2)(g) remain as proposed.

(3) The therapeutic portion of TGH, TFC, and TFOC must be prior-authorized by the department or their designee before services are provided.

(a) Review of authorization requests by the department or its designee will be made consistent with Children's Mental Health Bureau's (CMHB) Provider Manual and Clinical Guidelines for Utilization Management ~~dated December 1, 2010~~ adopted in ARM 37.87.903. A copy of the CMHB Provider Manual and Clinical Guidelines for Utilization Management can be obtained from the department by a request in writing to the Department of Public Health and Human Services, Developmental Services Division, Children's Mental Health Bureau, 111 Sanders, PO Box 4210, Helena MT 59604-4210.

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

37.87.702 MENTAL HEALTH CENTER SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE (SED), DEFINITIONS For purposes of this subchapter, the following definitions apply:

(1) "Community-based psychiatric rehabilitation and support (CBPRS)" means rehabilitation services provided in home, school, and community settings for

youth with serious emotional disturbance (SED) who are at risk of out of home or residential placement, or risk removal from current setting for youth under six years of age. CBPRS services are provided for a short period of time, generally 90 days or less, to improve or restore the youth's functioning in one or more of the ~~spheres~~ impaired areas identified in the SED definition in ARM 37.87.303. Services are provided by trained mental health personnel under the supervision of a licensed mental health professional and according to ~~a~~ rehabilitation ~~plan~~ goals.

(2) through (11) remain as proposed.

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

37.87.703 MENTAL HEALTH CENTER SERVICES FOR YOUTH WITH SERIOUS EMOTIONAL DISTURBANCE (SED), COVERED SERVICES (1) Mental health center services for youth with serious emotional disturbance include:

(a) Community-based psychiatric rehabilitation and support (CBPRS) services:

(i) are provided on a face-to-face basis primarily with a youth, and may also include consultation ~~services provided~~ on a face-to-face basis with family members, teachers, employers, or other key individuals in the youth's life when such contacts are clearly necessary to meet rehabilitation goals established in the youth's individual ~~rehabilitation~~ treatment plan;

(ii) through (iii) remain as proposed.

(iv) do not require prior authorization when provided on the same day as CSCT, Day Tx, or partial hospital services, if CBPRS is provided before or after program hours. This includes both individual and group CBPRS. Documentation of CBPRS must include time in and time out to show that CBPRS was not provided during program hours;

(v) are not allowed when the service to be provided is:

(A) through (D) remain as proposed.

(E) in a ~~shelter care facility,~~ therapeutic group home, hospital, psychiatric residential treatment facility, or other residential facilities;

(F) through (g)(i)(B) remain as proposed.

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

37.87.901 MEDICAID MENTAL HEALTH SERVICES FOR YOUTH, REIMBURSEMENT (1) Medicaid reimbursement for mental health services shall be the lowest of:

(a) remains as proposed.

(b) the rate established in the department's fee schedule. The department adopts and incorporates by reference the department's Medicaid Mental Health and Mental Health Services Plan, Individuals Under 18 Years of Age Fee Schedule dated ~~November 1, 2010~~ January 15, 2011. A copy of the fee schedule may be obtained from the Department of Public Health and Human Services, Developmental

Services Division, Children's Mental Health Bureau, 111 Sanders, P.O. Box 4210, Helena, MT 59604 or at www.mt.medicaid.org.

(2) remains as proposed.

(3) The department will not reimburse providers for two services that duplicate one another on the same day. The department adopts and incorporates by reference the Medicaid Mental Health Plan and Mental Health Services Plan for Youth Services Excluded from Simultaneous Reimbursement (Service Matrix) effective ~~December 1, 2010~~ January 15, 2011. A copy of the service matrix may be obtained from the department or at www.mt.medicaid.org.

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

37.87.903 MEDICAID MENTAL HEALTH SERVICES FOR YOUTH, AUTHORIZATION REQUIREMENTS (1) through (5) remain as proposed.

(6) Review of authorization requests by the department or its designee will be made with consideration of the department's clinical management guidelines. The department adopts and incorporates by reference the Children's Mental Health Bureau's Provider Manual and Clinical Guidelines for Utilization Management dated ~~December 1, 2010~~ January 15, 2011. A copy of the manual can be obtained from the department by a request in writing to the Department of Public Health and Human Services, Developmental Services Division, Children's Mental Health Bureau, 111 N. Sanders, P.O. Box 4210, Helena, MT 59604-4210 or at www.dphhs.mt.gov/mentalhealth/children/index.shtml.

(7) and (8) remain as proposed.

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

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

COMMENT #1: Referring to the definition of therapeutic services in proposed New Rule ll (37.87.1013), if only rehabilitative remedial versus psychotherapy services are provided, can the lead clinical staff (LCS) providing services hold a license, be credentialed, or be otherwise qualified without being a licensed clinician?

RESPONSE #1: The term "therapeutic services" will be changed to "therapy" in New Rule ll (37.87.1013) and the term "remedial" removed. Both rehabilitative and psychotherapy are terms used to define "therapy" services provided in a therapeutic group home (TGH) versus clinic setting. The department believes the LCS needs to be a licensed clinical psychologist, (psychologist) licensed master level social worker (MSW), or licensed clinical professional counselor (LCPC) to provide therapy in a TGH according to the definition in New Rule ll (37.87.1013). The department believes the LCS should be a licensed psychologist, MSW or LCPC to assure a minimum level of clinical competency in providing and supervising the delivery of

mental health treatment services to youth with a serious emotional disturbance (SED) in a TGH. The department believes clinical competency is gained through the education and experience needed in attaining professional licensure.

