ISSUE NO. 7

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 The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

Page Number

TABLE OF CONTENTS

PROPOSAL NOTICE SECTION

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.74.301, 17.74.350 through 17.74.357, 17.74.359, 17.74.360, 17.74.361, 17.74.364, and 17.74.365; the adoption of New Rules I through IV; and the repeal of ARM 17.74.303 pertaining to incorporation by reference, OSHA preclusion, and asbestos project management	))))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT, ADOPTION, AND REPEAL (ASBESTOS)

TO: All Concerned Persons

1. On May 4, 2011, at 1:30 p.m., the Department of Environmental Quality will hold a public hearing in Room 111, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment, adoption, and repeal of the above-stated rules.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, please contact Elois Johnson, Paralegal, no later than 5:00 p.m., April 25, 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:

17.74.301 APPLICABILITY AND PURPOSE (1) Except as otherwise specifically provided, this subchapter applies to all persons or entities engaged in an asbestos-related occupation, persons in charge of asbestos ~~abatement~~ projects, persons engaged in facility demolition or renovation activities, and persons who offer course work for accreditation of persons engaged in asbestos-related ~~abatement projects~~ occupations.

(2) The purpose of these rules is to regulate and establish criteria for certain asbestos ~~abatement~~ practices and to require statewide standards for accreditation of persons in asbestos-~~type~~ related occupations, for approval of course work, and for a fee and permit system.

AUTH: 75-2-503, MCA
IMP: 75-2-503, MCA

REASON: The department is proposing revisions to ARM 17.74.301 that conform the rule to the proposed revisions in this rulemaking notice and to the language used in 75-2-502(3), MCA. Even though "applicability and purpose" rules

generally are not enforceable, the department believes it is important that ARM 17.74.301 conforms to and explains the proposed content of subchapter 3 and the Asbestos Control Act.

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

17.74.350 INCORPORATION BY REFERENCE -- PUBLICATION DATES (1) Unless expressly provided otherwise, whenever there is a reference in this subchapter to~~:~~

~~(a)~~ a federal regulation, the reference is to the July 1, ~~2006~~ 2010, edition of the Code of Federal Regulations (CFR)~~;~~

~~(b) a section of the United States Code (USC), the reference is to the 2000 edition of the USC and Supplement III (2003); or~~

~~(c) a section of the Montana Code Annotated (MCA), the reference is to the 2005 edition of the MCA~~.

AUTH: 75-2-503, MCA
IMP: 75-2-503, MCA

REASON: Periodically, the department updates ARM 17.74.350, which incorporates by reference the CFR. The incorporation by reference process is accomplished by amending the respective publication dates specified in ARM 17.74.350. The amendments to ARM 17.74.350 would allow the department to follow the most recent edition of federal regulations, and thus maintain conformity with EPA, to preserve program authorization.

The department is proposing to delete (1)(b) because there are no references to the USC in subchapter 3.

The department also proposes to delete the reference to the MCA because the most recent version of the Asbestos Control Act is applicable even in the absence of a reference in the rules.

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

(a) and (a)(i) remain the same.

(b) National Institute of Occupational Safety and Health (NIOSH) Manual of Analytical Methods, fourth edition, August 1994, which contains a description of the 7400 Analytical Method for detecting asbestos and other fibers by phase contrast microscopy (PCM) and a description of the 7402 Analytical Method for detecting asbestos by transmission electron microscopy (TEM); and

(c) ~~Montana Asbestos Work Practices and Procedures Manual (2005)~~ Method for the Determination of Asbestos in Bulk Building Materials, EPA/600/R-93/116 (1993).

(2) remains the same.

AUTH: 75-2-503, MCA
IMP: 75-2-503, MCA

REASON: Concerning the deletion of (1)(c), the department assessed the Asbestos Control Program's rules and the Montana Asbestos Practices and Procedures Manual (manual) pursuant to a decision by the Supreme Court of the United States in Gade v. National Solid Wastes Management Association, 505 U.S. 88; 112 S. Ct. 2374, 120 L.Ed.2d 73 (1992), in which the Court held that Section 18 of the Occupational Safety and Health Act (OSH Act) preempts any state law or regulation that establishes an occupational health and safety standard on an issue for which the Occupational Safety and Health Administration (OSHA) had already promulgated a standard, unless the state had obtained OSHA's approval to adopt a state regulatory scheme. The department determined that many of the Asbestos Control Program's rules and manual requirements are preempted by the OSH Act. Because a large amount of material would have to be removed from the manual, the department has decided to remove the incorporation of the manual into the rule. Therefore, the department is proposing to remove the existing language in (1)(c).

In the new language in (1)(c), the department is proposing to incorporate by reference an asbestos analysis method (Method for the Determination of Asbestos in Bulk Building Materials, EPA/600/R-93/116 (1993)) because the method would be referenced in ARM 17.74.354. The department is proposing to incorporate this asbestos analysis method because it is EPA's preferred method. In 1979, EPA developed a protocol for analyzing asbestos in bulk insulation to support the "Asbestos-Containing Materials in Schools" program (40 CFR Part 763). This effort resulted in the publication of the Interim Method for the Determination of Asbestos in Bulk Insulation Samples, EPA-600/M4-82-020 (1982). This protocol used polarized light microscopy (PLM) and x-ray powder diffraction (XRD) analytical techniques. As EPA programs expanded into the monitoring of asbestos-containing products beyond bulk insulation materials, the need for additional analytical techniques made it necessary to revise and expand the "Interim Method." EPA developed an expanded protocol that included analysis by transmission electron microscopy (TEM) for a wide variety of building materials. The method was published in Method for the Determination of Asbestos in Bulk Building Materials, EPA/600/R-93/116 (1993). This method is referred to as the "Improved Method" and is recommended by EPA as a preferred substitute for the Interim Method. OSHA and other asbestos monitoring programs also reference this improved method.

17.74.352 DEFINITIONS For purposes of this subchapter, the following definitions apply:

(1) "Amended water" means water to which surfactant (wetting agent) has been added to increase the ability of the liquid to penetrate ACM.

~~(1)~~ (2) "Approved asbestos disposal facility" means a licensed Class II or Class IV landfill as described in ARM 17.50.504.

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

(4) "Asbestos-containing waste" has the meaning given for "asbestos-containing waste materials" in 40 CFR 61.141.

(3) through (6) remain the same, but are renumbered (5) through (8).

~~(7)~~ (9) "Asbestos project contractor/supervisor" means any person who ~~provides supervision and/or direction to asbestos workers engaged in an asbestos project~~ supervises asbestos projects and the personnel who conduct asbestos

projects.

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

~~(9)~~ (11) "Asbestos project worker" means any person other than those listed in ~~(4)~~ (6) and ~~(6)~~ (8) through ~~(8)~~ (10) who is engaged in an asbestos project, and who encapsulates, encloses, removes, repairs, renovates, places in new construction, or demolishes asbestos, or transports or disposes of asbestos-containing wastes.

(10) remains the same, but is renumbered (12).

(13) "Background level" means:

(a) the concentration of asbestos in a comparable environmental setting at or near an asbestos project site; or

(b) the concentration of asbestos that provides a defensible reference point to evaluate whether or not a release at the asbestos project site has occurred.

(14) "Building or other structure" as used in the definition of "asbestos project" in 75-2-502, MCA, has the meaning given for "facility" in 40 CFR 61.141.

~~(11) "Category I non-friable ACM" has the meaning given in 40 CFR 61.141.~~

~~(12) "Category II non-friable ACM" has the meaning given in 40 CFR 61.141.~~

~~(13) "Clean room" means an uncontaminated room having facilities for the storage of employees' street clothing and uncontaminated materials and equipment.~~

~~(14) "Containment area" means a negative-pressure asbestos project work area and decontamination unit that is configured to isolate asbestos project activities from areas that are to remain uncontaminated.~~

~~(15) "Critical barrier" means one or more layers of plastic sealed over all openings into a work area or any other similarly placed physical barrier sufficient to prevent airborne asbestos in a work area from migrating to an adjacent area.~~

~~(16) "Decontamination area" means an enclosed area adjacent and connected to the regulated area and consisting of an equipment room, shower area, and clean room, which is used for the decontamination of workers, materials, and equipment that are contaminated with asbestos.~~

(17) through (19) remain the same, but are renumbered (15) through (17).

~~(20)~~ (18) "Encapsulation" means the treatment of ~~regulated asbestos-containing material (R~~ACM~~)~~ with a material that surrounds or embeds asbestos fibers in an adhesive matrix to prevent the release of fibers, as the encapsulant creates a membrane over the surface (bridging encapsulant) or penetrates the material and binds its components together (penetrating encapsulant). This definition does not include the repainting of a previously painted~~,~~ and undamaged~~, non-friable R~~ACM surface primarily to improve the appearance of the surface.

~~(21)~~ (19) "Enclosure" ~~has the meaning given in 40 CFR 763.83~~ means an airtight, impermeable, permanent barrier around ACM to prevent the release of asbestos fibers into the air.

~~(22) "Equipment room (change room)" means a contaminated room located within the decontamination area that is supplied with impermeable bags or containers for the disposal of contaminated protective clothing and equipment.~~

(20) "Engaged in an asbestos-related occupation" means:

(a) conducting an asbestos inspection pursuant to ARM 17.74.354;

(b) creating a project design pursuant to ARM 17.74.355; or

(c) engaged in any activity for which an asbestos project permit is required

under this subchapter.

(23) remains the same, but is renumbered (21).

(22) "Friable" means able to be crumbled, pulverized, or reduced to powder by hand pressure when dry.

~~(24) "Friable asbestos-containing material" or "friable ACM" means any ACM that when dry may be crumbled, pulverized, or reduced to powder by hand pressure.~~

(25) remains the same, but is renumbered (23).

~~(26)~~ (24) "Inspection" means an activity undertaken in a facility to determine the presence or location, or to assess the condition, of ~~friable or non-friable R~~RACM or suspected ~~R~~RACM, whether by visual or physical examination, or by collecting samples of the material. This term includes reinspections of ~~friable and/or non-friable~~ known or assumed ~~R~~RACM which has been previously identified. The term does not include the following:

(a) remains the same.

(b) visual inspections performed solely to determine completion of ~~response actions~~ asbestos projects.

~~(27) "Local education agency" or "LEA" has the meaning given in 40 CFR 763.83.~~

~~(28) "Non-friable asbestos-containing material (non-friable ACM)" has the meaning given in 40 CFR 61.141.~~

~~(29) "Nonoccupational setting" means an environment in which the occupants are not handling, working with, or exposed to asbestos resulting from an asbestos project.~~

(30) remains the same, but is renumbered (25).

~~(31) "Regulated area" means an area established by an asbestos contractor or building owner to demarcate areas in which an asbestos project is being conducted, and any adjoining area where debris and waste from such asbestos work accumulate.~~

(32) remains the same, but is renumbered (26).

~~(33)~~ (27) "Renovation" ~~means altering (including modifying and/or remodeling) a facility or any of its components in any way, including the stripping or removal of RACM from a facility component. Operations in which load-supporting structural members are wrecked or taken out are demolitions~~ has the meaning given in 40 CFR 61.141.

(34) and (35) remain the same, but are renumbered (28) and (29).

(30) "Surfacing material" means material that is sprayed-on, troweled-on, or otherwise applied to surfaces, such as acoustical plaster on ceilings and fireproofing materials on structural members, or other materials applied to surfaces for acoustical, fireproofing, or other purposes.

(31) "Thoroughly inspect" means to conduct a facility demolition-specific or renovation-specific asbestos inspection, pursuant to ARM 17.74.354, for the purposes of:

(a) identifying all ACM that potentially may be impacted by the subsequent renovation or demolition; and

(b) determining which requirements of this subchapter, and the Asbestos Control Act codified at Title 75, chapter 2, part 5, MCA, apply to the proposed demolition or renovation activity.

~~(36) "Visible emissions" has the meaning given in 40 CFR 61.141.~~

AUTH: 75-2-503, MCA
IMP: 75-2-503, MCA

REASON: In ARM 17.74.352(1), the department is proposing to define "amended water" because that term is used in New Rules II, III, and IV. The addition of the definition is necessary to clarify the meaning of the rule.

The department is proposing to add "Class IV" to the definition of "approved asbestos disposal facility" because Class IV landfills may accept certain asbestos-containing wastes.

The department is proposing to add the definition of "asbestos-containing waste" because the term is used in ARM 17.74.352, 17.74.357, 17.74.359, and 17.74.360, and in New Rules I, II, and IV. Because Montana has been delegated authority to administer the asbestos National Emission Standards for Hazardous Air Pollutants (NESHAP), 40 CFR 61, subpart M (53 FR 50524), the department is proposing to define "asbestos-containing waste" to have the same meaning as the federal definition of "asbestos-containing waste material" so that the affected rule would be comparable to the federal regulation with respect to this term.

The department is proposing revisions to the definition of "asbestos project contractor/supervisor" that clarify the definition, but do not change the meaning.

The department is proposing revisions to the definition of "asbestos project worker" that list the common activities performed by an asbestos project worker, and conform the definition to the definition of "asbestos project" in 75-2-502, MCA. The proposed revisions to the definition of "asbestos project worker" clarify the definition, but do not change the meaning.

The department is proposing to add the definition of "background level" because the term is used in ARM 17.74.357(6). The addition of the definition is necessary to clarify the meaning of the rule.

The definition of "building or other structure" was included in the manual which, as noted in the statement of reasonable necessity for ARM 17.74.351, has been incorporated by reference into the rules, but no longer would be.

The department is proposing to delete the definitions "clean room," "containment area," "critical barrier," "decontamination area," "equipment room (change room)," "friable asbestos-containing material," "local education agency," "nonoccupational setting," and "regulated area" because the terms are not used in the text of subchapter 3. Also, the terms "non-friable asbestos-containing material," "visible emissions," "category I non-friable ACM," and "category II non-friable ACM" are defined in 40 CFR 61.141, which is incorporated by reference in ARM 17.74.351.

The department is proposing to replace "regulated asbestos-containing material (RACM)" with "ACM" in the definition of "encapsulation" to conform the definition to the usage of the term in 75-2-502(3), MCA. The department is proposing to delete the word "non-friable" from the definition of "encapsulation" because the word is unnecessary. The proposed revision does not change the meaning of the definition.

The department is proposing to provide the full text of the definition of "enclosure" as provided in 40 CFR 763.83. This would make the text of the

definition easier to find for people who use the rules. The proposed revision does not change the meaning of the definition.

The department is proposing to include a newly developed definition of "engaged in an asbestos-related occupation." The phrase "engaged in an asbestos-related occupation" is used only in ARM 17.74.301, Applicability and Purpose. The proposed definition would clarify the meaning of the rule. Even though "applicability and purpose" rules generally are not enforceable, the department believes it is important that this definition is added to ensure ARM 17.74.301 conforms to and explains the content of subchapter 3.

The department is proposing to add the definition of "friable" because the definition of "friable asbestos-containing material" is not used in the rules, but the term "friable" is used many times. The proposed definition of "friable" is substantively the same as the relevant portion of the existing definition of "friable asbestos-containing material."

The department is proposing to revise the definition of "inspection" by deleting "friable and/or non-friable" and replacing "RACM" with "ACM." This is necessary because some ACM is not regulated until it is removed in a regulated manner, but it still should be identified in the inspection. In addition, all ACM is friable or non-friable, so the term adds nothing to the definition. The department is proposing to substitute the phrase "asbestos projects" for the phrase "response actions" in (24)(b) to clarify the scope of visual inspections and because "response actions" appears nowhere else in subchapter 3.

The department is proposing to replace the existing definition of "renovation" with the federal definition of the same term as provided in 40 CFR 61.141. The use of the federal definition for the term "renovation" ensures that an affected rule would be comparable to the federal regulation with respect to this term. The definition of "renovation" in 40 CFR 61.141 is the same as the existing definition in ARM 17.74.352, except the existing definition includes the phrase "including modifying and/or remodeling." Both definitions include similar language that provides: "altering a facility or any of its components in any way ...." The phrase "altering a facility in any way" would include "modifying and/or remodeling." The department believes the phrase "modifying and/or remodeling" is redundant. The proposed amendment of the definition of "renovation" does not change the meaning of the definition or any rule.

The department is proposing to add the definition of "surfacing material" because the phrase is used in the proposed amendments to ARM 17.74.354. The addition of the definition of the phrase is necessary to clarify where bulk samples must be taken pursuant to ARM 17.74.354(3). The definition of the phrase is substantively the same as the definition of the same term provided in 40 CFR 763.83. 40 CFR part 763, Asbestos-Containing Materials in Schools, contains many asbestos management requirements similar to those in subchapter 3.

The department is proposing to add the definition of "thoroughly inspect" because the term is used in the proposed amendments to ARM 17.54.354. The term is used in 40 CFR 61.145(a), but there is no definition for the term provided in subpart M. The department has developed a definition for "thoroughly inspect" to ensure that the owner of an affected facility is informed as to what constitutes a satisfactory evaluation and meets the inspection standard under ARM 17.74.354.