Based on comments received in the rule making process, changes will be made to the licensing requirements regarding the amount of therapy required by the LCS and to allow some therapeutic intervention services to be provided by the program manager (PM). The department is adding a new definition for "therapeutic intervention", PMs may provide as part of the TGH treatment requirements for licensure. Both "therapy" and "therapeutic intervention" are therapeutic services for SED youth in a TGH.

COMMENT #2: Several commenters think the proposed rule changes represent a major change in options for providers in designing services for SED youth. SED is a broad label that covers a wide variety of problems for youth in the system. These changes take the flexibility out of providing TGH services for these youth.

Since 1990, when the first intensive TGH was created, the role of the LCS has been challenged. One group believes the LCS should be a licensed clinician like a licensed clinical professional counselor (LCPC), licensed clinical social worker (LCSW), or other licensed individual. The other line of thought was that the LCS should be a master's level position that did not require licensure, like individuals with a master's degree in education or public administration with experience in providing treatment. The two lines of thought on this topic have their pros and cons. The commenters have used and would like to continue using nonlicensed, experienced individuals in the LCS position. One commenter also requested existing staff that do not meet the new requirements be "grandfathered" in.

The first LCS in the state that designed one commenter's TGH system was not licensed, but had an important combination of skills and experience. The person had a master's degree in education and several years of experience managing the children's unit run by the state. While these examples are important, the most important combination of skills and education that is functionally eliminated from our system are individuals with advanced certification in applied behavior analysis (ABA). These individuals will no longer be able to hold a LCS position resulting in the elimination of existing employees from current jobs and prevent TGHs from employing individuals with these levels of education in the future. This restriction in a state that does not have an abundance of licensed professionals seems detrimental to a system that can barely find the individuals they need now. Another commenter says licensed clinicians are not necessarily trained or have the background to deliver evidence based approaches such as ABA.

For many years and even today, psychiatry has been unavailable to provider organizations. The commenter has implemented a system over the last 15 years with over 12 psychiatrists that work with their organization, which cannot be easily duplicated. The commenter uses psychiatrists for direct supervision of their residential program.

One commenter will have to use an employment strategy and treatment system that has not demonstrated the results consistently needed for quality services. The commenter created a residential program that provides services to some of the most difficult cases in the state, and delivers more than the minimum required services for the same reimbursement as other providers. The commenter claims it is being made to mothball that system for a system that has not been able to produce comparable results over the past 22 years.

These changes will limit the number and type of employee used over the last 22 years and will shrink the number of youth eligible for the program. This limit will include youth the state has a limited capacity to get services for in-state.

In some parts of the department extreme efforts are being undertaken to secure more staff with alternate education programs like the behavior certified applied behavior analysis (BCABA or ABA) courses being offered by Montana State University-Billings (MSU-B) and being implemented and mandated by the Developmental Disabilities Program (DDP). ABA is the preferred treatment for individuals with autism, developmental disabilities and/or individuals with suppressed intellectual capacity due to their mental health challenges. The rule as proposed eliminates staff qualified by alternate educational programs like ABA and prevents youth with autism and dually diagnosed youth with developmental disabilities and mental illnesses from being served in TGHs without incurring additional costs. These costs would be prohibitive to the operation of those programs.

The commenter alleges it will be forced to lay off staff and begin the process of moving children currently in services to services that allow the necessary flexibility to use approaches like ABA and other approaches that are not best offered by licensed clinical staff.

The commenter believes the primary mode of treatment contemplated by the proposed rule changes is "talk therapy" exclusively. It is the commenter's belief that only a limited population of youth benefit from this approach. The available research supports the commenter's claims on this matter.

While commenter will adjust their program to serve youth allowed by the rule change, some youth will need the kind of approaches used since 1990. These approaches will either not be allowed or will be too expensive to offer.

RESPONSE #2: The department assumes commenter is referring to New Rule II(2)(a) (37.87.1013) regarding the new definition of therapeutic services and LCS requirements. The department appreciates the commenter's work with difficult-to-serve youth and for building psychiatric service capacity. In some cases, commenter was reimbursed more than other residential providers to serve difficult youth.

Proposed New Rule ll (37.87.1013) defines TGH "therapeutic services" and requires they be provided by the LCS within their scope of practice as a licensed psychologist, MSW or LCPC . The term "therapeutic services" is being changed to "therapy" and a new definition for "therapeutic intervention" will be added to the rule per response #1. Licensing rules will be changed to allow the PM to provide some of the required therapeutic services. This change is being made to allow TGH staff who are not a licensed psychologist, MSW or LCPC as the PM to provide specialized services such as ABA to TGH clients, because commenter works with SED/DD and autistic youth.

Interactive psychotherapy will be added to the definition of "therapy". Interactive means using play equipment, physical devices, language interpreter or other mechanisms of nonverbal communication. Proposed New Rule ll (37.87.1013) will be updated to reflect this change.

Current TGH licensing ARM requires the LCS to be a clinical psychologist, master level social worker (MSW) or have a master's degree in a human services field with a minimum of one year clinical experience. ARM 37.87.702(3) defines "In-training mental health professional services" as services provided under the supervision of a licensed mental health professional by an individual who has completed all academic requirements for licensure as a psychologist, clinical social worker, or licensed professional counselor and is in the process of completing the supervised experience requirement for licensure.

The department understands some individuals with a master's degree in social work, counseling or psychology may not meet the Department of Labor's professional licensing requirements. The department believes the LCS should be a licensed psychologist, MSW or LCPC to assure a minimum level of clinical competency in providing mental health services to SED youth. Nothing in these rules would prohibit a licensed psychologist, MSW or LCPC from becoming ABA certified.

The definition of SED is broad and includes many different mental disorders and functional impairments well outside normal developmental expectations and severe behavioral abnormalities not attributable to intellectual, sensory, or health factors for at least a six-month period or obvious predictable period of six months. The definition of "therapy" is broad enough to encompass the diverse needs of SED youth being served. The definition includes a combination of supportive interactions, cognitive therapy and behavior modification techniques, and will be updated to include interactive psychotherapy to provide therapeutic change for youth in TGH, not exclusively "talk therapy".

Many TGH providers already use licensed clinicians in their programs. Licensing rules will allow TGH providers time to come into compliance with the new LCS requirement and not grandfather existing staff into these positions. The use of in-training professionals is allowed and the PM can provide some of the required therapeutic services. The department believes this addresses the commenter's concerns regarding capacity issues.

COMMENT #3: Many commenters were concerned about the TGH cost report, assumptions made from the cost report and the occupancy rate used in the cost report. Several commenters thought the department should obtain current occupancy rates prior to making the proposed rule changes. The commenters said the department agreed not to impose additional requirements on TGH providers unless additional funds were available to cover the new costs. The commenters say the proposed rule changes will include additional costs. Several had concerns about the new LCS requirement, the added expense of providing therapy services in the group home, and not being able to use outside providers. Additional funds are not available, so the proposed rule changes should not be made. TGH reimbursement rates have been frozen and will likely be rolled back to the 2009 rate. Providers cannot continue to be expected to absorb the cost of more unfunded mandates.

The 2008 TGH cost report was flawed. The report was not presented formally to providers for discussion, adjustment and agreement. The average TGH expenses and occupancy rate were not discussed with providers before the rule was filed.

In the work groups dating back to 2004, the department said that costs would be based on an 80% occupancy rate. Several commenters believe 80% is more realistic and accurate. In the 1980s, prior to Medicaid reimbursement for TGHs, the department's "rate matrix" was based on an 80% occupancy rate.

Most TGH providers solely serve Medicaid clients. TGH expenses must be based on expected revenue. Fewer than half of TGH providers raise enough donations to subsidize reimbursement rates. Therefore, TGH expenses are expected to be below revenue.

RESPONSE #3: The department completed a cost report of TGHs for state fiscal year (SFY) 2008. Expenses were divided into four categories: (1) room and board; (2) nonlicensed observation and support; (3) licensed therapies; and (4) education. One of the 14 TGH providers did not complete the cost report. Three TGH providers who completed the cost report did not report expenses in the "licensed therapies" category and were not included in calculating the average cost of TGH "licensed therapies". The "licensed therapies" category included expenses for both licensed and nonlicensed clinicians. Medicaid reimbursement is not available for categories (1) room and board or (4) education. Based on the TGH cost report, the average cost per day for all TGH providers for category (3) licensed therapies was $23.25 per day. The average cost for TGH providers for category (2) nonlicensed observation and support was $148.47 per day. The total of these two categories is $171.72 per day. At the SFY 2011 TGH reimbursement rate of $183.98, the department is reimbursing TGH providers 7% more than the average cost of providing the Medicaid portion of TGH services. If the TGH reimbursement rate for SFY 2012 is rolled back to the SFY 2009 reimbursement rate of $180.37, the TGH reimbursement rate is 5% more than the average cost of providing the Medicaid portion of TGH services.

The department does not believe the SFY 2008 TGH cost report was flawed. The financial information and average occupancy levels used in the report were based on actual data submitted by the TGH providers, and not occupancy rates used in the past. In SFY 2008 the average occupancy rate was 88%. The department did not agree to use an 80% occupancy rate. TGH providers received a draft cost report of their expenses to review and the department gave providers a chance to respond to anything they disagreed with in the cost report. TGH providers did not disagree with the utilization data they submitted on the cost report which was used to calculate the average occupancy rate.

The department carefully considered what additional requirements should be expected in a TGH reimbursed by Medicaid and which ones could include an additional expense. The department believes therapy services provided by appropriately trained and credentialed individuals should be required in group homes reimbursed by Medicaid. Other changes in TGH licensing requirements have been made in an attempt to offset additional costs. The department would like to point out that only 13.5% of the Medicaid portion of the cost report expenses reflect "licensed therapies." The department believes the TGH Medicaid daily rate should include more licensed therapeutic services to treat SED youth.

The department does not have data on current occupancy rates, and does not think it is reasonable to use current occupancy levels with SFY 2008 expenses.

COMMENT #4: In the development of these rules the department emphasized the importance and primary goal of implementing evidence and research-based treatment. These goals are not reflected in the proposed rule. Have they been abandoned? There is no mention of providers having the capacity to report outcomes. The state has data available and could require providers to report data to be used in making decisions.

RESPONSE #4: The department believes this comment is outside of the scope of the proposed rule changes. The department is not requiring the use of evidence-based practices in these rules. The department supports provider efforts to implement evidence-based practices using current Medicaid reimbursement methodology. The department agrees with the suggestion to require providers to report data and outcomes, but will not do so at this time.

COMMENT #5: Regarding proposed New Rules l and lll (37.87.1011 and 37.87.1015), one commenter would like clarification on whether incorporating the Children's Mental Health Bureau's (CMHB) Provider Manual and Clinical Guidelines for Utilization Management (provider manual) in the rule would require notice and opportunity for comment through the rulemaking process should any future changes be made. These amendments would have the force and effect of modifying this set of rules.

RESPONSE #5: Yes. The provider manual was included in the first MAR Notice 37-518 and posted on the CMHB's web site for review during this rulemaking

process. If future changes are needed in the provider manual, the rule process will be followed, giving interested parties time to review the manual and make comments on the proposed changes. (Please note the dated version of the provider manual is incorporated by ARM 37.87.903(6).)