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

17.74.353 APPLICABILITY--ASBESTOS PROJECT REQUIREMENTS

(1) All asbestos projects must be ~~performed~~ conducted in accordance with the requirements of ~~the Montana Asbestos Work Practices and Procedures Manual~~ this subchapter and 40 CFR 61, subpart M, with the following exceptions:

(a) the minimum quantities of regulated asbestos-containing material (RACM) specified in 40 CFR 61.145(a)(1)(i) and (ii) and (4)(i) and (ii) do not apply; ~~and~~

(b) for purposes of 40 CFR 61.145(a)(1) and (4), the minimum quantities of ~~RACM~~ asbestos provided in 75-2-502(3), MCA, ~~shall~~ apply~~.~~;

(c) in 40 CFR 61.145(b)(1), pertaining to notification requirements, "Provide the department with written notice of intention to demolish or renovate. Delivery of the notice by U.S. Postal Service, commercial delivery service, facsimile, email, or hand delivery is acceptable, and delivery of the notice is complete when the department receives the notice" is substituted for "Provide the Administrator with written notice of intention to demolish or renovate. Delivery of the notice by U.S. Postal Service, commercial delivery service, or hand delivery is acceptable";

(d) in 40 CFR 61.145(b)(3), pertaining to the written notice of intention to demolish or renovate, "Notice must be received by the department as follows:" is substituted for "Postmark or deliver the notice as follows:"; and

(e) alternate work practices may be used if approved in writing by the department in advance. Requests for approval to employ alternate work practices must be submitted to the department on a form provided by the department.

(2) remains the same.

AUTH: 75-2-503, MCA
IMP: 75-2-503, MCA

REASON: The department is proposing to delete the reference to the Montana Asbestos Work Practices and Procedures Manual from (1) for the same reasons given in the statement of reasonable necessity for ARM 17.74.351 for the deletion of the reference to the manual from ARM 17.74.351(1)(c). The department is proposing to replace the reference to the manual with "this subchapter" because many of the requirements in the manual that are not preempted by the OSH Act are proposed to be included in subchapter 3 in this rulemaking.

In (1)(b), the department is proposing to replace the federal term "RACM" with "asbestos," which is used in the Asbestos Control Act. Because (1)(b) concerns the Asbestos Control Act, it is necessary to use "asbestos."

The department is proposing to add (1)(c) and (d) to clarify the effective date of receipt of notification and to reflect the program's current business practice. It is necessary to define when delivery is accomplished because there are many things that can delay or otherwise affect mail delivery. It is more appropriate for the ten-day period for NESHAP-required notification to begin upon receipt of the notice by the department rather than upon the date of the postmark, in order to allow for consistency in the time available for the department to act. In 75-2-503(2), MCA, the

Legislature requires the department to issue asbestos project permits for asbestos projects costing $3,000 or less within seven calendar days following the "receipt" of a properly completed permit application and the appropriate fee, not within seven days following the date of the postmark. If the department has the same time period in all cases, the department will be able to act more consistently in all cases and not be rushed into a potentially wrong decision merely because mail service was delayed, resulting in insufficient time for the department to adequately assess what it should do.

The department is proposing in (1)(e) to allow alternative work practices, but only when a request is submitted on a form provided by the department and department approval is obtained prior to implementation of the alternate work practice. Alternate work practices upon approval by the department were provided for in Section 4.02 of the manual, and (1)(e) retains that flexibility where the department finds it to be appropriate.

17.74.354 INSPECTION REQUIREMENTS ~~OF~~ FOR DEMOLITION AND RENOVATION ACTIVITIES (1) Prior to any demolition or renovation of a facility, the owner or operator shall ~~have the facility inspected for the presence of asbestos by a Montana-accredited asbestos inspector~~ ensure the facility or part of the facility where demolition or renovation actions will occur is thoroughly inspected by a department-accredited asbestos inspector in accordance with this subchapter.

(2) ~~An inspection required under this rule must be conducted in conformance with the Montana Asbestos Work Practices and Procedures Manual.~~ The owner or operator shall ensure that a copy of the inspection report is kept on site during the asbestos project, and during subsequent renovations or demolition. The inspection report must be made available to the department upon request.

(3) A department-accredited asbestos inspector conducting an inspection in accordance with this subchapter shall:

(a) visually inspect the areas that may be affected to identify the locations of all suspect ACM;

(b) touch all suspect ACM to determine whether it is friable;

(c) collect bulk samples from each surfacing material that is not assumed to be ACM in a statistically random manner that is representative of the surfacing material. Samples must be collected as follows:

(i) at least three bulk samples must be collected from each surfacing material area that is 1,000 ft^2 or less;

(ii) at least five bulk samples must be collected from each surfacing material area that is greater than 1,000 ft^2, but less than or equal to 5,000 ft^2; and

(iii) at least seven bulk samples must be collected from each surfacing material area that is greater than 5,000 ft^2;

(d) collect samples from thermal system insulation as follows:

(i) at least one bulk sample from each area of patched thermal system insulation that is not assumed to be ACM;

(ii) at least three random bulk samples from each type of thermal system insulation that is not assumed to be ACM;

(iii) no bulk samples where the accredited inspector has determined that the thermal system insulation is fiberglass, foam glass, rubber, or other non-ACM;

(e) randomly collect at least three bulk samples from all mechanical system insulation and fittings, such as tees, elbows, and valves, that are not assumed to be ACM;

(f) randomly collect at least three bulk samples from each type of miscellaneous material that is not assumed to be ACM; and

(g) collect at least three bulk samples from any type of non-friable suspected ACM that is not assumed to be ACM.

(4) For inspections conducted under (3), the inspector shall ensure that:

(a) bulk samples are analyzed by persons or laboratories with proficiency demonstrated by current successful participation in a nationally recognized testing program such as the National Institute of Standards and Technology (NIST), National Voluntary Laboratory Accreditation Program (NVLAP), the round robin for bulk samples administered by the American Industrial Hygiene Association (AIHA), or an equivalent testing program accepted in writing by the department prior to analysis;

(b) except for wallboard system samples, bulk samples are not composited for analysis, but are analyzed for asbestos content by polarized light microscopy (PLM) using the "Method for the Determination of Asbestos in Bulk Building Materials" (EPA/600/R-93/116) or another method acceptable to the department; and

(c) the sample analytical report includes:

(i) results of the analysis;

(ii) method of analysis;

(iii) name and address of each laboratory performing an analysis;

(iv) the laboratory's accreditation number;

(v) the date of analysis; and

(vi) the name and signature of the person performing the analysis.

(5) For the purposes of an inspection conducted under (3):

(a) a material is considered to be ACM if the analytical results of at least one sample collected from that material show that asbestos is present in an amount greater than 1%; and

(b) a material is considered not to be ACM only if the analytical results for all samples collected from the material show that asbestos is not present in an amount greater than one percent.

(6) For inspections conducted under (3), the asbestos inspector shall report the findings in a written inspection report to the owner of the building or the operator conducting the planned demolition or renovation activity. The asbestos inspection report must include:

(a) the site of the asbestos inspection;

(b) the scope and purpose of the inspection and how it corresponds to the extent of the planned renovation or demolition activity;

(c) the date of the asbestos inspection;

(d) the signature of the accredited inspector conducting the asbestos inspection;

(e) the inspector's accreditation number and expiration date;

(f) an inventory of all assumed asbestos-containing and sampled materials;

(g) all sample locations;

(h) where ACM is located by type;

(i) the areas where friable material is assumed to be ACM, and areas where non-friable material is assumed to be ACM;

(j) a copy of the sample analytical report with the name and address of each laboratory performing an analysis, the date of analysis, and the name and signature of the person performing the analysis; and

(k) information on whether it will be necessary to remove any ACM before any activity begins that would break up, dislodge, or similarly disturb the material.

(7) If the inspection required in (1) was not conducted or was improperly conducted prior to commencement of renovation or demolition activities, an inspection must be conducted in accordance with (3) as soon as possible upon discovery of the missing or improper inspection, and before any additional renovation or demolition activities occur, with the addition of the following:

(a) industry-recognized procedures must be employed for sampling and analyzing settled dust to determine the extent of any asbestos contamination. The department will provide a list of acceptable procedures upon request;

(b) air sampling may not be used by the department-accredited asbestos inspector as the sole means of evaluating whether asbestos is present; and

(c) the department-accredited asbestos inspector shall summarize sampling and analytical procedures and evaluation findings in a written report. A recommendation on whether a new or continued asbestos project is necessary based on the evaluation must be included in the written report. The report must be submitted to the department before any further renovation or demolition work occurs.

(8) The department may conduct its own asbestos inspection if it deems an inspection conducted under (7) deficient.

(9) An inspection conducted under (7) does not excuse any failure to complete the inspection required in (1).

AUTH: 75-2-503, MCA
IMP: 75-2-503, MCA

REASON: The department is proposing to revise (1) to include the term "thoroughly inspected." Because Montana has been delegated authority to administer subpart M, the department is proposing to use the federal term "thoroughly inspect" in a manner comparable to its use in subpart M (40 CFR 61.145(a)).

The proposed new (2) would require that a copy of the inspection report be kept on site during the asbestos project and any subsequent renovations or demolition. It is necessary to keep the inspection report on site to provide a reference for asbestos workers and the supervisor for identifying asbestos sources to be addressed during the course of an asbestos project. Maintaining the inspection report on site also would inform department inspectors about the presence and location of asbestos, which would assist the department in determining compliance. Finally, maintaining the inspection report on site during subsequent renovation and demolition activities will provide a reference for workers to ensure that they do not impact any ACM that might remain in the facility after the asbestos project is completed.

Proposed new (3) through (6) are substantively the same as the comparable sections contained in 3.01 through 3.03 of the manual, except for proposed new (3)(d). Proposed (3)(d) requires sampling of all patched thermal system insulation if it is not assumed to be ACM, while the comparable section in the manual requires sampling of such material only where there is less than "six linear or square feet." Patched thermal system insulation that is not assumed to be ACM should be sampled, and patches larger than six linear or square feet should not be exempt.

The department is proposing new (7) through (9) to address the situation where a thorough inspection was not conducted prior to the start of a renovation or demolition. The purpose is to ensure that a proper, if belated, inspection is conducted subsequently consistent with subpart M and that the scope of any ensuing project is tailored to address possible impacts from an unpermitted project to the facility, if necessary. The requirement to conduct a subsequent inspection is necessary to protect public health or mitigate harm to public health and the environment by ensuring that asbestos within a facility is properly characterized and any disturbed asbestos is addressed through proper work practices, if necessary.

17.74.355 ASBESTOS PROJECT PERMITS (1) remains the same.

(2) The ~~owner, or the~~ asbestos project contractor~~,~~ or the owner or operator of the facility where an asbestos project is to be conducted shall submit to the department, on a form provided by the department, an application for a project permit that contains the following:

(a) a completed, signed ~~original~~ Montana Asbestos Project Permit Application and NESHAP Demolition/Renovation Notification form provided by the department; and

~~(b) a description of the facility, the asbestos project to be performed, and the dates during which the asbestos project will be performed;~~

~~(c) a signed statement by the owner or the asbestos project contractor/supervisor that all work performed under authorization of the requested permit will be performed in accordance with this subchapter;~~

~~(d) a list of the asbestos project workers and contractor/supervisors who will be performing functions on the project, including their Montana accreditation identification numbers and accreditation expiration dates;~~

~~(e)~~ (b) the permit fee required under ARM 17.74.401~~;~~.

~~(f) a project design prepared by an asbestos project designer. At a minimum, the asbestos project design must contain the following information:~~

~~(i) a description of the physical work area, including a drawing (not necessarily to scale), indicating the location of exhaust ventilation machines, decontamination enclosures and waste load-out area;~~

~~(ii) a description of the amount of RACM to be removed, encapsulated, enclosed, repaired, transported, or disposed;~~

~~(iii) a description of how the project will shut down and lock out electric power and heating, ventilation, and air conditioning systems;~~

~~(iv) a description of precleaning and removal of objects from the work area;~~

~~(v) a schedule for sealing off all openings with critical barriers including, but not limited to, corridors, doorways, skylights, ducts, grills, diffusers, and other penetrations of the work area;~~

~~(vi) a description of containment barriers including airlocks, fire and emergency exits, and labeling procedures to be used on barriers;~~

~~(vii) a description of the worker decontamination enclosure system to be used;~~

~~(viii) a description of exhaust ventilation systems to be used;~~

~~(ix) a description of alternate methods of containment to be used, such as glove bags, removal of the entire asbestos covered pipe or structure, and construction of mini-enclosures, which, if used, must comply with the Montana Asbestos Work Practices and Procedures Manual.~~

~~(x) a description of personal protective equipment and clothing to be worn by asbestos project workers;~~

~~(xi) a description of work practices to be followed by asbestos project workers;~~

~~(xii) a description of methods to be used to remove, encapsulate, repair, or enclose RACM;~~

~~(xiii) a description of wetting agents, encapsulants, and sealants to be used;~~

~~(xiv) a description of the air monitoring plan and the identity of the individual conducting the air monitoring; and~~

~~(xv) a description of the procedures to be used for transportation and disposal of RACM.~~

(3) If an application is deficient or incomplete, the department shall notify the applicant of the information necessary to complete the application. If the department has not received the information within ~~its established time frame~~ ten days from the date of the deficiency letter, the application will be considered withdrawn.

(4) If the dates during which an asbestos project is to be conducted change, the asbestos project contractor/supervisor, or the owner ~~of the facility~~ or operator shall notify the department of the change at least 24 hours prior to:

(a) through (5) remain the same.

(6) The department shall issue asbestos project permits for asbestos projects having a cost of $3,000 or less within seven calendar days following the receipt of a properly completed permit application and the appropriate fee.

(7) A copy of the asbestos project permit application, permit, project design, contract, and sketch must be posted and maintained on site in a conspicuous location during the asbestos project.

(8) For an asbestos project limited to transportation and disposal, the posting of the project sketch required in (7) does not apply.

AUTH: 75-2-503, MCA
IMP: 75-2-503, 75-2-511, MCA

REASON: The department is proposing revisions to (2)(a) that clarify the rule, but do not change the meaning.

The department is proposing to delete (2)(b) through (d) and (2)(f) because these requirements are preempted by the OSH Act. The deletion of these subsections is for the same reasons given in the statement of reasonable necessity for the deletion of the manual from ARM 17.74.351(1)(c).

In (3), the department is proposing to add a defined time frame "ten days from

the date of the deficiency letter" in place of the phrase "established time frame." The standard "ten days from the date of the deficiency letter" reflects the program's current business practice for submittal of information. It is necessary for the department to continue to be consistent in this matter and for the applicant to know the exact time frame for submittal of information.

The department is proposing to add "operator" in (4) because this will allow notice of a change of dates to be provided to the department by other persons as authorized in the NESHAP and does not limit the notice requirement to the asbestos project contractor/supervisor. It gives greater flexibility in giving notice without causing any detriment to the department's needs.

The department is proposing to add new (6), which is a restatement of 75-2-503(2), MCA. The restatement of the statute would provide in another location the time that the department has to issue an asbestos project permit which would be beneficial to an applicant and make the rules more complete.

The proposed new (7) would require that a copy of the permit application, permit, design, contract, and sketch be kept on site during the asbestos project. It is necessary to keep these on site to provide a reference for asbestos workers and the contractor/supervisor to identify the asbestos tasks to be addressed during the course of an asbestos project. Maintaining the permit application, permit, design, contract, and sketch on site also would assist the department in determining compliance.

The proposed new (8) would state that it is not necessary to post a project sketch for transportation and disposal projects because a sketch would not have any utility.

17.74.356 ASBESTOS PROJECT CONTROL MEASURES (1) An asbestos project contractor/supervisor shall be:

(a) physically present at all times at the work site when regulated work is being conducted on an asbestos project.;

(b) ~~The asbestos project contractor/supervisor shall be~~ accessible to all asbestos project workers; and

(c) responsible for ensuring that the asbestos project complies with the asbestos project permit and the project design.

~~(2) Asbestos projects, including any on-site air monitoring, must comply with the requirements of the Montana Asbestos Work Practices and Procedures Manual.~~

~~(3)~~ (2) ~~Upon written request, the department may approve a~~Alternate control measures that are equivalent to those required under this ~~rule~~ subchapter may be used if written approval is obtained from the department in advance.

AUTH: 75-2-503, MCA
IMP: 75-2-503, MCA

REASON: The department is proposing amendments to (1) to reformat the existing sentence without changing the meaning of that section of the rule, and to provide for the addition of new (1)(c). The department is proposing to add (1)(c) to clarify which person is responsible for compliance with the asbestos project permit and the project design. The deletion of (2) is proposed for the same reason given in

the statement of reasonable necessity for the deletion of the reference to the manual from ARM 17.74.351(1)(c). The department is proposing to substitute "subchapter" for "rule" in existing (3) to correct a clerical error and has reformatted that section without changing the meaning.