COMMENT #6: Referring to proposed New Rule ll (37.87.1013), does the requirement for TGH providers to meet the requirements in the provider manual require TGH providers to meet licensing standards as a licensed mental health center (MHC) and a TGH?

RESPONSE #6: No.

COMMENT #7: Referring to proposed New Rule II(5) (37.87.1013), Medicaid does not reimburse for room and board, maintenance, or any other nontherapeutic component of TGH services. However Medicaid does cover the cost for these components in PRTF or hospital level of care. This reimbursement disparity is a disincentive for community placement and an incentive for higher levels of care where board and room is paid. The commenter would like the department to begin a conversation with the Centers for Medicare and Medicaid (CMS) for consideration of paying room and board in TGH.

RESPONSE #7: The limit on Medicaid reimbursement for TGH room and board is not new. The comment is outside the scope of the proposed rule change.

COMMENT #8: Referring to proposed New Rule lV (37.87.1017), does the requirement for therapeutic family care (TFC) and therapeutic foster care (TFOC) providers to meet the requirements in the provider manual require TFC and TFOC providers to meet licensing standards as a licensed mental health center?

RESPONSE #8: No.

COMMENT #9: Referencing to proposed New Rule IV (37.87.1017), several commenters do not believe the Extraordinary Needs Aide (ENA) rate is equitable, and say that because this service is paid so much lower than community-based psychiatric rehabilitation and support services (CBPRS), it will not be used. The methodology for developing the ENA rate suggests that the lowest paid, most inexperienced staff would be hired to provide this important service to manage youth with highly unmanageable behaviors. Unmanageable behaviors according to the definition of this service are behaviors that cannot be managed by existing staff. The methodology for developing the rate of $14.56 per hour is based on having the lowest paid staff person, at $9.50 an hour, provide the service. This service has successfully been used in the past to keep youth from going to higher levels of care by using experienced staff. The commenters would like the department to conduct a survey of providers who have used this service and recommend an increase in the ENA reimbursement rate.

One commenter said they agree the current practice of using CBPRS is reimbursed at a level that exceeds the cost of delivering the one-to-one service in the structure, proximity and blocks of time utilized in TGH care. They recommend the department be consistent and look at the cost allocation method developed by the DD division. A 10 to 15% rate reduction would be reasonable, the $14.56 reimbursement rate is not. This rate reinforces the state's policy to serve less intensive youth.

One commenter said the method for calculating the ENA rate appears to set the hourly salary at $9.50 an hour. The prescription of the hourly wage and control of what these individuals do is beginning to make them look a bit like state employees. If so, they should get salaries comparable to other state employees with similar duties and responsibilities.

RESPONSE #9: The department does not believe it is necessary to conduct a survey of TGH providers who have used CBPRS services for youth in a TGH. It is not the department's intent to prescribe an hourly wage to providers for ENA staff. The base rate was chosen because it is above the $8.50 an hour minimum for the direct care wage reimbursement requirement. The administrative overhead cost was the median rate from the SFY 2008 TGH cost report and the benefit rate was based on the rate the state uses for grant applications. These rates were used in projecting costs associated with this new service. The DDP method for establishing the ENA rate will not be used. The department does not believe there are any state employees in comparable positions. The department believes the ENA reimbursement rate is adequate. ENA staff must be supervised by the LCS, who should be knowledgeable about managing youth with behavior problems. The LCS is responsible for the supervision and overall provision of treatment services to youth in a TGH. It is not the department's intent to serve less intensive youth. The intent was to make one-to-one staff services available for all TGHs and to reimburse the service adequately.

COMMENT #10: Referencing to proposed New Rule IV (37.87.1017), a commenter says the ENA rate does not allow for administrative expenses or have an allocation built in for overtime expenses.

RESPONSE #10: The ENA reimbursement rate includes an administrative overhead rate of 22.59%, which was the median rate from the SFY 2008 TGH cost report. If TGHs reported costs for overtime staff in the report, they were included in developing the ENA reimbursement rate.

COMMENT #11: Referring to proposed New Rule Vll (37.87.1025), one commenter has always provided individual, group and family therapy to youth in permanency therapeutic foster care (TFOC) out of the bundled rate. The current rule is already clear that these therapies are included in the rate.

RESPONSE #11: The department testified at the public hearing for MAR Notice 37-518 that proposed New Rule VII (37.87.1025) would be withdrawn because the definition of permanency TFOC is referenced in proposed New Rule Vl(7)

(37.87.1023). Proposed New Rule VI(7) (37.87.1023) references the definition of "intensive" level therapeutic family care (TFC) in ARM Title 37, chapters 37 and 97. The requirements of "intensive" level TFC in ARM Title 37, chapters 37 and 97 applies to permanency level TFOC. Medicaid no longer reimburses for intensive level TFC. Wording to this effect will be added to proposed New Rule VI(7) (37.87.1023) for clarity. The department will adopt proposed New Rule VII (37.87.1025) as originally proposed. The department is not changing the TFOC rules at this time, and is only moving the TFC and TFOC rules into the Children's Mental Health chapter in ARM Title 37, chapter 87, subchapter 10.

COMMENT #12: Referring to proposed New Rule Vll(1)(c) (37.87.1025), commenter proposes the department allow for the clinical supervision in TFOC to be provided by a child psychiatrist as well as a licensed psychologist.

RESPONSE #12: This comment is outside the scope of the proposed rule changes. The department is not changing the TFOC rules at this time, and is only moving the TFC and TFOC rules into the Children's Mental Health chapter in ARM Title 37, chapter 87, subchapter 10.

COMMENT #13: Referring to proposed New Rule Vll (37.87.1025), one commenter asks if permanency TFOC is available to youth who are permanently placed with a guardian or family member including parent or other voluntary placement not involving a formal foster care placement of custodial relationship established through Child and Family Services Division (CFSD).