17.74.357 STANDARDS AND METHODS FOR CLEARING ASBESTOS PROJECTS AND REQUIREMENTS FOR PERSONS CLEARING ASBESTOS PROJECTS (1) At the conclusion of any asbestos project conducted in a facility, the owner of the facility or the owner's designee shall ~~sample and analyze the air to ensure that the indoor concentration of airborne fibers in a nonoccupational setting for each of five samples is less than or equal to 0.01 fibers per cubic centimeter of air or 70 structures per square millimeter of filter. Clearance sampling is not required if an asbestos project in a facility has occurred immediately prior to demolition of the entire facility, and the facility is not reoccupied prior to demolition. The five air samples must be taken in accordance with the Montana Asbestos Work Practices and Procedures Manual~~ ensure that final visual inspection and air clearance sampling are conducted in all asbestos project work areas.

(2) ~~The department may approve alternate work practices.~~ The concentration of asbestos fibers in air clearance samples collected pursuant to (1) must be:

(a) less than or equal to 0.01 fibers per cubic centimeter of air for each of five samples collected within the work area, if analyzed by PCM. The PCM analysis must be conducted using the NIOSH 7400 or NIOSH 7402 method; or

(b) less than or equal to the average concentration of 70 structures per square millimeter for five samples collected within the work area, if analyzed by transmission electron microscopy (TEM). The TEM analysis must be conducted using EPA's interim TEM analytical methods provided in 40 CFR 763, subpart E, appendix A.

(3) Final visual inspection and clearance sampling and analysis must be conducted as follows:

(a) a person performing a final visual inspection and final air clearance sampling shall:

(i) observe the entire asbestos project area to verify that the asbestos project contractor has removed all visible asbestos-containing waste, dust, and debris from the work area;

(ii) require any necessary recleaning by the asbestos project contractor and conduct subsequent visual inspections that verify that the asbestos project contractor has removed all ACM identified in the asbestos project permit and related asbestos-containing waste, dust, and debris from the work area; and

(iii) complete a signed, written affidavit verifying that the asbestos project contractor has removed all ACM identified in the asbestos project permit and related asbestos-containing waste, dust, and debris;

(b) a person collecting final air clearance samples shall:

(i) ensure final clearance air sampling and testing are not performed until after the final visual inspection has been completed in accordance with this rule;

(ii) once the work area has passed the final visual inspection, sweep an air stream from a high-speed blower or equivalent air-blowing device across all surfaces

in the work area for a time adequate to disturb air in all areas of the work area prior to beginning final air clearance sampling;

(iii) ensure the air is continually agitated, creating maximum air disturbance in all potentially occupied areas, i.e., continually running fans, during the collection of final air clearance samples. Agitating the air in the work area prior to final air clearance sampling is not required for unoccupied areas such as crawl spaces; and

(iv) immediately after agitating the air in the work area, begin collecting at least five final clearance air samples in the work area;

(c) for an asbestos project with more than a single isolated work area within a large space contained by four walls and a ceiling, the owner or operator of a renovation or demolition activity shall ensure the isolated work areas are sampled by taking at least one air sample within each isolated work area. If more than five isolated work areas are used in a space contained by four walls and a ceiling, at least five aggressive air samples must be collected. The first four air samples must be gathered from those isolated work areas where the greatest potential for asbestos exposure exists; the fifth sample must be taken in the last isolated work area in which the asbestos project occurred;

(d) for asbestos projects employing glovebags, the owner or operator of the renovation or demolition activity shall have at least one aggressive air sample collected in the immediate area of each glovebag, with at least five air samples collected for each space contained by four walls and a ceiling. If more than five glovebags are used in a space contained by four walls and a ceiling, at least five air samples are required for that space. The five samples must be gathered from areas where the greatest potential for asbestos exposure exists;

(e) the asbestos project may not be cleared until after the final visual inspection and after the results of all required air clearance samples demonstrate that asbestos concentrations do not exceed the applicable concentration specified in (2);

(f) persons conducting a final visual inspection and final air clearance sampling and testing shall record:

(i) the names of the asbestos project contractor/supervisor and the person or persons conducting final visual inspection and final air clearance sampling;

(ii) the name and address of the facility site and location of the asbestos project;

(iii) the number of the asbestos project permit issued by the department;

(iv) the date of final visual inspection and final air clearance sampling;

(v) whether the work area was aggressed;

(vi) the number of samples collected;

(vii) the type of samples (i.e., PCM or TEM);

(viii) a statement of whether final visual inspection and final air clearance sampling has documented the completion of the asbestos project;

(g) the final visual inspection and air clearance sampling report must include the signatures of the project contractor/supervisor and final air clearance sampling person attesting to the completion of the asbestos project; and

(h) the results of the final visual inspection and final air clearance sampling and testing must be maintained by the asbestos project contractor and by the person who performed the sampling and must be made available to the department within

five working days of a request for the results.

(4) For asbestos projects with final air clearance sampling, the person conducting final air clearance sampling shall:

(a) collect five samples of air, with each sampling at least 1,199 liters of air, by using an air sampling pump capable of drawing a volume that is equal to or greater than 1,199 liters of air through each of the five millimeter filters, at a rate equal to or greater than one liter and less than ten liters per minute for TEM samples and equal to or greater than one liter and less than 16 liters per minute for PCM samples;

(b) ensure that the flow rate for each air sampling pump is calibrated at the beginning and end of the sampling period; and

(c) ensure air sampling cassettes are placed four to six feet above the floor at a 45 degree angle down. The cassettes must be uniformly distributed throughout the work area. At least one cassette must be located in each room. If the asbestos project was conducted in more than five rooms, a representative sample of rooms must be selected. Each cassette must be subject to normal air circulation, avoiding room corners, walls, ceilings, obstructed locations, and sites near windows, doors, or vents.

(5) If the background level of asbestos, as identified by the thorough inspection required in ARM 17.74.354(1), is determined to exceed the maximum allowable concentration in (2), the department may issue a written waiver from (3)(e) upon receipt of a written request in advance of the asbestos project.

(6) An asbestos project is considered complete when the final visual inspection documents no residual visible ACM, dust, or debris is present, and the results of clearance air sampling meet the requirements of (2).

(7) Air samples required by this rule may be analyzed only by laboratories accredited by the American Industrial Hygiene Association (AIHA) or laboratories that participate in the AIHA proficiency analytical testing (PAT) program and that have received a "proficient" rating for asbestos PCM samples, or another laboratory accepted in writing by the department. For sampling and sample analysis, a quality assurance program must be implemented as described in the NIOSH 7400 method or another quality assurance program accepted in writing by the department. PAT results must be submitted to the department upon request.

(8) PCM analyses required by this rule may be conducted only by a person certified in the NIOSH 582 or 582E sample collection and analytical method and who participates in a round robin quality assurance/quality control program for PCM analysts or another certification or quality assurance/quality control program accepted in writing by the department in advance.

(9) TEM sample analyses required by this rule must be conducted by a laboratory accredited by the National Voluntary Laboratory Accreditation Program or a laboratory accredited by an equivalent accreditation program that is accepted in advance by the department in writing.

(10) Proposed alternate standards and methods for clearing asbestos projects that provide results at least as accurate as the standards and methods set forth in (1) through (9) may be used if approved in advance by the department in writing. Requests for approval to employ alternate standards and methods must be submitted in advance to the department on a form provided by the department.

(11) A person performing a final visual inspection and final air clearance sampling:

(a) must be accredited by the department as an asbestos project worker or asbestos project contractor/supervisor; and

(b) may not be contractually associated with the asbestos project contractor, and there may not be any common ownership or employment relationship between the person or entity carrying out the asbestos project and the person or entity conducting the final clearance or sampling and analysis operations.

AUTH: 75-2-503, MCA
IMP: 75-2-503, MCA

REASON: The department is proposing a minor revision to (1) that clarifies the rule, but does not change the meaning. The department is proposing to delete the phrase "nonoccupational setting" from (1) because the phrase has no logical purpose in the sentence. The proposed deletion of the phrase does not change the meaning of the rule.

The department is proposing to divide existing (1) into three sections. New (2) contains the standards from (1) and adds the methods by which the required sampling must be done. NIOSH 7400 and TEM were the methods required in the manual. NIOSH 7402 was added because it allows differentiation between asbestos and nonasbestos fibers. The proposal to create three sections clarifies the rule, but does not change the meaning of the rule.

The department is proposing to delete existing (2) concerning alternative methods and move the provision to ARM 17.74.353(1)(e). The inclusion of existing (2)'s reference to work practices in ARM 17.74.357 is not logical and appears to have been in error, as work practices already would have been employed before the clearance stage of any project. The alternative work practices referenced in existing (2) do not apply to the standards and methods for final clearance addressed in ARM 17.74.357, but to work practices found in 40 CFR part 61, subpart M, which is addressed in ARM 17.74.353(1).

Proposed (3) through (9) are substantively the same as the comparable sections contained in 6.01 through 6.10 from the manual, except proposed new (7), (8), and (9) would allow alternatives to the required specifications, if the alternatives are acceptable to the department. It is necessary to allow some flexibility in specifications for laboratory analyses, quality control, and accreditation given that the advance of technology often results in new methods of analysis, quality control, and accreditation and the department does not want such methods to be disallowed out of hand.

Except as specified above, the proposed move of these sections from the manual to ARM 17.74.357 would not change the content of subchapter 3.

The department also proposes to add new (10), which provides that the department may approve alternate standards and methods for clearing asbestos projects that provide results at least as accurate as those set forth in the rule. The department should have the flexibility to allow alternative work practices to clear a project where the specified standards and methods may be inappropriate under particular circumstances, as long as the alternative can be demonstrated to provide

equally accurate results. The proposed alternative must be requested in advance so the department has an opportunity to ensure that the alternative standard or method is at least as accurate as the required standard or method before it is employed.

The department proposes to add new (11), which sets certain requirements for persons conducting final visual inspection and final air clearance sampling. Section (11) is substantively the same as sections 6.01(a) and (b) of the manual, with the additional provision in (11)(b) that would bar any common ownership or employment relationship between the person or entity conducting the final visual inspection and final air clearance sampling and the person or entity carrying out the asbestos project. Prohibiting only contractual relationships between persons carrying out an asbestos project and persons clearing those projects does not prevent many of the situations where conflicts of interest may occur. Where the person or entity carrying out the clearance employs any of the same persons or shares any part of its ownership with the person or entity that carried out the abatement project, the potential for a conflict of interest is at least as great as where there is a contractual relationship. It is important to avoid even the appearance of a conflict, much less the presence of an actual conflict.

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

17.74.359 ANNUAL ASBESTOS PROJECT PERMITS (1) remains the same.

(2) The owner or operator of a facility may apply to the department for an annual asbestos project permit if the facility:

(a) and (b) remain the same.

(c) maintains an asbestos health and safety program that incorporates standard operating procedures for employees involved in asbestos projects ~~in accordance with the Montana Asbestos Work Practices and Procedures Manual~~.

(3) An owner or operator conducting asbestos projects under an annual asbestos project permit shall comply with all requirements pertaining to asbestos project notification.

(4) The owner or operator of a facility applying for an annual asbestos project permit shall submit to the department:

(a) and (b) remain the same.

(c) a completed application on a form provided by the department, including:

(i) through (iv) remain the same.

(v) a signed statement that ~~removed RACM~~:

(A) asbestos-containing waste will be transported to and disposed of at an approved asbestos disposal facility ~~and the name and location of~~;

(B) identifies the transporter of the asbestos-containing waste; and

(C) identifies the disposal facility by name and location.

(5) ~~A facility owner or operator may apply annually for renewal of an annual permit.~~ An annual asbestos project permit expires one year after issuance unless the facility owner applies for renewal at least 45 days before the expiration date and the department approves the application.

~~(a)~~ (6) An application for renewal ~~need~~ of an annual asbestos project permit must address in detail only the portions of the permit application that require

revision, updating, supplementation, or deletion, and may reference any required information that has been previously submitted.

(7) An amendment to the permit is required when there is a change in project contractor, demolition/renovation contractor, transporter, or disposal site or other change of similar scope or magnitude.

AUTH: 75-2-503, MCA
IMP: 75-2-503, 75-2-504, MCA

REASON: Deletion of the reference to the manual in (2)(c) is proposed for the same reasons given in the statement of reasonable necessity for the deletion of the reference to the manual from ARM 17.74.351(1)(c).

The proposed amendments to (3) and (4)(c)(v) clarify the rules and add a requirement that the transporter of the asbestos-containing waste be identified in the annual asbestos project permit application, but otherwise do not change the meaning. It is important that the transporter be identified to ensure transportation is carried out by a properly accredited person.

The department is proposing amendments to (5) because the existing language is unclear. It is necessary for a permittee to know exactly when a permit will expire and when a permit renewal application must be submitted. The requirement to submit an application to renew an annual asbestos project permit 45 days before it expires is appropriate because it traditionally takes up to 45 days for the department to thoroughly review and consider annual asbestos project permit applications.

The proposed substitution of the phrase "of an annual asbestos project permit must" for the word "need" clarifies but does not change the meaning of (5).

The department is proposing to add new (7) to clarify the types of revisions to an annual asbestos project permit that require the applicant to submit a fee pursuant to ARM 17.74.401(1)(c). That rule requires that an application to amend an annual asbestos project permit be accompanied by a fee, and there has been confusion in the regulated community about the types of changes that require an amendment and submission of a fee. The addition of new (7) is intended to help clarify the issue.

17.74.360 RECORDKEEPING (1) through (2)(b) remain the same.

(3) Records of asbestos projects must include, but are not limited to, the following:

(a) remains the same.

(b) the location and description of each project and the amount of ~~R~~ACM that was enclosed, removed, repaired, encapsulated, or placed in new construction;

(c) remains the same.

(d) the name and address of each facility where asbestos-containing waste ~~RACM~~ was deposited for disposal~~. Holders of annual permits are not required to maintain records designating where wastes from specific asbestos projects are deposited, but holders of annual permits shall maintain records of each shipment of RACM~~;

(e) a ~~receipt~~ waste shipment record from each disposal facility indicating the amount of ~~RACM~~ asbestos-containing waste deposited at the site and the date of the deposit; and

(f) the ~~transportation manifest~~ waste shipment records indicating the amount of ~~RACM~~ asbestos-containing waste transported to each ~~approved asbestos~~ disposal facility and the name and location of each facility.

AUTH: 75-2-503, MCA
IMP: 75-2-513, MCA

REASON: The department is proposing to change the term "RACM" to "ACM" in (3)(b) because some of the affected asbestos may not be regulated until it is removed in a regulated manner. It is the ACM that must be identified in the record.

The department is proposing to change the term "RACM" to "asbestos-containing waste" in (3)(d) through (f) for the same reason provided in the statement of reasonable necessity for defining the phrase "asbestos-containing waste" in ARM 17.74.352.

The department also proposes to use the term "waste shipment record" instead of "receipt" or "transportation manifest" to more accurately and consistently describe the documents that are the subject of the rule.

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

17.74.361 DEPARTMENT INSPECTIONS (1) The owner of the facility where an asbestos project is being or was conducted, or a person conducting or in charge of an asbestos project shall:

(a) remains the same.

(b) upon request, make records maintained pursuant to this subchapter available to the department for inspection and copying; and

~~(c) allow department inspectors to consult privately with asbestos project workers concerning occupational exposure to asbestos and other matters related to the applicable provisions of this subchapter, to the extent necessary for an effective and thorough inspection; and~~

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

AUTH: 75-2-503, MCA
IMP: 75-2-518, MCA

REASON: The proposed deletion of (1)(c) is necessary because the department has determined it does not have the statutory authority to require private consultations with asbestos workers. Such conversations still may take place voluntarily.

17.74.364 TRAINING PROVIDER REQUIREMENTS (1) Pursuant to 75-2-511, MCA, a person may not offer a training course in Montana for accreditation of persons to engage in an~~y~~ asbestos-related occupation in Montana unless the

department has approved the course. A person offering a training course outside Montana also may apply to the department for course approval.

(2) remains the same.

(3) For department approval of a training course, instructors' qualifications must include:

(a) remains the same.

(b) current accreditation in the ~~course(s) they teach~~ asbestos-related occupation related to the course to be taught.

(i) ~~A training provider~~ An instructor who is accredited as a contractor/supervisor may teach the asbestos project worker course without current accreditation as an asbestos project worker.

(4) remains the same.

(5) All training course materials and examinations must be submitted to the department in advance for approval. A person may apply for approval of a training course by submitting all of the following to the department at least 45 calendar days prior to the proposed date of course presentation:

(a) through (h) remain the same.

(i) documentation of EPA course approval if the course has been approved by EPA ~~pursuant to 15 USC 2643~~.

(6) remains the same.

(7) The department must be notified in advance of any proposed changes in the content of training courses, examinations, or instructors. The department shall approve or deny in writing any proposed changes in training course or examination contents or change in instructor(s) ~~prior to approving the course or examination~~.