RESPONSE #13: The department is not changing the TFOC rules at this time, and is only moving the TFC and TFOC rules into the Children's Mental Health chapter in ARM Title 37, chapter 87, subchapter 10.

COMMENT #14: The department noticed the provider manual referenced in ARM 37.86.2206 is dated December 1, 2010. The current provider manual dated, adopted and incorporated is in ARM 37.87.903(6). To have the provider manual dated in both rules is redundant and would require both rules be opened if changes were needed to the provider manual. When the provider manual is updated only 37.87.903 will be opened.

RESPONSE #14: The date will be removed from the provider manual referenced in ARM 37.86.2206(3)(a).

COMMENT #15: Two commenters, referring to ARM 37.87.702, do not believe the financial data provided regarding the increased utilization for CBPRS separates out the cost of CBPRS services provided for youth in a TGH, from youth not in a TGH. They wanted to see financial data that differentiates CBPRS service utilization from in and outside the TGHs, and for individual versus group CBPRS utilization (outside the TGH) to justify the proposed changes in the definition of CBPRS and the individual and group CBPRS limits.

RESPONSE #15: The significant increase in CBPRS was for CBPRS not provided to youth in a TGH. See fiscal information from CBPRS paid claims in the chart below. The data is incomplete for SFY 2010 because providers have 365 days to bill. Approximately 90% of the CBPRS not provided to youth in a TGH, was individual CBPRS versus group CBPRS. The group CBPRS limits in ARM 37.87.703(1)(a)(vi) were also added for quality assurance purposes.

	SFY 2008	SFY 2009	SFY 2010
MHC – CBPRS	$2,411,360	$3,398,868	$4,246,421
% Change per SFY		41%	25%
TGH – CBPRS	$451,144	$422,169	$194,147
% Change per SFY		-6.5%	-54%
Total MHC & TGH CBPRS	$2,862,504	$3,821,037	$4,440,568
% Change per SFY		33.5%	16%

COMMENT #16: One commenter, in referring to the definition of CBPRS in ARM 37.87.702, pointed out that the SED definition in ARM 37.87.303 with respect to youth under six years old does not include "spheres". The commenter asked if CBPRS will not be available to SED youth under six.

RESPONSE #16: No. CBPRS is available to SED youth under six that meet the SED criteria in ARM 37.87.303. Wording in the rule was changed to make this clear.

COMMENT #17: If the department is concerned about utilization growth in CBPRS, referring to the definition in ARM 37.87.702, it could propose a weekly maximum limit to the number of hours of CBPRS that could be provided.

RESPONSE #17: CBPRS services should be based on the individual needs of the youth. The "generally 90 days or less" definition still allows flexibility in the weekly amount of service needed by the youth. The department does not wish to limit the number of CBPRS hours per week.

COMMENT #18: Referring to the changes in the definition of CBPRS in ARM 37.87.702, one commenter believes CBPRS will only be available after a significant decline in the SED youth's level of functioning. This implies the youth must first fail before qualifying for CBPRS. This has the potential to lead to increased and more expensive services, including out-of-home placement. This service should be available at the point of diagnosis rather than waiting for the youth to become at risk of out-of-home placement or residential placement. The change in definition also represents a significant shift from a model of rehabilitation and support to one of treatment.

There is compelling evidence that demonstrates many SED youth and families succeed in managing the youth's SED when support is provided early and as often as clinically indicated. Early identification and intervention has been a core value of the system of care. The commenter would like the department to propose rules

consistent with the system of care literature rather than depart from tried and proven methods of effective mental health service delivery.

RESPONSE #18: The proposed rule does not eliminate the use of CBPRS for youth under the age of six if the youth meets SED criteria. The system of care implies a larger system than just Medicaid. The Children's Mental Health Bureau focuses on youth with SED while other parts of the system (ie: the Early Childhood Services Bureau), focus on early childhood intervention. The CBPRS definition represents a shift from support to treatment or rehabilitation services to serve those youth most in need.

COMMENT #19: Many commenters were concerned about ARM 37.87.702(1) the changes in the definition of CBPRS, the time constraints of 90 days or less, limiting the service to SED youth who are at risk of out-of-home or residential placement. Most believe the changes would make partnerships between head start programs and mental health centers unavailable. Most believe children under six are not at risk of out-of-home placement. Many referenced how important and cost effective this early mental health intervention is and without these programs, later treatment would result in greater expense for tax payers. Many requested the rule be amended to avoid eliminating these programs and not place arbitrary limits on CBPRS. The service should be continued if clinically indicated after the first 90 days.

Many commenters said that preschool mental illness is a problem. One of five preschool children have a psychiatric illness. Serious mental health problems often begin early in life and carry long-term consequences.

CBPRS is making an impact in preschool mental health and federal funding is available through Substance Abuse and Mental Health Services Administration (SAMHSA) grants for early childhood mental health. The department should apply for this grant.

Several point out that children in head start come from low income families, and many of them have experienced a number of risk factors associated with mental illness. Risk factors such as poverty, physical and sexual abuse, transient life styles or homelessness, exposure to domestic violence and drug abuse. Risk factors may have a negative impact on the child's social, emotional, or cognitive development. Persistent behavior problems can affect educational attainment, proper social development, employment, and the likelihood of criminality. Research confirms that young children's social and emotional adjustment is related to early school and future success.

One head start program conducted mental health screenings for their children in the fall. Five to 10% of them were identified as needing intensive mental health support. CBPRS is provided in the classroom in partnership with a mental health center. Several models have been tried in the head start classroom, without success. Using the CBPRS model has been successful.

They also point out that CBPRS can follow and work with the youth after head start, during the summer months and in kindergarten. This head start program receives a United Way grant for their mental health program and without this model they could lose future funding.

Several commenters said many of these children would be unable to remain in head start due to their emotional instability without this service. Often there are 20 children with two adults in head start classrooms. These adults are not trained to address the children's mental health needs. CBPRS aides provide ongoing teaching, modeling, and coaching to the children and adults in the classroom. These children need more than 90 days to learn socialization, self regulation, conflict resolution, and problem solving.

Providing CBPRS only in conjunction with other mental health services is not always cost effective. When children can begin to make changes in their self-regulation by having classroom support, there often is no need for further intervention.

One commenter understands the budget implications of unlimited CBPRS utilization. However, the 90-day limit does not reflect the intensity of the service or the clinical application of the mentoring relationship. Many youth we serve have reactive attachment, post traumatic stress and mood disorders. The relationship with the CBPRS aid may just be developing at 90 days. This would create another broken relationship for the youth. Why is this effective "wrap around" service being limited?

One commenter believed this change will not accomplish the department's goal of limiting service utilization and spending. A different method not harmful to youth could have been proposed. The new limits will result in a service that is "too little, too late". Outcome data indicates CBPRS is beneficial in avoiding out-of-home care. Youth and families will not be able to access CBPRS prior to a significant decline in the youth's functioning.

Existing guidelines suggest eligibility is based on medical necessity. The proposed changes suggest all children are limited to 90 days regardless of the child's individual medical need.

Individual and group CBPRS has been invaluable since permanency level TFOC was limited to adoptive and birth families. The first 90 days is spent establishing basic physical and psychological containment so the child feels safe, assessing problem areas and building the therapeutic relationship. Outcomes are based on relationships and not simply behavioral techniques.

One commenter's use of CBPRS is similar to Selligman's research on Learned Helplessness and Dr. Bruce Perry's work, which helps children experience positive adult relationships repeatedly for each identified sphere issue. As parents and children move through treatment they get caught in negative loops. CBPRS is another level of therapeutic intervention providing hope to the parents and child and

models emotional connection and behavioral interventions in the "working through stage". This stage generally lasts eight to 15 months. CBPRS staff work with other team members to reflect their internal worlds and relational dynamics, maintain positive behavioral progress and generalize behaviors for success upon discharge.

RESPONSE #19: The department uses procedure code H2019 for billing CBPRS services. This code is defined by the American Medical Association, Healthcare Common Procedure Coding System (HCPCS), 2010 Coders Desk Reference as a "therapeutic behavioral service" provided for a short period of time for SED youth at risk of placement in a restrictive treatment facility or from a group home to a higher level of care. The definition requires a staff member to provide one-to-one therapeutic assistance and intervention to SED youth receiving other specialty mental health services.

The department will use the proposed definition in rule for CBPRS and has added language to the rule specific to youth under six years of age to improve or restore their functioning in one or more impaired areas outlined in the SED definition that jeopardize their placement in their current setting, such as a head start program. Services may also be provided in the youth's home or community settings.

The department understands mental illness is a problem for youth under six, which is why there is a SED definition for youth under six in ARM 37.87.303. Youth under six must exhibit "severe" behavioral abnormality that results in substantial impairment in functioning for a period of or predictable period of six months. The department already requires youth under six to have a SED to receive Medicaid mental health services. This requirement is not new.

The department interprets "short term" to be generally 90 days or less. However the department has not set a limit. If the youth needs additional services, due to being at risk of out-of-home or residential placement or current setting for youth under six they can continue to receive services. Services must be medically necessary, documented in the youth's medical record, and are subject to retrospective review by the department. Services should be intense and time limited. The youth's situation may change at a later date and they may again require and receive CBPRS services.

CBPRS is being limited to those SED youth most in need, because of the significant growth in utilization.

Requiring CBPRS services to be provided with other services follows the definition for the procedure code. CBPRS is a paraprofessional service. If the youth has a SED, professional services are likely needed in conjunction with paraprofessional services for effective treatment.

Moderate level TFOC staff should be able to provide many of the direct therapeutic services one commenter uses CBPRS staff, for example: assessing the youth and family problems, building a therapeutic relationship and establishing physical and

psychological containment. Moderate level TFOC staff is required to provide active treatment directed at specific SED symptoms and behaviors and utilize some specialized behavior management techniques.

COMMENT #20: Referring to ARM 37.87.702, one commenter would like clarification about whether a rehabilitation plan for CBPRS services is the youth's individualized treatment plan, or is a separate treatment plan required. If it is a separate plan, please include a description of the individualized rehabilitation plan in the definition section.

RESPONSE #20: The term "rehabilitation plan" is not new in the definition, however, the department will change "rehabilitation plan" to "rehabilitation goals" for clarity. The term will also be changed in the provider manual. "Rehabilitation treatment plan" in ARM 37.87.703(1)(a)(i) will also be changed to " . . . meet rehabilitation goals established in the youth's individual treatment plan;" for consistency.

CBPRS rehabilitation goals must be incorporated into the youth's treatment plan and meet the licensing requirements for mental health center individualized treatment plans in ARM 37.106.1916.

COMMENT #21: Referring to ARM 37.87.702, one commenter asks if there are any duties an in-training practitioner may not perform in the delivery of any children's mental health services.

RESPONSE #21: Specific mental health duties are not identified in the definition of an in-training mental health professional in ARM 37.87.702. The only change to the rule was to reference their supervision requirements according to their professional licensing rules.

COMMENT #22: One commenter believes the term "consultation services" in reference to CBPRS in ARM 37.87.703(1)(a)(i) is unclear.