(8) Guest speakers at a training course, such as physicians, attorneys, or other asbestos experts, do not need to be accredited in the discipline being taught. However, their presentation must be supervised by the course instructor and the course instructor remains responsible for ensuring that all required information is taught.

(8) through (10) remain the same, but are renumbered (9) through (11).

(12) Within two working days of completing a course, the training course provider shall submit a course roster to the department. The course roster must identify:

(a) the name and address of the training provider who provided the course;

(b) the name of the asbestos-related occupation course completed;

(c) the date(s) of the class;

(d) the printed name and signature of at least one course instructor;

(e) each course participant's signature and printed name;

(f) each course participant's course certificate number; and

(g) a statement that each person receiving a certificate has completed the training required for accreditation under this subchapter.

AUTH: 75-2-503, MCA
IMP: 75-2-511, MCA

REASON: The department is proposing amendments to (1) to allow training courses outside the state to be approved by the department. The department has

received requests for approval of training classes to be held outside Montana for Montana accreditation and believes it is necessary to amend this rule to allow approval of those courses.

The department is proposing to amend (3)(b) to clarify that a person is accredited in an occupation, not in a course.

In (5)(i), the department is proposing to strike the reference to 15 USC 2643 because the requirement is not necessary for determining whether the submitted training course materials and examinations meet the department's requirements. Section 15 USC 2643 concerns the promulgation of regulations by EPA and is not related to training course approval.

The department is proposing to delete the requirement in (7) that department approval for changes to training courses, examinations, or instructors be granted prior to approving the course or examination, as it is a non sequitur. It is only after the department has approved a course or examination that changes must be approved by the department.

The department is proposing to add (8), pertaining to guest speakers, to allow training course providers to use outside asbestos experts to broaden and enhance the course content and make the course more interesting for attendees. The proposed addition of (8) does not change, but instead confirms, the requirement that responsibility for course content remains with the accredited course instructor.

The department is proposing to add (12), pertaining to submitting a course roster to the department, because the information would allow the department to more quickly process on-line applications for accreditation. The department is currently developing on-line asbestos project permitting and accrediting.

17.74.365 TRAINING COURSE REQUIREMENTS (1) through (5) remain the same.

(6) For purposes of this rule, the phrase "public and commercial building" has the meaning given in the definition of "facility" at ARM 17.74.352~~(23)~~.

AUTH: 75-2-503, MCA
IMP: 75-2-511, MCA

REASON: The proposed amendments to ARM 17.74.352 would change the numbering of the definitions. Therefore, the citation to ARM 17.74.352(23) is incorrect. The department prefers to not include the exact section number in citations that cross-reference definitions in rules because definitions are listed alphabetically and are easy to find without section numbers, and, when definitions are renumbered, all of the citations referencing an exact section number require updating.

4. The proposed new rules provide as follows:

NEW RULE I TRANSPORTATION AND DISPOSAL OF ASBESTOS-CONTAINING WASTE (1) A person may not transport asbestos-containing waste generated at a facility unless accredited by the department as an asbestos project worker or asbestos project contractor/supervisor or escorted and supervised by a

person who is accredited as an asbestos project worker or asbestos project contractor/supervisor.

(2) Prior to transporting or disposing of asbestos-containing waste from an asbestos project, a person shall obtain an asbestos project permit from the department.

(3) A person who transports or escorts a vehicle that contains asbestos-containing waste from an asbestos project shall:

(a) maintain proof of accreditation and the asbestos project permit and make it available, upon request, to the department during asbestos-containing waste handling activities;

(b) prior to waste pick up:

(i) obtain assurance from the asbestos project contractor/supervisor that the asbestos-containing waste is adequately wet;

(ii) confirm the asbestos-containing waste is properly packaged in leak-tight containers, or wrappings, except as provided in 40 CFR 61.150(a)(3);

(iii) confirm the contained or wrapped asbestos-containing waste is labeled with the name of the waste generator and the location at which the waste was generated;

(iv) ensure that any vehicle used to transport asbestos-containing waste during the loading and unloading of the waste is marked with signs conforming to the requirements of 40 CFR Part 61, subpart M;

(v) ensure that the waste shipment record form contains all information required by 40 CFR Part 61, subpart M, and record the asbestos project permit number on the form;

(vi) either deposit asbestos-containing waste at a licensed Class II or Class IV landfill facility as soon as practical, or, if asbestos-containing waste is not disposed of as soon as practical, store any asbestos-containing waste in a secure holding facility or location accessible only to asbestos project workers or asbestos project contractor/supervisors accredited by the department; and

(vii) retain responsibility for asbestos-containing waste until the waste is accepted by a licensed Class II or Class IV landfill; and

(c) retain the waste shipment record for at least two years.

AUTH: 75-2-503, MCA
IMP: 75-2-503, MCA

REASON: The department is proposing to adopt New Rule I because it provides certain transportation and disposal elements that were previously included in the manual and because transportation and disposal of asbestos-containing waste are included in the definition of "asbestos project" in 75-2-502, MCA. The department is proposing to remove the incorporation by reference of the manual from the rules because it included many requirements that were preempted by the OSH Act (see the reason for ARM 17.74.351), and the department is proposing to include many of the "non-OSHA" requirements from the manual in the existing rules and new rules, as well as including new provisions to further ensure that the transportation of asbestos-containing waste is as protective of human health and the environment as is reasonably possible.

Section (1) requires a person who transports, or escorts the transport of, asbestos-containing waste to be accredited by the department as an asbestos project worker or asbestos project contractor/supervisor. It is necessary that a department-accredited person be present at all times during the transportation of asbestos-containing waste because the additional training that is required for accreditation protects human health and the environment. If there is a vehicle accident or other mishap involving the transport of asbestos-containing waste, an accredited asbestos project worker or asbestos project contractor/supervisor would have the training to prevent the release of asbestos emissions or to manage a release of emissions. It is not necessary for the driver to be accredited, if the driver is escorted by an accredited person who is responsible for ensuring that all requirements are followed.

Section (2) requires that a person obtain an asbestos project transportation permit prior to transporting asbestos-containing waste from a facility. Section 75-2-502(3), MCA, defines "asbestos project" as including the transportation or disposal of asbestos-containing waste, and 75-2-511(2), MCA, states that a person may not conduct an asbestos project without a permit from the department. Therefore, the Legislature has mandated that an asbestos project permit be required for the transportation of asbestos-containing waste.

Section (3) clarifies the requirements of 40 CFR 61.150 and the "non-OSHA" requirements from Section 5.09 of the manual and imposes on the transporter the obligation to ensure that all NESHAP requirements are met. The proposed criteria are necessary to ensure safe handling standards for asbestos destined for disposal. The requirements are currently achievable with existing transportation and handling techniques and reflect many industry best practices already in use.

NEW RULE II ENCLOSURE OF ASBESTOS-CONTAINING MATERIAL

(1) A person may not conduct asbestos enclosure procedures for an asbestos project unless accredited by the department as an asbestos project worker or asbestos project contractor/supervisor.

(2) When conducting asbestos enclosure procedures for an asbestos project, a person shall:

(a) apply amended water to the ACM to reduce airborne asbestos concentrations;

(b) remove or repair loose or hanging ACM;

(c) ensure that the enclosure material is impact resistant and installed in a manner that provides an airtight barrier;

(d) ensure that the enclosed ACM is conspicuously marked or labeled to warn persons of its presence; and

(e) meet the requirements of ARM 17.74.357.

AUTH: 75-2-503, MCA
IMP: 75-2-503, MCA

REASON: The department is proposing to adopt an enclosure rule because it provides certain requirements that were previously included in the manual, and because enclosure is included in the definition of "asbestos project" in 75-2-502,

MCA. The proposed additions include many useful asbestos management standards or practical enclosure procedures from the related asbestos provisions of 40 CFR 763, Asbestos-Containing Materials in Schools. The additions are necessary to protect human health by establishing standards for sealing asbestos, which has the incidental benefit of furthering compliance with the existing subpart M work practice and emission standards. The requirements are currently achievable with existing asbestos-related sealing techniques and reflect many industry best practices already in use.

NEW RULE III ENCAPSULATION OF ASBESTOS-CONTAINING MATERIAL (1) A person may not conduct asbestos encapsulation procedures for an asbestos project unless accredited by the department as an asbestos project worker or asbestos project contractor/supervisor.

(2) A person conducting asbestos encapsulation procedures for an asbestos project shall:

(a) apply amended water to the ACM to reduce airborne asbestos concentrations;

(b) remove or repair loose or hanging ACM;

(c) field-test encapsulants prior to their use by applying each encapsulant to a small area to determine how well the encapsulant works with the ACM to be encapsulated; and

(d) meet the requirements of ARM 17.74.357.

(3) Bridging and penetrating encapsulants must be applied to ACM according to the encapsulant manufacturer's specifications.

(4) Encapsulants must be applied in a manner that does not dislodge or disturb the ACM.

AUTH: 75-2-503, MCA
IMP: 75-2-503, MCA

REASON: The department is proposing to adopt an encapsulation rule because it provides certain requirements that were previously included in the manual, and because encapsulation is included in the definition of "asbestos project" in 75-2-502, MCA. The proposed additions include many useful asbestos management standards or practical encapsulation procedures from the related asbestos provisions of 40 CFR 763, Asbestos-Containing Materials in Schools. The additions are necessary to protect human health by establishing standards for effectively encapsulating asbestos, which has the incidental benefit of furthering compliance with the existing subpart M work practice and emissions standards. The requirements are currently achievable with existing covering or sealing techniques and reflect many industry best practices already in use.

NEW RULE IV REPAIR OF ASBESTOS-CONTAINING MATERIAL (1) A person may not conduct asbestos repair procedures for an asbestos project unless accredited by the department as an asbestos project worker or asbestos project contractor/supervisor.

(2) A person conducting asbestos repair procedures for an asbestos project

shall:

(a) apply amended water to the ACM to reduce airborne asbestos concentrations;

(b) remove or repair loose or hanging ACM;

(c) ensure that the repaired ACM is sufficiently repaired to prevent the release of asbestos;

(d) ensure that the repaired ACM is conspicuously marked or labeled to warn persons of its presence; and

(e) meet the requirements of ARM 17.74.357.

AUTH: 75-2-503, MCA
IMP: 75-2-503, MCA

REASON: The department is proposing to adopt a repair rule because "repair" is included in the definition of "asbestos project" in 75-2-502, MCA. The proposed additions include many useful asbestos management standards or practical repair procedures from the related asbestos provisions of 40 CFR 763, Asbestos-Containing Materials in Schools. The additions are necessary to protect human health by establishing standards for effectively repairing asbestos, which has the incidental benefit of furthering compliance with the existing subpart M work practice and emission standards. The requirements are currently achievable with existing techniques and reflect many industry best practices already in use.

5. The rule proposed to be repealed is as follows:

17.74.303 EXCLUSIONS (AUTH: 75-2-503, MCA; IMP: 75-2-503, MCA), located at page 17-8301, Administrative Rules of Montana. The department is proposing to repeal this rule for consistency with the asbestos NESHAP, 40 CFR 61, subpart M, which has been adopted by reference into the state's rules and which the department is proposing to continue to adopt by reference. 40 CFR 61.141 excludes regulation of renovations and demolitions in residential buildings having four or fewer dwelling units. Section 75-2-503(1), MCA, states that the rules adopted by the department to implement the Asbestos Control Act must be consistent with federal law. ARM 17.74.303 excludes from regulation a private homeowner conducting, on his own, an asbestos project within his own residence, but does not exclude from regulation asbestos projects in other residential buildings having four or fewer dwelling units. The department does not believe that rules that are more stringent than comparable federal laws necessarily are inconsistent with those laws. However, given limited department asbestos program resources, it is necessary for the department to limit the scope of facilities regulated under its asbestos program to those facilities regulated under Subpart M.

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 May 12, 2011. To be

guaranteed consideration, mailed comments must be postmarked on or before that date.

7. David Rusoff, attorney, has been designated to preside over and conduct the hearing.

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

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

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL QUALITY

/s/ David Rusoff
DAVID RUSOFF
Rule Reviewer

BY: */s/ Richard H. Opper*
RICHARD H. OPPER, Director

Certified to the Secretary of State, April 4, 2011.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.38.101, 17.38.106, 17.38.502, 17.38.511, and 17.38.513 pertaining to plans for public water supply or wastewater system, fees, definitions, water supply, and chemical treatment of water	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT (PUBLIC WATER AND SEWAGE SYSTEM REQUIREMENTS)

TO: All Concerned Persons

1. On May 11, 2011, at 1:30 p.m., the Board of Environmental Review will hold a public hearing in Room 111, Metcalf Building, Department of Environmental Quality, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules. In addition, the department will hold an informal question/answer session at 1:00 p.m., at the same address, to answer questions regarding those proposed amendments.

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., April 25, 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:

17.38.101 PLANS FOR PUBLIC WATER SUPPLY OR WASTEWATER SYSTEM (1) and (2) remain the same.

(3) As used in this rule, the following definitions apply in addition to those in 75-6-102, MCA:

(a) through (e)(ii) remain the same.

(f) "Rural distribution system" means those portions of a water distribution system that are outside the limits of a city or town and that:

(i) have fewer than one service connection per mile on average;

(ii) are constructed of water mains six inches in diameter or less; and

(iii) do not provide fire flows.

(f) through (l)(ii) remain the same, but are renumbered (g) through (m)(ii).

(4) A person may not commence or continue the construction, alteration, extension, or operation of a public water supply system or wastewater system until the applicant has submitted a design report along with the necessary plans and specifications for the system to the department or a delegated division of local government for its review and has received written approval. Three sets of plans

and specifications are needed for final approval. Approval by the department or a delegated division of local government is contingent upon construction and operation of the public water supply or wastewater system consistent with the approved design report, plans, and specifications. Failure to construct or operate the system according to the approved plans and specifications or the department's conditions of approval is an alteration for purposes of this rule. Design reports, plans, and specifications must meet the following criteria:

(a) through (i) remain the same.

(j) the department may grant a deviation from the standards referenced in (4)(a) through ~~(f)~~ (e) when the applicant has demonstrated to the satisfaction of the department that strict adherence to the standards of this rule is not necessary to protect public health and the quality of state waters. Deviations from the standards may be granted only by the department.

(5) through (18) remain the same.

AUTH: 75-6-103, MCA
IMP: 75-6-103, 75-6-112, 75-6-121, MCA

17.38.106 FEES (1) remains the same.

(2) Department review will not be initiated until fees calculated under (2)(a) through (e) and (5) have been received by the department. If applicable, the final approval will not be issued until the calculated fees under (3) and (4) have been paid in full. The total fee for the review of a set of plans and specifications is the sum of the fees for the applicable parts or subparts listed in these citations.

(a) The fee schedule for designs requiring review for compliance with Department Circular DEQ-1 is set forth in Schedule I, as follows:

SCHEDULE I

Policies	
ultra violet disinfection	$ 700
point-of-use/point-of-entry treatment	$ 700
Section 1.0 Engineering Report	$ 280
Section 3.1 Surface water	
quality and quantity	$ 700
structures	$ 700
Section 3.2 Ground water	$ 840
Section 4.1 Clarification	
standard clarification	$ 700
solid contact units	$ 1,400
Section 4.2 Filtration	
rapid rate	$ 1,750
pressure filtration	$ 1,400
diatomaceous earth	$ 1,400
slow sand	$ 1,400
direct filtration	$ 1,400
biologically active filtration	$ 1,400
membrane filtration	$ 1,400

micro and ultra filtration ..... $ 1,400
bag and cartridge filtration ..... $ 420
Section 4.3 Disinfection ..... $ 700
Section 4.4 Softening ..... $ 700
Section 4.5 Aeration
natural draft ..... $ 280
forced draft ..... $ 280
spray/pressure ..... $ 280
packed tower ..... $ 700
Section 4.6 Iron and manganese ..... $ 700
Section 4.7 Fluoridation ..... $ 700
Section 4.8 Stabilization ..... $ 420
Section 4.9 Taste and odor control ..... $ 560
Section 4.10 Microscreening ..... $ 280
Section 4.11 Ion exchange ..... $ 700
Section 4.12 Adsorptive media ..... $ 700
Chapter 5 Chemical application ..... $ 980
Chapter 6 Pumping facilities ..... $ 980
Section 7.1 Plant storage ..... $ 980
Section 7.2 Hydropneumatic tanks ..... $ 420
Section 7.3 Distribution storage ..... $ 980
Section 7.4 Cisterns ..... $ 420
Chapter 8 Distribution system
per lot fee ..... $ 70
non-standard specifications ..... $ 420
transmission distribution (per lineal foot) ..... $ 0.25
rural distribution system (per lineal foot) ..... $ 0.03
Chapter 9 Waste disposal ..... $ 700
Appendix A
new systems ..... $ 280
modifications ..... $ 140

(b) through (7) remain the same.