RESPONSE #22: The department agrees and has removed the wording "services provided" after "consultation" for clarity. The sentence will read, "are provided on a face-to-face basis primarily with a youth and may also include consultation on a face-to-face basis with family members, teachers, employers, or other key individuals in the youth's life . . ."

COMMENT #23: Referring to ARM 37.87.703(1)(a)(ii), one commenter said that after youth discharge from their services, they provide CBPRS with respite to youth at the request of the parents. The youth continues to receive outpatient medication management. The commenter requests clarification whether in the new rule, this would be allowable if CBPRS is documented in the initial clinical assessment, master treatment plan and quarterly treatment plans as required by mental health center rules. If the family only uses CBPRS would providers be required to pay back the CBPRS units provided?

RESPONSE #23: Respite is not considered "other mental health services" under this requirement. CBPRS services are retrospectively reviewed, and repayment to the department could be required.

COMMENT #24: Can the CBPRS provider be reimbursed for attending a treatment team meeting with family members, teachers, or other key individuals in the youth's life per ARM 37.87.703(1)(a)(i)?

RESPONSE #24: CBPRS staff may attend treatment team meetings, but will not be reimbursed for this per 37.87.703(1)(a)(v)(F). CBPRS is a face-to-face service that may include consultation with family members, teachers, employers, and other key individuals per ARM 37.87.703(1)(a)(i). Medicaid does not reimburse providers for attending treatment team meetings, except for targeted youth case managers.

COMMENT #25: Referring to ARM 37.87.703(1)(a)(ii), two commenters are concerned about the requirement that CBPRS must be provided with other mental health services and question the legality of requiring one Medicaid service in order to access another service. This is not allowable under federal Medicaid regulations.

RESPONSE #25: If the youth is at risk of out-of-home or residential placement or current setting for youth under age six, additional mental health services would be needed to treat the youth's SED. CBPRS is a para-professional service.

The department believes commenters are referring to 42 CFR section 441.18 specific to case management: not conditioning other services on the receipt of case management, not using case management to restrict an individual's access to other Medicaid services and allowing the free choice of qualified case management providers. The rules do not restrict access, condition services or limit free choice and do not violate federal regulation.

COMMENT #26: Referring to ARM 37.87.703(1)(a)(v)(E), several commenters disagree with CBPRS not being allowed for youth in a shelter care facility. The commenters would like CBPRS allowed in shelter care facilities to help stabilize youth and prevent them from being moved to more restrictive levels of care.

Shelter care is a temporary placement not reimbursed by Medicaid, therefore it is not a duplication of service. A youth may be temporarily placed in a shelter care program if they are suddenly removed from their home by child protective services. Ethical standards of care would suggest that CBPRS continue during the youth's temporary stay in shelter care, particularly since it is a service that can maintain the youth in their community. Is it the department's intent to deny CBPRS services to youth and families in all temporary settings, such as homeless shelters and domestic violence shelters?

RESPONSE #26: The department agrees with commenters and has as changed the final rule to allow CBPRS services to be provided to SED youth residing in

shelter care facilities, when they meet criteria for the service. CBPRS services may not be used to supplement shelter care facility staffing requirements and services must be based on the needs of individual youth residing in the facility.

COMMENT #27: Referring to ARM 37.87.703(1)(a)(iii) and (iv), one commenter thanks the department for changing the rule and allowing CBPRS services to be provided in day treatment programs for youth in the PRTF waiver with prior authorization and not requiring prior authorization for CBPRS services before or after program hours for services received on the same day as CSCT, day treatment, or partial hospital programs. Does this include both individual and group CBPRS?

RESPONSE #27: Yes, both individual and group CBPRS are included. The final rule will be updated to reflect this.

COMMENT #28: Referring to ARM 37.87.703(1)(a)(v) and (vi), one commenter believes this rule eliminates group CBPRS for after-school, out-of-school and summer programs and CBPRS groups for youth at the moderate level while their parents are in Family Dynamics Parent's groups. This is especially concerning when combined with ARM 37.87.702(1) containing the 90-day limit to the definition of CBPRS. CBPRS services integrate the treatment. Youth and parents experience the same model, interventions, and structured relationships. Youth experience uniform concentration on developmental issues and are saturated with corrective emotional interactions in these services. Youth can then generalize these skills into other settings, such as home, school, and community. These services also provide opportunities to safely integrate socially with peers, provide a break for parents worn out by caring for SED youth and provide a place where the youth feel accepted. These programs are needed because youth are not able to function successfully in other community programs provided by the school or day care providers. Many older SED youth cannot be trusted to be left alone in the community or at home. The limits for group CBPRS will require us to turn away youth when the number of youth exceed available CBPRS staff.

RESPONSE #28: If youth meet criteria for CBPRS, some of these programs may continue. CBPRS is being limited to those SED youth most in need, because of the significant growth in utilization. The department believes a limit on the size of group CBPRS is important, in-part to assure quality rehabilitation and individualized services to SED youth. The limit also assures the group size is manageable and safe.

COMMENT #29: Several commenters did not think ARM 37.87.703 provides enough information describing allowable CBPRS activities. The rule describes what is not allowed for CBPRS. It would be helpful to describe the purpose and allowable CBPRS interventions. I recommend the following activities be allowed and be added to ARM 37.87.703, (1) restoration of basic skills necessary to function in the community, home and family relationships; (2) redevelopment of communication and socialization skills; (3) social skills and basic and daily living skills required for success in an academic program; (4) skills development and practice of skills

necessary to structure and use leisure time; and (5) immediate intervention in a crisis situation.

RESPONSE #29: The department believes the CBPRS definition in ARM 37.87.702(1) provides enough detail regarding covered services by referring to the functional impairments listed in the definition of SED in ARM 37.87.303. CBPRS services are rehabilitative services provided to SED youth at risk of out-of-home or residential placement, or current placement for youth under six years of age. An example of a "current placement" for youth under six is a head start program. Services may be provided in the youth's home, school or community setting for a short period of time, generally 90 days or less, to improve or restore the youth's functioning in one or more areas identified in the SED definition.

COMMENT #30: Referring to ARM 37.87.901(3)**,** one commenter requested a change in the "Medicaid and Mental Health Service Plan Youth Services Excluded from Simultaneous Reimbursement" (service matrix) to allow TGHs to request prior authorization for specialized therapy outside the bundled rate in isolated cases when it may be necessary for a youth in a TGH. The example given was for outpatient therapy provided by a Montana Sex Offender Treatment Association (MSOTA) - certified therapist. The commenter has an LCSW who provides therapy to youth in their TGH, and does not see any other diagnoses that would require an outside therapist.

RESPONSE #30: The department agrees with the proposal and has changed the service matrix to allow specialized outpatient therapy on an infrequent basis for youth in a TGH, when prior authorized. Please note, however, that outpatient therapy provided by an MSOTA-certified therapist must target a qualifying SED diagnosis to be reimbursed by Medicaid. The TGH would assist the outpatient therapist in getting prior authorization.

COMMENT #31: One commenter states proposed New Rule V (37.87.1021) does not allow for TFC to be provided in regular foster homes or in kinship homes. In the current provider manual, foster homes, and kinship homes were permitted to utilize TFC services.

RESPONSE #31: The department believes the commenter is referring to the provider manual incorporated in ARM 37.87.903(6), and agrees that TFC may be provided in foster homes and kinship homes. The provider manual states on page 49 that "TFC is provided in adoptive or biological homes". Regular foster homes and kinship homes were mistakenly omitted from this sentence. The department will amend the provider manual to include foster and kinship homes.

COMMENT #32: One commenter would like clarification about why a youth who has a certificate of need (CON) for permanency level TFOC would need another CON if discharged to a moderate level TFOC. This seems unnecessary as the youth is moving to a lower level of care, requires fewer services and costs are reduced.

Eliminating this requirement would streamline the process and save the provider the time it takes to prepare and submit the CON.

RESPONSE #32: The department disagrees. A CON is necessary for both moderate and permanency TFOC levels because a youth discharging from permanency level TFOC may not meet the medical necessity criteria or need moderate level TFOC. Youth may be appropriately served with other mental health services such as outpatient therapy.

7. The department intends the rule amendments to be effective January 15, 2011.

/s/ John Koch
Rule Reviewer

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

Certified to the Secretary of State January 3, 2011.

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

In the matter of the adoption of New Rule I and II and the amendment of ARM 37.79.102, 37.79.326, 37.79.503, and 37.79.505 pertaining to Healthy Montana Kids	)))))	CORRECTED NOTICE OF ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On October 28, 2010 the Department of Public Health and Human Services published MAR Notice No. 37-524 pertaining to the proposed adoption and amendment of the above-stated rules at page 2521 of the 2010 Montana Administrative Register, Issue Number 20. On December 9, 2010 the department published the notice of the adoption and amendment at page 2845 of the 2010 Montana Administrative Register, Issue Number 23.

2. This corrected notice is being filed to correct an error in the effective date. The effective date of January 1, 2011 had been specified in the proposal notice but was inadvertently left out of the notice of adoption. The department intends the rule changes to be applied effective January 1, 2011.

3. Replacement pages for the corrected notice were submitted to the Secretary of State on December 31, 2010.

4. All other rule changes adopted, amended, and repealed remain the same.

/s/ John Koch
Rule Reviewer

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

Certified to the Secretary of State January 3, 2011.

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE

Interim Committees and the Environmental Quality Council

Administrative rule review is a function of interim committees and the Environmental Quality Council (EQC). These interim committees and the EQC have administrative rule review, program evaluation, and monitoring functions for the following executive branch agencies and the entities attached to agencies for administrative purposes.

Economic Affairs Interim Committee:

- Department of Agriculture;
- Department of Commerce;
- Department of Labor and Industry;
- Department of Livestock;
- Office of the State Auditor and Insurance Commissioner; and
- Office of Economic Development.

Education and Local Government Interim Committee:

- State Board of Education;
- Board of Public Education;
- Board of Regents of Higher Education; and
- Office of Public Instruction.

Children, Families, Health, and Human Services Interim Committee:

- Department of Public Health and Human Services.

Law and Justice Interim Committee:

- Department of Corrections; and
- Department of Justice.

Energy and Telecommunications Interim Committee:

- Department of Public Service Regulation.

Revenue and Transportation Interim Committee:

- Department of Revenue; and
- Department of Transportation.

State Administration and Veterans' Affairs Interim Committee:

- Department of Administration;
- Department of Military Affairs; and
- Office of the Secretary of State.

Environmental Quality Council:

- Department of Environmental Quality;
- Department of Fish, Wildlife, and Parks; and
- Department of Natural Resources and Conservation.

These interim committees and the EQC have the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. They also may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt, amend, or repeal a rule.

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is P.O. Box 201706, Helena, MT 59620-1706.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions:

Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR or Register) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the Attorney General (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

Known Subject

1. Consult ARM Topical Index.
   Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.

Statute

2. Go to cross reference table at end of each number and title which lists MCA section numbers and department corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through September 30, 2010. This table includes those rules adopted during the period October 1, 2010, through December 31, 2010, and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not include the contents of this issue of the Montana Administrative Register (MAR or Register).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through September 30, 2010, this table, and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule, and the page number at which the action is published in the 2010 and 2011 Montana Administrative Register.

To aid the user, the Accumulative Table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number.

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