AUTH: 75-6-108, MCA
IMP: 75-6-108, MCA

REASON: The proposed amendments to ARM 17.38.101 provide a definition for "rural distribution system" and correct an erroneous internal reference in ARM 17.38.101(4)(j). The proposed definition of "rural distribution system" is necessary to implement the reduced design review fees for those systems as proposed in the amendments to ARM 17.38.106, discussed below. Rural distribution systems are those that are outside of cities and that have mains with relatively simple construction and long stretches of mains without service connections.

ARM 17.38.101(4)(j) authorizes deviations from standards referenced in (4)(a) through (f). The standards that were intended to be referenced were those in (4)(a) through (e), which are department circulars and rules incorporated in this rule

by reference. The proposed amendment is necessary to conform the language of the rule to the original intent.

The proposed amendment to ARM 17.38.106 adds a new fee category for rural distribution systems. The new rate will reduce fees for review of those systems. These systems have large distribution systems but are fairly simple to review. The new lower fee rate is necessary in order for the review fee to reflect actual review costs to the department, as required under 75-6-108(3), MCA. Systems that would submit plans under this new definition and fee schedule would see a significant reduction in their review fees, from 25 cents/lineal foot to three cents/ lineal foot. The department does not have sufficient information to estimate the number of fee payers nor the lineal feet of distribution systems that may be affected by the reduced fee.

17.38.502 DEFINITIONS (1) remains the same.

(2) "Water hauler" is a person engaged in the business of transporting water, ~~to be used for human consumption~~ through a non-piped conveyance, from a water source to a cistern or other reservoir ~~by ten or more families or~~ to be used for human consumption in a public water supply system. As defined in 75-6-102, MCA, a public water supply system is a system that has at least 15 service connections or that regularly serves at least 25 or more persons daily for ~~at least~~ any 60 or more days ~~of the~~ in a calendar year.

AUTH: 75-6-103, MCA
IMP: 75-6-103, MCA

REASON: The proposed amendment to ARM 17.38.502 is necessary to clarify that the water hauler requirements apply only to non-piped means of delivery. The amendments also conform the rule to the current definition of "public water supply system" set forth in 75-6-104(14), MCA.

17.38.511 WATER SUPPLY (1) Water to be hauled must be taken from a ~~supply approved by the~~ department-approved community public water supply system and from a department-approved water loading station that meets the requirements of Department Circular DEQ-1.

(2) ~~Periodical~~ Water haulers shall collect bacteriological samples ~~will be collected~~ from the water hauling equipment ~~by the department or its authorized representatives~~ at least once per month for each approved public water supplier the hauler uses that month.

(3) If a water hauler's public water supplier is in compliance with the monitoring and maximum contaminant level requirements set forth in ARM Title 17, chapter 38, subchapter 2, the water hauler is not required to duplicate the entry point sampling of the supplier unless specifically required to do so by the department.

AUTH: 75-6-103, MCA
IMP: 75-6-103, MCA

REASON: The proposed amendments to ARM 17.38.511(1) clarify that a

water hauler's supply must be a department-approved community public water supply system. Because water haulers are regulated as community systems, the water they haul must be received from a system designed and monitored as such. The proposed amendments also clarify that water loading stations require department approval. This amendment is necessary to comply with existing department requirements for loading stations in Department Circular DEQ-1. Proposed (2) removes the reference to the department or its representatives conducting biological sampling. This has not been actual department practice because of limited staff resources, and amending the rule is necessary to clarify that bacteriological sampling is the obligation of the water hauler. Finally, proposed (3) provides that water haulers are not required to duplicate the entry point sampling of their supplier if the supplier is in compliance with the requirements in ARM Title 17, chapter 38, subchapter 2. This amendment is necessary to help regulated haulers in determining applicable sampling requirements.

17.38.513 CHEMICAL TREATMENT OF WATER (1) ~~Each~~ Except as provided in (3), water haulers shall dose each load of water ~~shall be dosed~~ with enough chlorine to provide a free chlorine or total chlorine residual of at least 0.4 parts per million (ppm), not to exceed 4.0 ppm, at the time the water hauling equipment is filled and at the time the water is delivered to the receiving system. ~~The w~~Water haulers shall ~~have DPD test kits~~ use department-approved methods to ~~check~~ monitor the chlorine residual concentration.

(2) ~~Sufficient chlorine must be added when delivering water into the cistern to have a chlorine residual of 0.4 parts per million detected when the cistern is filled.~~ Water haulers shall monitor each load of water, and shall record chlorine residual results on department-approved forms. Haulers shall retain the records of chlorine residual results for each load and shall provide the records to the department upon request. By the tenth of the month following a delivery, haulers shall report the following to the department on department-approved forms:

(a) one chlorine residual result for each day water is delivered, taken from the load with the lowest monitored residual result; and

(b) for days that a hauler obtains and delivers water from multiple public water suppliers, one chlorine residual result per supplier per day, taken from the loads with the lowest monitored residual result.

(3) Water haulers using an approved chloraminated source of water shall monitor, record, and report residuals as required in (1) and (2), but are not required to adjust total chlorine levels.

AUTH: 75-6-103, MCA
IMP: 75-6-103, MCA

REASON: The proposed amendments to ARM 17.38.513(1) clarify that the residual of 0.4 mg/L of free or total chlorine is a minimum that must be maintained at the time the water hauling equipment is filled and at the time the water is delivered to the receiving system. Water haulers are not responsible for the quality of the water after it enters the receiving system. The amendments also require that the hauler use department-approved methods to monitor chlorine residuals. The

proposed amendments to ARM 17.38.513(2) provide that each load of hauled water must be monitored, and specify the time and manner of reporting the results to the department. Proposed (3) clarifies the requirements for haulers that utilize a chloraminated source of water. Because of the complications associated with adding chlorine to chloraminated water, as well as the regulatory requirements applicable to the supplier, haulers utilizing chloraminated sources of water are required only to monitor and report the chloramines level of the water, and are not required to treat the water. The proposed amendments to this rule are necessary to ensure the safety of hauled water, which has an increased potential of being exposed to sources of contamination.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to ejohnson@mt.gov, no later than 5:00 p.m., May 12, 2011. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

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

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

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

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

/s/ James M. Madden BY: */s/ Joseph W. Russell*
JAMES M. MADDEN JOSEPH W. RUSSELL, M.P.H.,
Rule Reviewer Chairman

Certified to the Secretary of State, April 4, 2011.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.36.922 and 17.36.924 pertaining to local variances and variance appeals to the department	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT (SUBDIVISIONS/ON-SITE SUBSURFACE WASTEWATER TREATMENT)

TO: All Concerned Persons

1. On May 11, 2011, at 2:00 p.m., or upon the conclusion of the public hearing for MAR Notice No. 17-318, the Board of Environmental Review will hold a public hearing in Room 111, Metcalf Building, Department of Environmental Quality, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact Elois Johnson, Paralegal, no later than 5:00 p.m., April 25, 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:

17.36.922 LOCAL VARIANCES (1) As provided in this rule, a local board of health, as defined in 50-2-101, MCA, may grant variances from the requirements in this subchapter and in Department Circular DEQ-4, ~~2004 edition~~ except for requirements established by statute.

(2) The local board of health may grant a variance from a requirement only if it finds ~~that all conditions in these rules regarding the variance are met, and~~ that all of the following criteria are met:

(a) granting the variance will not:

(a) through (f) remain the same, but are renumbered (i) through (vi).

~~(g)~~ (vii) cause a nuisance due to odor, unsightly appearance, or other aesthetic consideration;

(b) compliance with the requirement from which the variance is requested would result in undue hardship to the applicant;

(c) the variance is necessary to address extraordinary conditions that the applicant could not reasonably have prevented;

(d) no alternatives that comply with the requirement are reasonably feasible; and

(e) the variance requested is not more than the minimum needed to address

the extraordinary conditions.

~~(3) The local board of health may adopt variance criteria in addition to those set out in (2).~~

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

AUTH: 75-5-201, 75-5-305, MCA
IMP: 75-5-305, MCA

REASON: As required by 75-5-305(2)(a), MCA, this subchapter sets out the board's minimum requirements for control and disposal of sewage. Local boards of health are required to adopt sewage regulations that are not less stringent than these minimum standards. Section 50-2-116(1)(k), MCA. The board is also required to adopt criteria for variances from the minimum standards, and the statutes provide for an appeal to the department of local board decisions on variances from the minimum standards. Section 75-5-305(3), MCA. The board's variance criteria are set out in ARM 17.36.922(2).

The current variance criteria in ARM 17.36.922(2) prohibit variances that would cause adverse health or environmental effects. When adopted, these criteria were not intended to be exclusive. ARM 17.36.922(3) authorizes local boards to adopt criteria in addition to those in ARM 17.36.922(2). The current rules treat the state variance criteria, like the state substantive standards, as minimum requirements that local boards may supplement.

A recent department legal opinion determined that the state variance criteria rules were not consistent with statutory requirements. Section 50-2-116(1)(k), MCA, requires that local variance criteria be "identical" to the state board criteria. ARM 17.36.922(3), which allows additional local variance criteria, is inconsistent with 50-2-116(1)(k), MCA. In addition, 75-5-305(4), MCA, requires that the department use the state Board of Environmental Review's variance criteria when reviewing local variance decisions. ARM 17.36.924(9), which allows the department to apply local variance criteria in variance appeals, is inconsistent with 75-5-305(4), MCA. The proposed repeal of ARM 17.36.922(3) and 17.36.924(9) is necessary to conform the board rules to these statutory requirements.

Local variance criteria typically require a variance applicant to make a showing of hardship to justify a variance. Because the department may not use local criteria when reviewing variances, the board is proposing to adopt hardship criteria in the state rules. Based on recommendations from local health departments and sanitarians, the board is proposing to adopt four additional variance criteria.

Proposed ARM 17.36.922(2)(b) requires a showing that compliance with the requirement from which the variance is requested would result in undue hardship for the applicant. This provision is necessary to limit variances to situations in which compliance with a requirement creates a significantly greater burden for the applicant than for others to whom the requirement applies.

Proposed ARM 17.36.922(2)(c) requires a showing that the variance is necessary to address extraordinary conditions that the applicant could not reasonably have prevented. This provision is necessary to limit variances to situations that are not typical, and to require applicants to use reasonable care to avoid placing themselves in those situations.

Proposed ARM 17.36.922(2)(d) requires a showing that there are no reasonably feasible alternatives for complying with the requirement. This provision is necessary to limit variances to situations in which no reasonable alternative exists.

Finally, proposed ARM 17.36.922(2)(e) requires a showing that the variance requested is not more than the minimum needed to address the extraordinary conditions. This provision is necessary to limit the scope of a variance to what is needed to alleviate the particular conditions that create undue hardship.

The proposed amendments also make several changes for clarification. The reference to the 2004 edition of DEQ-4 in ARM 17.36.922(1) is proposed to be deleted because the current edition of DEQ-4 is 2009, which is correctly referenced in ARM 17.36.914(2). ARM 17.36.922(1) is amended to clarify that local boards cannot grant variances from statutory requirements, such as the restrictions on gray water irrigation set out in ARM 17.36.919(3)(c). Finally, a minor change is proposed to ARM 17.36.922(2) to delete a requirement for compliance with other rule conditions when granting a variance. This provision is inconsistent with the authority of local boards to grant variances to any of the requirements in this subchapter and DEQ-4, except those established by statute.

17.36.924 VARIANCE APPEALS TO THE DEPARTMENT (1) through (3) remain the same.

(4) If the appeal fulfills the requirements of (2), the department shall ~~conduct a hearing on the appeal~~ proceed to review the local variance decision under the contested case provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, MCA.

~~(5) The hearing must be conducted under the provisions of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, MCA. Except as provided in (7), the department must conduct the hearing within 90 days of the department's written notice to the appellant that the appeal meets the requirements of (2).~~

~~(6) The department shall review each application under ARM Title 17, chapter 4, subchapter 6 to determine if the department's action may result in significant effects to the quality of the human environment, thereby requiring an environmental impact statement.~~

~~(7) If the department's analysis indicates that an environmental impact statement is required, the department shall have 60 days from the date of issuance of the final environmental impact statement to conduct a hearing under this rule.~~

~~(8) After conducting the hearing, the department may allow up to 14 days for written comments to be submitted concerning the appeal.~~

~~(9) The department shall apply the local government variance requirements at issue in the case, provided the requirements meet the minimum requirements stated in ARM 17.36.913 and 17.36.922.~~

(5) As provided in 2-4-612, MCA, the common law and statutory rules of evidence apply in department proceedings to review local board variance decisions. The parties may provide evidence and testimony to the department in addition to that presented to the local board.

(6) In evaluating the local board variance decision, the department shall apply the variance criteria in ARM 17.36.922(2), and may not consider local variance criteria. The department may substitute its judgment for that of the local board as to

the interpretation and application of the variance criteria in ARM 17.36.922(2). However, the department shall be bound by the local board's interpretation of other local board rules in effect at the time of the local board's decision.

(7) Challenges to the applicability or validity of a rule of the local board are outside the scope of department review. Variance requests that do not seek to go below a state minimum standard are also outside the scope of department review. If a variance is requested from a local requirement that is more stringent than the requirements in this subchapter, the department may review the local board's decision only if the variance, if granted, would also require a variance from the requirements in this subchapter.

~~(10)~~ (8) The department shall issue a formal decision, including findings of fact and conclusions of law, within 30 days after the hearing process is completed.

AUTH: 75-5-201, 75-5-305, MCA
IMP: 75-5-305, MCA

REASON: The proposed amendments to ARM 17.36.924(4) and repeal of ARM 17.36.924(9) implement the statutory requirement that the department use the state Board of Environmental Review's variance criteria when hearing appeals of local board variance decisions. See Reason statement for the amendments to ARM 17.36.922.

The proposed repeal of ARM 17.36.924(5) would eliminate the requirement that hearings be held within 90 days of filing a complete appeal. Pursuant to 75-5-305(4), MCA, appeals must be conducted under the contested case procedures of the Montana Administrative Procedure Act, Title 2, chapter 4, part 6, MCA (MAPA). Under MAPA procedures, pre-hearing steps such as discovery and motions can take longer than 90 days. Repealing the 90-day requirement is necessary to allow the parties to fully utilize MAPA. The current rule requiring MAPA procedures is proposed to be moved from ARM 17.36.924(5) to ARM 17.36.924(4).

The proposed repeal of ARM 17.36.924(6) and (7) would eliminate the requirement for the department to conduct environmental review under the Montana Environmental Policy Act (MEPA) when it issues a decision in a local variance appeal. Repeal of this provision is necessary because MEPA does not require environmental review when the department issues a decision in a variance contested case.

The proposed amendments would repeal ARM 17.36.924(8), which allows comments for two weeks following a hearing. Repeal is necessary because this comment process does not follow MAPA contested case procedures. Variance appeals are typically conducted by hearing examiners. Under MAPA, the parties to variance appeals must be given an opportunity to file post-hearing exceptions and briefs and make oral arguments to the director. Section 2-4-621(1), MCA. MAPA does not limit the post-hearing exceptions and briefing process to two weeks.

Proposed new ARM 17.36.924(5), (6), and (7) set out procedural requirements applicable to the department contested case proceedings to review a local variance decision. These requirements are based on statutory provisions and past precedent. The proposed new sections are necessary to provide guidance to parties about the contested case process.

The proposed amendment to ARM 17.36.924(10), renumbered as (8), clarifies that the statutory 30-day period starts to run after the MAPA hearing process is completed and the matter is fully submitted for final department decision. The MAPA hearing process includes an oral argument hearing before the department director if the evidentiary hearing is held by a hearing examiner and a party files exceptions to the hearing examiner's proposed decision.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to ejohnson@mt.gov, no later than 5:00 p.m., May 12, 2011. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

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

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

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

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

/s/ James M. Madden BY: */s/ Joseph W. Russell*
JAMES M. MADDEN JOSEPH W. RUSSELL, M.P.H.,
Rule Reviewer Chairman

Certified to the Secretary of State, April 4, 2011.

BEFORE THE BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the adoption of NEW RULES I through XII qualification of social workers and professional counselors to perform psychological testing, evaluation, and assessment	)))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

TO: All Concerned Persons

1. On May 5, 2011, at 1:00 p.m., a public hearing will be held in room B-07, 301 South Park Avenue, Helena, Montana, to consider the proposed adoption of the above-stated rules.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Social Work Examiners and Professional Counselors (board) no later than 5:00 p.m., on April 29, 2011, to advise us of the nature of the accommodation that you need. Please contact Cyndi Breen, Board of Social Work Examiners and Professional Counselors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2392; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdswpc@mt.gov.

3. GENERAL STATEMENT OF REASONABLE NECESSITY: The 2009 Montana Legislature enacted Chapter 453, Laws of 2009 (Senate Bill 235), an act expanding the exemption from licensure as a psychologist to include psychological testing, evaluation, and assessment by qualified members of other professions, including licensed professional counselors. The bill was signed by the Governor on May 5, 2009.

The 2009 Montana Legislature also enacted Chapter 199, Laws of 2009 (House Bill 530), an act revising the definition of social work to clarify that the term includes the administering, evaluating, and assessing of tests. The bill was signed by the Governor on April 9, 2009. Both bills became effective on October 1, 2009.

Senate Bill 235 amended 37-17-104, MCA, to require that the board adopt rules to qualify licensed social workers and professional counselors to perform psychological testing, evaluation, and assessment. Further, these rules must be consistent with the guidelines of the national associations of social workers and professional counselors. Therefore, the board is proposing to adopt New Rules I through XII to set the qualification standards in compliance with the statutory requirements and further implement the legislation.

4. The proposed new rules provide as follows:

NEW RULE I GENERAL USE OF ASSESSMENT AND TESTING INSTRUMENTS (1) The primary purpose of educational and psychological assessment is to provide measures that are objective and interpretable in either comparative or absolute terms. Counselors and social workers shall interpret the statements in this rule as applying to the whole range of appraisal techniques, including test and nontest data.

(2) Counselors and social workers shall promote the welfare and best interests of the client in the development, publication, and utilization of educational and psychological assessment results and interpretations, and take reasonable steps to prevent others from misusing the information these techniques provide. They shall respect the clients' rights to know the results of the interpretations made and the basis for their conclusions and recommendations.

AUTH: 37-17-104, MCA
IMP: 37-17-104, MCA

NEW RULE II COMPETENCE TO USE AND INTERPRET ASSESSMENT AND TESTING INSTRUMENTS (1) Counselors and social workers shall recognize the limits of their competence and perform only those testing and assessment services for which they have been trained. They shall be familiar with reliability, validity, related standardization, error of measurement, and proper application of any technique utilized.

(2) Counselors and social workers using computer-based test interpretations shall be trained in the construct being measured and the specific instrument being used, prior to using this type of computer application.

(3) Counselors and social workers shall take reasonable measures to ensure the proper use of psychological assessment techniques by persons under their supervision.

(4) Counselors and social workers are responsible for the appropriate selection, application, scoring, interpretation, and use of assessment instruments whether they score and interpret such tests themselves or use computerized or other services.

(5) Counselors and social workers responsible for decisions involving individuals or policies that are based on assessment results shall have a thorough understanding of educational and psychological measurement, including validation criteria, test research, and guidelines for test development and use.

(6) Counselors and social workers shall provide accurate information and shall not make false claims when making statements about assessment instruments or techniques.

(7) Counselors and social workers shall seek to identify and correct client misconceptions about assessment instruments or techniques and about the meaning of scores, charts, or graphs given to them as an assessment product. Special efforts shall be made to avoid unwarranted connotations of such terms as "IQ" and grade equivalent scores.

AUTH: 37-17-104, MCA

IMP: 37-17-104, MCA

NEW RULE III INFORMED CONSENT IN THE USE OF ASSESSMENT AND TESTING INSTRUMENTS (1) Prior to assessment, counselors and social workers shall explain the nature and purposes of assessment and the specific use of results in language the client (or other legally authorized person on behalf of the client) can understand, unless an explicit exception to this right has been agreed upon in advance. Regardless of whether scoring and interpretation are completed by counselors and social workers, by assistants, or by computer or other outside services, counselors and social workers shall take reasonable steps to ensure that appropriate explanations are given to the client.

(2) The examinee's welfare, explicit understanding, and prior agreement shall determine the recipients of test results. Counselors and social workers shall include accurate and appropriate interpretations with any release of individual or group test results.

AUTH: 37-17-104, MCA
IMP: 37-17-104, MCA

NEW RULE IV RELEASE OF INFORMATION TO COMPETENT PROFESSIONALS OF ASSESSMENT AND TESTING INSTRUMENT RESULTS

(1) Counselors and social workers shall not misuse assessment results, including test results and interpretations, and take reasonable steps to prevent this misuse of such by others.

(2) Counselors and social workers shall ordinarily release data (e.g., protocols, counseling or interview notes, or questionnaires) in which the client is identified only with the consent of the client or the client's legal representative. Such data shall usually be released only to persons recognized by counselors and social workers as competent to interpret the data.

AUTH: 37-17-104, MCA
IMP: 37-17-104, MCA

NEW RULE V PROPER DIAGNOSIS OF MENTAL DISORDERS WITH THE USE OF ASSESSMENT AND TESTING INSTRUMENTS (1) Counselors and social workers shall take special care to provide accurate diagnosis of mental disorders. Assessment techniques (including a personal interview) used to determine client care (e.g., locus of treatment, type of treatment, or recommended follow-up) shall be carefully selected and appropriately used.

(2) Counselors and social workers shall recognize that culture affects the manner in which clients' problems are defined. Clients' socioeconomic and cultural experience shall be considered when diagnosing mental disorders.

AUTH: 37-17-104, MCA
IMP: 37-17-104, MCA

NEW RULE VI TEST SELECTION IN THE USE AND INTERPRETATION OF ASSESSMENT AND TESTING INSTRUMENTS (1) Counselors and social workers shall carefully consider the validity, reliability, psychometric limitations, and appropriateness of instruments when selecting tests for use in a given situation or with a particular client.

(2) Counselors and social workers recognize that the psychometric characteristics of a test (e.g., reliability, validity) are a function of the cultural composition of the population in which they were evaluated, validated, or normed. Licensees shall exercise due diligence in selecting tests to be used within a culturally diverse population in order to minimize the risk of inappropriate interpretation of test scores.

AUTH: 37-17-104, MCA
IMP: 37-17-104, MCA

NEW RULE VII CONDITIONS OF TEST ADMINISTRATION WHEN USING ASSESSMENT AND TESTING INSTRUMENTS (1) Counselors and social workers shall administer tests under the same conditions that were established in their standardization. When tests are not administered under standard conditions or when unusual behavior or irregularities occur during the testing session, those conditions shall be noted in interpretation and the results may be designated as invalid or of questionable validity.

(2) Counselors and social workers shall be responsible for ensuring that assessment administration programs function properly to provide clients with accurate results when computer or other electronic methods are used for test administration.

(3) Counselors and social workers shall not permit unsupervised or inadequately supervised use of tests or assessments, unless the tests or assessments are designed, intended, and validated for self-administration and/or scoring.

(4) Prior to test administration, conditions that produce most favorable test results shall be made known to the examinee.

AUTH: 37-17-104, MCA
IMP: 37-17-104, MCA

NEW RULE VIII DIVERSITY WHEN USING ASSESSMENT AND TESTING INSTRUMENTS (1) Counselors and social workers shall be cautious in using assessment techniques, making evaluations, and interpreting the performance of populations not represented in the norm group on which an instrument was standardized. They shall recognize the effects of age, color, culture, disability, ethnic group, gender, race, religion, sexual orientation, and socioeconomic status on test administration and interpretation, and place test interpretation results in proper perspective with other relevant factors.

AUTH: 37-17-104, MCA
IMP: 37-17-104, MCA

NEW RULE IX TEST SCORING AND INTERPRETATION WHEN USING ASSESSMENT AND TESTING INSTRUMENTS (1) In reporting assessment results, counselors and social workers shall indicate any reservations that exist regarding validity or reliability, because of the circumstances of the assessment or the inappropriateness of the norms for the person tested.

(2) Counselors and social workers shall exercise caution when interpreting the results of research instruments possessing insufficient technical data to support respondent results. The specific purposes for the use of such instruments shall be stated explicitly to the examinee.

(3) Counselors and social workers who provide test scoring and test interpretation services to support the assessment process shall confirm the validity of such interpretations. They shall accurately describe the purpose, norms, validity, reliability, and applications of the procedures and any special qualifications applicable to their use. The public offering of an automated test interpretation service is considered a professional-to-professional consultation. The formal responsibility of the consultant is to the consultee, but the ultimate and overriding responsibility is to the client.

AUTH: 37-17-104, MCA
IMP: 37-17-104, MCA

NEW RULE X TEST SECURITY WHEN USING ASSESSMENT AND TESTING INSTRUMENTS (1) Counselors and social workers shall maintain the integrity and security of tests and other assessment techniques consistent with legal and contractual obligations. Counselors and social workers shall not appropriate, reproduce, or modify published tests or parts thereof, without acknowledgment and permission from the publisher.

AUTH: 37-17-104, MCA
IMP: 37-17-104, MCA

NEW RULE XI OBSOLETE TESTS AND OUTDATED TEST RESULTS WHEN USING ASSESSMENT AND TESTING INSTRUMENTS (1) Counselors and social workers shall not use data or test results that are obsolete or outdated for the current purpose. Counselors and social workers shall make every effort to prevent the misuse of obsolete measures and test data by others.

AUTH: 37-17-104, MCA
IMP: 37-17-104, MCA

NEW RULE XII TEST CONSTRUCTION FOR ASSESSMENT AND TESTING INSTRUMENTS (1) Counselors and social workers shall use established scientific procedures, relevant standards, and current professional knowledge for test design in the development, publication, and utilization of educational and psychological assessment techniques.

AUTH: 37-17-104, MCA
IMP: 37-17-104, MCA

5. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Social Work Examiners and Professional Counselors (board), 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdswpc@mt.gov, and must be received no later than 5:00 p.m., May 13, 2011.

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

7. The board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this board. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies the person wishes to receive notices regarding all board administrative rulemaking proceedings or other administrative proceedings. The request must indicate whether e-mail or standard mail is preferred. Such written request may be sent or delivered to the Board of Social Work Examiners and Professional Counselors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; faxed to the office at (406) 841-2305; e-mailed to dlibsdswpc@mt.gov; or made by completing a request form at any rules hearing held by the agency.

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted on June 8, 2009, by electronic mail.

9. Don Harris, attorney, has been designated to preside over and conduct this hearing.

BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS
LINDA CRUMMETT, LCSW, PRESIDENT

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

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

Certified to the Secretary of State April 4, 2011

BEFORE THE BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 24.219.301 definitions, 24.219.501 and 24.219.601 application procedures, and the adoption of NEW RULE I supervisor qualifications, and NEW RULES II through IX parenting plan evaluations	)))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On May 5, 2011, at 1:00 p.m., a public hearing will be held in room B-07, 301 South Park Avenue, Helena, Montana, to consider the proposed amendment and adoption of the above-stated rules.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Social Work Examiners and Professional Counselors (board) no later than 5:00 p.m., on April 29, 2011, to advise us of the nature of the accommodation that you need. Please contact Cyndi Breen, Board of Social Work Examiners and Professional Counselors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2392; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdswpc@mt.gov.

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

24.219.301 DEFINITIONS (1) through (3) remain the same.

(4) "Exploitation" means the manipulation or use, or the attempted manipulation, or the attempted use of a professional relationship with a client, student, or supervisee for the licensee's emotional, financial, romantic, sexual, or personal advantage, or for the advancement of the licensee's personal, religious, political, or business interests.

(5) and (5)(a) remain the same.

(b) link people with systems that provide them with resources, services, and opportunities;

(c) through (7) remain the same.

(8) "Supervisor," when used to refer to a person who supervises the work of an applicant for licensure, means a ~~licensed clinical social worker, a licensed clinical professional counselor, a licensed psychologist, or a licensed and board-certified psychiatrist~~ person who meets the criteria set forth in [NEW RULE I].

AUTH: 37-1-131, 37-22-201, MCA
IMP: 37-1-131, 37-22-102, 37-22-201, 37-23-101, 37-23-102, MCA

REASON: The board previously proposed amending the definition of "supervisor" in a 2009 rulemaking notice. Following public comment, the board withdrew the proposed changes on supervisor training and experience to allow supervisors time to adjust to the proposed standards and enable trainees to find qualified supervisors. The board is now satisfied that sufficient time has elapsed for those affected to adjust to the proposed new supervision standards.

Therefore, the board is amending (8) to ensure that applicants are receiving the quality of supervision that is necessary to adequately protect the public and prepare applicants for licensure. The board is proposing New Rule I within this notice to clearly set forth supervisor qualifications in a separate rule, rather than including them within the definition.

24.219.501 APPLICATION PROCEDURES (1) through (2)(v) remain the same.

(vi) supervisor must attest to the above under penalty of law. Falsification or misrepresentation of any of the above may be considered misrepresentations and a violation of professional ethics, which may result in discipline of the supervisor's license.

(3) through (7) remain the same.

(8) If an applicant has previously held a license to practice as a social worker in this state, and the previous license was terminated as a result of the applicant's failure to renew the license, the applicant shall complete ten hours of board-approved continuing education credits for each year that the applicant's license was terminated. The applicant shall submit proof of completion of these hours at the time of application.

AUTH: 37-1-131, 37-1-319, 37-22-201, MCA
IMP: 37-1-131, 37-1-306, 37-22-301, MCA

REASON: The board requires that individuals with expired licenses obtain and submit evidence of continuing education (CE) prior to license reactivation. The board concluded that individuals with terminated licenses should be held to the same standard. The board is amending ARM 24.219.501 and 24.219.601 to require that when applying for new, original licensure, terminated applicants provide proof of CE equivalent to that required for maintaining licensure. Without the amendments, terminated applicants might be held to the same standard as first-time applicants, and may be required to retake an examination or obtain supervised experience.

24.219.601 APPLICATION PROCEDURE (1) Any person seeking licensure as a professional counselor must apply on the board's official forms, which may be obtained through the board office. All requirements with documentation must be met at the time of application. Incomplete applications will not be considered by the board.

(2) through (7) remain the same.

(8) If an applicant has previously held a license to practice as a professional counselor in this state, and the previous license was terminated as a result of the applicant's failure to renew the license, the applicant shall complete ten hours of board-approved continuing education credits for each year that the applicant's license was terminated. The applicant shall submit proof of completion of these hours at the time of application.

AUTH: 37-1-131, 37-1-319, 37-22-201, MCA
IMP: 37-1-131, 37-1-306, 37-23-202, MCA

4. The proposed new rules provide as follows:

NEW RULE I SUPERVISOR QUALIFICATIONS (1) A person supervising the experience of an applicant for licensure shall meet the minimum qualifications set forth in this rule.

(2) The supervisor must be a licensed clinical social worker, licensed clinical professional counselor, licensed marriage and family therapist, licensed psychologist, or licensed and board-certified psychiatrist.

(3) The supervisor must hold an active and current license in good standing, which was issued by the licensing board or other officially recognized licensing body of the state where supervision occurs.

(4) The supervisor must have three years of post-licensure experience or board-approved training in clinical supervision.

(5) Board-approved training in supervision shall consist of a minimum of one semester hour of board-approved graduate education or 20 clock hours of board-approved training in clinical supervision.

AUTH: 37-1-131, 37-22-201, MCA
IMP: 37-1-131, 37-22-101, 37-22-301, 37-23-101, 37-23-202, MCA

REASON: The board determined that some applicants are not receiving the appropriate quality of supervision that is necessary to ensure licensure of qualified applicants. In conjunction with the amendment of the "supervisor" definition in ARM 24.219.301, the board is proposing New Rule I to specifically delineate the minimum qualifications necessary to ensure adequate protection of the public through proper supervision of applicants.

NEW RULE II ORIENTING GUIDELINES (1) The purpose of the parenting plan evaluation regulations is to protect both the public, who are the consumers of services, and the licensees, who are the providers of services. These regulations intend to ensure competency of the provider and consistency of the procedures in child custody proceedings, pursuant to Title 40, chapter 4, MCA, Termination of Marriage, Child Custody, Support.

(2) The purpose of a parenting plan evaluation is to determine, to the extent possible, what is in the best interests of the child. The "fit" between each parent and the child or children is the central issue, not the diagnosis of each parent or of each

child. If a parent or child shows any relevant mental, cognitive, physical, or other disorder, the implications of that disorder for the best interest of the child must be addressed.

(3) Two different parents showing very similar personalities and parenting styles might affect two different children in essentially different ways. It cannot be assumed that qualities generally admired by the population-at-large are necessarily those that make the better parent, or are in the best interests of the child. For example, factors such as which parent has the most money, the most friends, the largest house, is the most religious, the most physically active, has the most education, is home the most, lacks a history of diagnosis or treatment, and so on, may bear on the issue at hand, but are not the determining factors in and of themselves. How each factor supports the child's needs and well-being, or detracts from the child's needs and well-being, is a primary consideration. The intention of a parenting plan evaluation is to make a parenting recommendation that will support the child's development along the healthiest lines possible.

AUTH: 37-1-131, 37-22-201, MCA
IMP: 37-1-131, 37-22-102, 37-22-201, 37-23-102, MCA

REASON: The board determined it is reasonably necessary to adopt several new rules to set forth regulations for licensees who provide parenting plan evaluations. The board notes that a substantial percentage of the complaints filed against board licensees relate to licensees' participation in these evaluations and the number of these complaints and subsequent board discipline taken is increasing. Therefore, the board is proposing New Rules II through IX to set forth clear guidelines for licensees providing these services and ensure competent providers and consistency within the associated parenting plan procedures.

NEW RULE III ROLE OF THE LICENSEE (1) In a parenting plan evaluation, the licensee shall maintain an unbiased, impartial role. The client is the child, and recommendations must be made which are in the best interests of the child. The licensee shall clarify with all parties, attorneys, and the court the nature of the licensee's role as an objective evaluator.

(a) The licensee shall act as an impartial evaluator of the parties, assessing relevant information, and informing and advising the court and other parties of the relevant factors pertaining to the parenting issue.

(b) The licensee shall remain impartial, regardless of whether the licensee is retained by the court or by a party to the proceeding, and regardless of whom is responsible for payment.

(c) If circumstances prevent the licensee from performing in an impartial role, the licensee shall attempt to withdraw from the case. (See [New Rule IV])

(d) If the licensee is not able to withdraw, the licensee must reveal any factors that may bias the licensee's findings and/or compromise the licensee's objectivity.

(e) Communication with parents or attorneys must be conducted in such a manner as to avoid bias. The licensee must exercise discretion in informing parties or their attorneys of significant information that is gathered during the course of the

evaluation. The licensee shall not communicate essential information to one party's attorney, without also communicating the information to the other party's attorney and to the guardian ad litem, if one is appointed.

AUTH: 37-1-131, 37-22-201, MCA
IMP: 37-1-131, 37-22-102, 37-22-201, 37-23-102, MCA

NEW RULE IV DUAL RELATIONSHIPS (1) The licensee shall avoid dual relationships and other situations which might produce a conflict of interest when performing parenting plan evaluations.

(a) The licensee shall not conduct a parenting plan evaluation in a case in which the licensee has served or can reasonably anticipate serving in a therapeutic role for the child or the child's immediate family, or has had other significant involvement; e.g., social, personal, business, or professional, that may compromise the licensee's objectivity.

(b) The licensee may not accept any of the involved participants in the parenting plan evaluation as therapy clients, either during or after the evaluation.

(c) The licensee who is asked to testify regarding a therapy client who is involved in a parenting plan case, shall be aware of the limitations and possible biases inherent in such a role and the possible impact on the ongoing therapeutic relationship. If required to testify, the licensee may not give an expert opinion regarding parenting plan issues, and shall limit the licensee's testimony to factual issues.

AUTH: 37-1-131, 37-22-201, MCA
IMP: 37-1-131, 37-22-102, 37-22-201, 37-23-102, MCA

NEW RULE V COMPETENCY (1) Licensees performing parenting plan evaluations in Montana shall be licensed to practice in the state of Montana.

(2) Licensees performing parenting plan evaluations must comply with the board's rules regarding unprofessional conduct.

(3) Licensees may only perform parenting plan evaluations if they have acquired specialized training, education, and experience in the areas of assessment of children and adults, child and family development, child and family psychopathology, and the impact of divorce on families. They shall acquire current knowledge regarding diverse populations, especially as it relates to child-rearing issues.

(4) Licensees may only operate within their areas of competence and shall seek appropriate supervision when necessary.

(5) Licensees must understand the construction/ administration/interpretation of the test procedures the licensee employs.

(6) Licensees must maintain current knowledge of scientific, professional, and legal developments within their area of claimed competence, and use that knowledge, consistent with accepted clinical and scientific standards, in selecting current data collection methods and procedures for an evaluation.

(7) Licensees shall use multiple methods of data collection in a parenting plan evaluation.

(8) Licensees shall be aware of personal and societal biases and engage in nondiscriminatory practice. The licensee shall be aware of how biases regarding age, gender, race, ethnicity, national origin, religion, sexual orientation, disability, language, culture, and socioeconomic status may interfere with an objective evaluation and recommendations, and shall strive to overcome any such biases or withdraw from the evaluation.

(9) Licensees shall understand, clarify, and utilize the concept of the "best interests of the child" guidelines, as set forth in Title 40, chapter 4, MCA.

(10) Licensees shall maintain current knowledge of legal standards regarding parenting plans, divorce, and laws regarding abuse, neglect, and family violence. Licensees shall also understand the civil rights of parties in legal proceedings in which they participate, and manage their professional conduct in a manner that does not diminish or threaten those rights.

(11) Licensees shall recognize and state any limitations of their assessments and reports.

(12) Licensees shall not render diagnoses or form an expert opinion about any party not personally evaluated, and may not make parenting plan recommendations when both parents and children have not been personally evaluated by the licensee. In situations where all parties cannot be evaluated, licensees shall limit recommendations and opinions to individuals evaluated, and shall avoid making recommendations regarding placement and visitation.

AUTH: 37-1-131, 37-22-201, MCA
IMP: 37-1-131, 37-22-102, 37-22-201, 37-23-102, MCA

NEW RULE VI LIMITS OF CONFIDENTIALITY (1) Licensees shall inform all participants, including parents, children (when feasible), other family members, and third party contacts such as teachers, physicians, and child care providers, as to the limits of confidentiality, which can be expected with regard to any information they may provide to the licensee over the course of the evaluation.

(a) This includes the limits of confidentiality applicable to the general practice of social work or counseling, such as a duty to warn in instances of possible imminent danger to a participant or to others, or legal obligations to report suspected child or elder abuse, and also exceptions to confidentiality stemming from the specific requirements of a parenting plan evaluation, including:

(i) the potential need to disclose information provided by any participant to other participants, in order to obtain accounts of circumstances pertinent to the issues being evaluated;

(ii) the expectation of disclosure of relevant information provided by individual participants to the attorneys involved in the case, to the court, and to the guardian ad litem, if one has been appointed; and

(iii) the likely disclosure of the licensee's findings, professional opinions, and recommendations regarding the resolution of contested matters, which fall within the scope of the evaluation to parents, their attorneys, the court, and any other party, such as a guardian ad litem.

(2) Licensees shall obtain written waivers of confidentiality from the parents who are participating in the evaluation, encompassing all disclosures of information

to other persons, including other participants in the evaluation, attorneys, and the court.

(3) Licensees shall take reasonable precautions in their handling of children's disclosures of abuse, neglect, or any other circumstances, when such disclosure may place the child at increased risk of physical or emotional harm. Licensees shall also recognize the right of any person accused of misconduct to respond to such allegations, while placing the highest priority on the safety and well-being of the child.

(4) Licensees shall recognize that disclosures of statements by abused spouses may pose special risks to the safety and well-being of persons who claim to be victims of domestic abuse. Prior to disclosure of such allegations to an alleged perpetrator or to other persons who may support, collude with, or otherwise increase the risk of abuse, the licensee shall inform the alleged victim that the disclosure will take place. If appropriate, information will be provided as to available community resources for protection, planning, and personal assistance, and counseling for victims of domestic abuse.

(5) Licensees shall provide judges, attorneys, and other appropriate parties with access to the results of the evaluation, but make reasonable efforts to avoid the release of notes, test booklets, structured interview protocols, and raw test data to persons untrained in their interpretation. If legally required to release such information to untrained persons, licensees shall first offer alternative steps, such as providing the information in the form of a report, or releasing the information to another licensee who is qualified in the interpretation of the data, and who will discuss or provide written interpretations of the data with the person(s) who are seeking the information.

(6) Licensees shall not agree to requests by participants in a parenting plan evaluation that information shared with the licensee be concealed.

(a) When such requests are made, the licensee shall clarify the requirements of the evaluation as regards to confidentiality, and may advise the participant to consult with the participant's attorney before proceeding with the evaluation.

(7) The licensee must ultimately respect the right of any participant to withhold information from the evaluation. Whether the refusal to provide information should itself be made known to others, it must be decided by the licensee, based on the relevance of such refusal to the issues before the court, in the particular case at hand.

(8) Licensees shall recognize the possibility that the need to disclose information obtained in the evaluation may limit the validity of data acquired during the evaluation, by inhibiting the free and complete disclosure of information by participants.

AUTH: 37-1-131, 37-22-201, MCA
IMP: 37-1-131, 37-22-102, 37-22-201, 37-23-102, MCA

NEW RULE VII DISCLOSURE AND INFORMED CONSENT (1) Licensees shall obtain informed consents from parents involved in parenting plan evaluations and, to the extent feasible, inform children of significant aspects of the evaluation prior to conducting interviews, testing, or other data-gathering procedures.

Disclosure of information to the parents shall include a thorough explanation of all major aspects of the evaluation, including:

(a) a general review of the purpose, nature, methods, scope, and limitations of a parenting plan evaluation, and the potential impact of the evaluation on the outcome of litigation;

(b) clarification as to who has requested the evaluation and who will receive verbal or written feedback as to the results and recommendations;

(c) the nature of data to be collected and potential uses to which that data will be put, including data from testing and structured interview protocols;

(d) the methods of assessing and collecting fees for professional services, including specification of who will be financially responsible for the evaluation, expectations as to the timing of payments, and policies related to the collection of unpaid fees; and

(e) the nature and limits of confidentiality, both as generally applicable to professional services, and as required by the nature of the evaluation. ([See New Rule VI)]

(2) Licensees shall inform the parents of the above elements and offer each parent the opportunity to discuss the proposed evaluation with an attorney before proceeding.

AUTH: 37-1-131, 37-22-201, MCA
IMP: 37-1-131, 37-22-102, 37-22-201, 37-23-102, MCA

NEW RULE VIII COLLECTION AND USE OF DATA (1) The licensee shall use generally accepted standards for the collection and use of data.

(2) In evaluating alternative hypotheses, licensees shall include data from several different sources and of several different types, such as interviews, testing, observations of interactions, questionnaires, and record reviews. The licensee shall be prepared to specify the reasons for collecting each kind of data and how it relates to the child's best interest.

(3) As data are collected, the licensee must keep comprehensive and detailed records. All raw data, including but not limited to test forms, handwritten notes, scribbles in margins, records of telephone conversations, observations of parent-child interaction, observations of parent-parent interaction, consultations with other professionals, or any audio or video tapes must be saved and made available for review, if necessary.

(4) Data that are not objective should not be treated as though they are. The licensee shall attempt to corroborate or rule out allegations that either parent has behaviors that affect the child detrimentally. If the licensee is not able to form a clear opinion based on objective data or data verified by multiple sources, the licensee should state this fact. If appropriate, the licensee may offer a method by which further data along any dimension might be gathered; for example, recommending that a child meet with a therapist over time, or that a parent undergo drug and alcohol assessment.

(5) If issues affecting what is in the child's best interest arise and cannot be investigated due to the limited scope of the evaluation as imposed by the court or an agency, the licensee shall report those issues to the parents, their attorneys, and the

court. If issues arise that the licensee does not have the expertise to investigate or form an opinion on, another licensee or specialist who does have the required expertise should be brought in to address that issue.

AUTH: 37-1-131, 37-22-201, MCA
IMP: 37-1-131, 37-22-102, 37-22-201, 37-23-102, MCA

NEW RULE IX DOCUMENTATION (1) When licensees complete a parenting plan evaluation, they shall produce a written report of the findings and recommendations.

(2) Licensees shall retain all items presented to them or a copy thereof, that are used for consideration in formulating a professional opinion (e.g., videos, photos, etc.) as well as a copy of the final report.

(3) Licensees shall maintain clear and complete records.

(4) Licensees shall retain all releases of information signed by the parties.

(5) Licensees shall maintain adequate documentation of their contacts with clients and of the clinically significant information derived from these contacts.

(6) Licensees shall create and maintain documentation of all data that form the basis for their conclusions in the detail and quality that would be consistent with reasonable scrutiny in an adjudicative forum.

(7) Licensees shall make clear to all parties that the report may be altered at any time by the licensee, until the final decision of the court is made.

(8) Licensees shall make a reasonable effort to ensure that the court, attorneys, parents, and guardian ad litem, if any, receive the report at the same time.

(9) Licensees shall recognize that all items in the case file, other than copies of tests, raw test data, and computer-generated interpretive reports may be brought into the courtroom.

(10) Licensees shall recognize that all parenting plan evaluations and reports are highly sensitive material and discretion is necessary.

AUTH: 37-1-131, 37-22-201, MCA
IMP: 37-1-131, 37-22-102, 37-22-201, 37-23-102, MCA

5. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Social Work Examiners and Professional Counselors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdswpc@mt.gov, and must be received no later than 5:00 p.m., May 13, 2011.

6. An electronic copy of this Notice of Public Hearing is available through the department and board's site on the World Wide Web at www.swpc.mt.gov. The department strives to make the electronic copy of this notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site

accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems, and that technical difficulties in accessing or posting to the e-mail address do not excuse late submission of comments.

7. The board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this board. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies the person wishes to receive notices regarding all board administrative rulemaking proceedings or other administrative proceedings. The request must indicate whether e-mail or standard mail is preferred. Such written request may be sent or delivered to the Board of Social Work Examiners and Professional Counselors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; faxed to the office at (406) 841-2305; e-mailed to dlibsdswpc@mt.gov; or made by completing a request form at any rules hearing held by the agency.

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

9. Don Harris, attorney, has been designated to preside over and conduct this hearing.

BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS
LINDA CRUMMETT, LCSW, PRESIDENT

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

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

Certified to the Secretary of State April 4, 2011

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
AND THE BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS
STATE OF MONTANA

In the matter of the amendment of ARM 24.101.413 renewal dates and requirements, and the adoption of New Rules I through XIII licensure and regulation of marriage and family therapists	))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On May 5, 2011, at 1:00 p.m., a public hearing will be held in room B-07, 301 South Park Avenue, Helena, Montana, to consider the proposed amendment and adoption of the above-stated rules.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Social Work Examiners and Professional Counselors (board) no later than 5:00 p.m., on April 29, 2011, to advise us of the nature of the accommodation that you need. Please contact Cyndi Breen, Board of Social Work Examiners and Professional Counselors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2392; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail dlibsdswpc@mt.gov.

GENERAL STATEMENT OF REASONABLE NECESSITY: The 2009 Montana Legislature enacted Chapter 403, Laws of 2009 (Senate Bill 271), an act providing for the regulation and licensure of marriage and family therapists, and certain exemptions from such licensure. The bill was signed by the Governor on April 28, 2009, and became effective on July 1, 2009. The board determined it is reasonably necessary to adopt New Rules I through XIII to further implement the statutory provisions and set the standards of qualification, education, training, and experience for licensed marriage and family therapists. Where additional specific bases for a proposed action exist, the board will identify those reasons immediately following that rule.

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

<u>24.101.413 RENEWAL DATES AND REQUIREMENTS</u> (1) through (5)(ak) remain the same.

(al)	Social Workers and Professional Counselors	Professional Counselor - Clinical	Annually	December 31
		Social Worker - Clinical	Annually	December 31
		Marriage and Family Therapist	Annually	December 31

(am) through (7) remain the same.

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

4. The board proposes to adopt the following new rules. The proposed new rules provide as follows:

NEW RULE I FEE SCHEDULE FOR MARRIAGE AND FAMILY THERAPISTS (1) Application/original license fee $100
(2) Renewal fee (based on annual renewal) 100
(3) Renewal fee (inactive to active) 100
(4) Temporary permit 50
(5) Additional standardized fees are specified in ARM 24.101.403.

AUTH: 37-1-134, 37-37-201, MCA
IMP: 37-1-134, 37-1-141, 37-37-201, MCA

REASON: To align with the provisions of Senate Bill 271, the board is proposing New Rule I to set licensure, renewal, and temporary permit fees for marriage and family therapists. Professional and occupational licensing boards are mandated by 37-1-134, MCA, to set and maintain licensure fees commensurate with associated costs. The board estimates that the fees will affect approximately 150 licensees and applicants and result in $17,500.00 of annual revenue.

NEW RULE II APPLICATION PROCEDURES (1) Any person seeking licensure must apply on the board's official forms, which may be obtained through the department. All requirements with documentation must be met at the time of application. Incomplete applications will not be considered by the board.

(2) Completed applications must include:

(a) application fee;

(b) verification of the applicant's education via official transcripts provided directly from the school(s) and/or educational institution(s) to the board office; and

(c) three professional or academic reference letters, including one from the applicant's supervisor which shall include:

(i) name of applicant and supervisor, including the supervisor's type of license and number and signature;

(ii) dates and total hours of supervision received and number of supervised hours of clinical contact; and

(iii) recommendation to approve for licensure or not.

(3) Applicants shall be given written notice of examination eligibility or ineligibility.

(4) The license will be effective as of the date all requirements, including payment of the original license fee, are met. An applicant shall not work as a licensed marriage and family therapist until the effective date of the license.

(5) Applicants shall be allowed a maximum of three attempts to successfully pass the examination.

(6) After the third attempt, if the applicant has not achieved a passing score, the applicant must request in writing to the board to retake the examination. The board may require the applicant to complete a preapproved remediation plan prior to additional exam administrations.

(7) If the applicant fails to satisfy the requirements for licensure within one year of the date the application is determined by the department to be complete, the application will expire, the application fee will be forfeited, and a new completed application and application fee will be required.

AUTH: 37-1-131, 37-22-201, MCA
IMP: 37-1-131, 37-37-201, MCA

NEW RULE III LICENSURE REQUIREMENTS (1) Applicants must provide documentation of obtaining a doctoral or master's degree in:

(a) marriage and family therapy from a program accredited by the Commission on Accreditation for Marriage and Family Therapy Education (COAMFTE);

(b) marriage and family counseling from a program accredited by the Council for the Accreditation of Counseling and Related Educational Programs (CACREP); or

(c) a closely related field, for example, marriage and family counseling with an educational program consisting of a minimum of 48 semester hours (or 72 quarter hours) that includes at least 36 hours of courses comprised of human development, family development/family dynamics, marriage and family systems/systems theory, marriage and family therapy, ethics in marriage and family therapy, and research in marriage and family therapy; and

(d) in addition, at least nine hours of credit must be earned in actual direct client contact, including at least six semester hours of practicums and three or more semester hours of internship or externship to include a minimum total of 500 direct-client contact hours of which at least 50 percent is with couples or families, and 100 hours of supervision of which at least 75 are in individual supervision with, at most, one other supervisee.

(2) For the purpose of meeting the 3,000 clock-hour requirement of 37-37-201, MCA, an applicant shall provide verification of the following:

(a) up to 500 client contact hours accumulated during the attainment of the graduate degree, with:

(i) supervision of up to 100 hours, using a 5:1 ratio of client contact hours to supervision hours of which at least 75 percent are in individual supervision as described in (1)(d) above; and

(ii) group supervision must consist of no more than six supervisees.

(b) at least 1,000 hours of client contact accumulated after the attainment of the graduate degree and within the last five years, with a minimum of 50 percent of those hours providing services to couples and families and under the supervision of a qualified supervisor, using a 5:1 ratio of client contact hours to supervision hours with:

(i) at least 200 hours of supervision of which at least 75 percent are in individual supervision as defined in (1)(d) above, and of which a minimum of 80 hours is earned with each supervisor; and

(ii) at least 50 percent of supervision must involve raw clinical data, i.e., live observation in the therapy room or through a one-way mirror or live-feed camera, videotape, or audiotape.

(c) the 3,000 hours shall have been completed in their entirety at the time of submission of the application.

(3) An applicant must achieve a passing score on the National Marriage and Family Therapy Licensing Examination administered by the Association of Marital and Family Therapy Regulatory Boards (AMFTRB).

AUTH: 37-1-131, 37-22-201, MCA
IMP: 37-1-131, 37-37-201, MCA

NEW RULE IV TEMPORARY PRACTICE PERMIT (1) An applicant for licensure by examination who has completed the education and experience requirements for a marriage and family therapy license may be granted a temporary permit to practice marriage and family therapy, provided that an application for Montana licensure, supporting credentials, and fees has been submitted to the board.

(2) Except as provided in (3), a temporary permit issued to an applicant who passes the examination remains valid until the license is granted, or for up to one year from the date the temporary permit was granted, whichever is shorter.

(3) A temporary permit expires one year after the date it was issued and may not be renewed.

(4) An applicant for licensure by endorsement in Montana may be granted a temporary permit to practice marriage and family therapy, provided the applicant has submitted a completed application as described in [NEW RULE VI], and that the initial screening by board staff shows that the current license is in good standing and not on probation or subject to ongoing disciplinary action. The temporary permit will remain valid until a license is granted or until notice of proposal to deny license is served, whichever occurs first. In the event that neither contingency has occurred within one year of issuance of the temporary permit to the endorsement applicant, the temporary permit shall expire and may not be renewed.

(5) An individual holding a temporary practice permit shall use the title "Licensed Marriage and Family Therapy Candidate."

AUTH: 37-1-131, 37-1-319, 37-22-201, MCA
IMP: 37-1-131, 37-1-305, 37-37-101, MCA

NEW RULE V APPLICATION TO CONVERT AN ACTIVE STATUS LICENSE TO AN INACTIVE STATUS LICENSE AND CONVERSION FROM INACTIVE TO ACTIVE STATUS (1) A licensee may place a license on inactive status by either indicating on the renewal form that inactive status is desired or by informing the board office in writing that an inactive status is desired. The license must have been active and in good standing prior to the first time it is placed on inactive status. It is the sole responsibility of the inactive licensee to keep the board informed as to any change of address during the period of time the license remains on inactive status. Inactive licensees must pay the inactive license fee annually to maintain license status.

(2) A license shall not be on inactive status for more than five consecutive years. At the end of the fifth year that a license has been on inactive status, the license must be converted to active status. If the license is not converted to active status, the provisions of 37-1-141, MCA, apply to the renewal, lapse, expiration, or termination of the license.

(3) An inactive status license does not entitle the holder to practice as a licensed marriage and family therapist in the state of Montana. Upon application and payment of the appropriate fee, the board may reactivate an inactive license if the applicant does each of the following:

(a) presents satisfactory evidence that the applicant has not been out of active practice for more than five years and that the applicant has attended 20 hours of continuing education per year of inactive status, with a maximum of 40 hours of continuing education, which comply with the continuing education rules of the board and is approved by the board. The continuing education hours must have been acquired within the 24 months immediately preceding application to reactivate; and

(b) submits certification from the marriage and family therapy licensing body of all jurisdictions where the applicant is licensed or has practiced; that the applicant is in good standing and has not had any disciplinary action taken against the applicant's license; or if the applicant is not in good standing by that jurisdiction, an explanation of the nature of the violation(s) resulting in that status including the extent of the disciplinary treatment imposed.

AUTH: 37-1-131, 37-1-319, 37-22-201, MCA
IMP: 37-1-131, 37-1-319, 37-37-101, MCA

NEW RULE VI LICENSURE OF OUT-OF-STATE APPLICANTS (1) A license to practice as a licensed marriage and family therapist in the state of Montana may be issued to the holder of an out-of-state marriage and family therapist license, provided the applicant completes, and files with the board, an application for licensure and the required application fee. The candidate must meet the following requirements:

(a) the candidate has held a valid and unrestricted license as a licensed marriage and family therapist in another state or jurisdiction, which was issued under standards equivalent to or greater than current standards in this state. Official written verification of such licensure status must be received by the board directly from the other state(s) or jurisdiction(s); or

(b) for applications received before July 1, 2011, the candidate is a clinical member of the American Association of Marriage and Family Therapists (AAMFT) in good standing.

AUTH: 37-1-131, 37-22-201, MCA
IMP: 37-1-131, 37-1-304, 37-37-201, MCA

NEW RULE VII RENEWALS (1) Renewal notices will be sent as specified in ARM 24.101.414.

(2) Marriage and family therapy licenses must be renewed on or before the date set by ARM 24.101.413.

(3) The provisions of ARM 24.101.408 apply.

AUTH: 37-1-131, 37-22-201, MCA
IMP: 37-1-131, 37-1-141, MCA

NEW RULE VIII CODE OF ETHICS - LICENSED MARRIAGE AND FAMILY THERAPISTS (1) Pursuant to 37-22-201 and 37-23-103, MCA, the board adopts the following professional and ethical standards for licensed professional counselors, licensed social workers, and licensed marriage and family therapists to ensure the ethical, qualified, and professional practice of social work, professional counseling, and marriage and family therapy for the protection of the general public. These standards supplement current applicable statutes and rules of the board. A violation of the following is considered unprofessional conduct as set forth elsewhere in rule, and may subject the licensee to such penalties and sanctions provided in 37-1-136, MCA.

(2) A licensed marriage and family therapist shall abide by the following code of professional ethics.

(a) Licensees shall not:

(i) commit fraud or misrepresent services performed;

(ii) divide a fee or accept or give anything of value for receiving or making a referral;

(iii) violate a position of trust by knowingly committing any act detrimental to a client;

(iv) exploit in any manner the professional relationships with clients or former clients, supervisees, supervisors, students, employees, or research participants;

(v) engage in or solicit sexual relations with a client or commit an act of sexual misconduct or a sexual offense if such act, offense, or solicitation is substantially related to the qualifications, functions, or duties of the licensee;

(vi) condone or engage in sexual harassment. Sexual harassment is defined as: "deliberate or refuted comments, gestures, or physical contact of a sexual nature that are unwelcome by the recipient";

(vii) discriminate in the provision of services on the basis of race, creed, religion, color, sex, physical or mental disability, marital status, age, or national origin;

(viii) provide professional services while under the influence of alcohol or other mind-altering or mood-altering drugs which impair delivery of services; or

(ix) engage in any advertising which is in any way fraudulent, false, deceptive, or misleading.

(b) All licensees shall:

(i) provide clients with accurate and complete information regarding the extent and nature of the services available to them;

(ii) terminate services and professional relationships with clients when such services and relationships are no longer required or where a conflict of interest exists;

(iii) make every effort to keep scheduled appointments;

(iv) notify clients promptly and seek the transfer, referral, or continuation of services pursuant to the client's needs and preferences if termination or interruption of services is anticipated;

(v) attempt to make appropriate referrals pursuant to the client's needs;

(vi) obtain informed written consent of the client or the client's legal guardian prior to the client's involvement in any research project of the licensee that might identify the client or place them at risk;

(vii) obtain informed written consent of the client or the client's legal guardian prior to taping, recording, or permitting third-party observation of the client's activities that might identify the client or place them at risk;

(viii) safeguard information provided by clients. Except where required by law or court order, a licensee shall obtain the client's informed written consent prior to releasing confidential information; and

(ix) disclose to and obtain written acknowledgement from the client or prospective client as to the fee to be charged for professional services, and/or the basis upon which the fee will be calculated.

AUTH: 37-1-131, 37-1-136, 37-1-319, 37-22-201, MCA
IMP: 37-1-131, 37-1-136, 37-1-316, 37-22-201, 37-37-101, MCA

NEW RULE IX HOURS, CREDITS, AND CARRY OVER (1) Each marriage and family therapist licensee shall earn 20 clock hours of accredited continuing marriage and family therapy education for each year. Clock hours or contact hours shall be the actual number of hours during which instruction was given.

(2) A maximum of ten clock hours may be given for the first-time preparation of a new course, in-service training workshop, or seminar which is related to the enhancement of marriage and family therapy practice, values, skills, and knowledge; or a maximum of ten clock hours credit may be given for the preparation by the author or authors of a professional marriage and family therapy paper published for the first time in a recognized professional journal, or given for the first time at a statewide or national professional meeting.

(3) If a licensee completed more than 20 hours of continuing education, excess hours in an amount not to exceed 20 hours may be carried forward to the next year.

(4) Any licensee may apply for an exemption from the continuing marriage and family therapy education requirements of these rules by filing a statement with the board setting forth good faith reasons why he or she is unable to comply with these rules, and an exemption may be granted by the board.

(5) Marriage and family therapy applicants licensed before July 1 of the renewal year will be required to fulfill the 20-hour requirement. Those licensed after July 1 are required to obtain one-half of the 20-hour requirement; and those licensed after October 1 will not be required to obtain continuing education credits for renewal.

AUTH: 37-1-131, 37-1-319, 37-22-201, MCA
IMP: 37-1-131, 37-1-306, 37-37-101, MCA

NEW RULE X ACCREDITATION AND STANDARDS (1) The following standards shall govern the approval of continuing marriage and family therapy education activities by the board:

(a) they shall have significant intellectual or practical content and the primary objective shall be to increase the participant's professional competence as a marriage and family therapist; and

(b) they shall constitute an organized program of learning, dealing with matters directly related to the practice of marriage and family therapy, professional responsibility, or ethical obligations of marriage and family therapists.

(2) Providers of continuing marriage and family therapy education shall apply to the board for accreditation and demonstrate that the offered course complies with the standards.

(3) The board, in its discretion, may determine the number of hours acceptable for any continuing education credit.

(4) Licensees and course providers may inquire in advance of continuing education activity for board accreditation.

AUTH: 37-1-131, 37-1-319, 37-22-201, MCA
IMP: 37-1-131, 37-1-306, 37-37-101, MCA

NEW RULE XI REPORTING REQUIREMENTS (1) Each licensee shall attest to completion of the licensee's continuing education requirements prior to renewal.

AUTH: 37-1-131, 37-1-319, 37-22-201, MCA
IMP: 37-1-131, 37-1-306, 37-37-101, MCA

NEW RULE XII CONTINUING EDUCATION NONCOMPLIANCE

(1) In the event that a licensed marriage and family therapist fails to comply with these continuing education rules in any respect, the board shall promptly send a notice of noncompliance. The notice shall specify the nature of the noncompliance and state that unless the noncompliance is corrected or a request for a hearing before the board is made within 60 days, the statement of noncompliance shall be considered grounds for suspension or revocation.

AUTH: 37-1-131, 37-1-136, 37-1-319, 37-22-201, MCA
IMP: 37-1-131, 37-1-136, 37-1-306, 37-1-316, 37-37-101, MCA

NEW RULE XIII UNPROFESSIONAL CONDUCT FOR MARRIAGE AND FAMILY THERAPISTS (1) Any violation of this rule constitutes unprofessional conduct.

(2) A licensee shall not:

(a) misrepresent the type or status of license held by the licensee;

(b) intentionally cause physical or emotional harm to a client;

(c) misrepresent or permit the misrepresentation of his or her professional qualifications, affiliations, or purposes;

(d) have sexual relations with a client, solicit sexual relations with a client, or to commit an act of sexual misconduct or a sexual offense if such act, offense, or solicitation is substantially related to the qualifications, functions, or duties of the licensee;

(e) engage in sexual acts with a client or with a person who has been a client within the past 18 months. A licensee shall not provide marriage and family therapy services to a person with whom the licensee has had a sexual relation at any time;

(f) engage in sexual contact or a romantic relationship with current clients;

(g) engage in sexual contact with a former client. The licensee who engages in such activity following termination of professional services, bears the burden of demonstrating that there has been no exploitation in light of all relevant factors, including:

(i) the amount of time that has passed since professional services terminated;

(ii) the nature and duration of the professional services;

(iii) the circumstances of termination;

(iv) the client's personal history;

(v) the client's current mental status;

(vi) the likelihood of adverse impact on the client; and

(vii) any statements or actions made by the licensee during the defined professional relationship, suggesting or inviting the possibility of a post termination sexual or romantic relationship with the client.

(h) perform or hold himself or herself out as able to perform professional services beyond his or her field or fields of competence as established by his or her education, training, and/or experience;

(i) permit a person under his or her supervision or control to perform or permit such person to hold himself or herself out as competent to perform professional services beyond the level of education, training, and/or experience of that person;

(j) prior to the commencement of treatment, fail to disclose to the counselee or prospective counselee the fee to be charged for the professional services or the basis upon which such fee will be computed;

(k) engage in a dual relationship with a client or former client if the dual relationship has the potential to compromise the client's well-being, impair the licensee's objectivity and professional judgment, or create or increase the risk of exploitation of the client. If a dual relationship arises as a result of unforeseeable and unavoidable circumstances, the licensee shall promptly take appropriate professional precautions. Appropriate professional precautions must ensure that the client's well-being is not compromised and that no exploitation occurs, and should

include consultation, supervision, documentation, or obtaining written informed consent of the client;

(l) participate in bartering, unless bartering is considered to be essential for the provision of services negotiated without coercion and entered into at the client's initiative and with the client's informed consent. Licensees who accept goods or services from clients as payment for professional services assume the full burden of demonstrating that this arrangement will not be detrimental to the client or the professional relationship; or

(m) falsify or misrepresent a record of supervision submitted in connection with an application for licensure.

AUTH: 37-1-131, 37-1-136, 37-1-319, 37-22-201, MCA
IMP: 37-1-131, 37-1-136, 37-1-316, 37-37-101, MCA

5. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Social Work Examiners and Professional Counselors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to dlibsdswpc@mt.gov, and must be received no later than 5:00 p.m., May 13, 2011.

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

7. The board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this board. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies the person wishes to receive notices regarding all board administrative rulemaking proceedings or other administrative proceedings. The request must indicate whether e-mail or standard mail is preferred. Such written request may be sent or delivered to the Board of Social Work Examiners and Professional Counselors, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; faxed to the office at (406) 841-2305; e-mailed to dlibsdswpc@mt.gov; or made by completing a request form at any rules hearing held by the agency.

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted on July 23, 2009, by electronic mail.

9. Don Harris, attorney, has been designated to preside over and conduct this hearing.

BOARD OF SOCIAL WORK EXAMINERS
AND PROFESSIONAL COUNSELORS
LINDA CRUMMETT, LCSW, PRESIDENT

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

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

Certified to the Secretary of State April 4, 2011

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

In the matter of the amendment of ARM 37.78.102 pertaining to Temporary Assistance for Needy Families (TANF)	))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT

TO: All Concerned Persons

1. On May 9, 2011, at 10:30 a.m., the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed amendment of the above-stated 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 May 2, 2011, to advise us of the nature of the accommodation that you need. Please contact Kenneth Mordan, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

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

37.78.102 TANF: FEDERAL REGULATIONS ADOPTED BY REFERENCE

(1) The TANF program shall be administered in accordance with the requirements of federal law governing temporary assistance for needy families as set forth in Title IV of the Social Security Act, 42 USC 601 et seq., as amended by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, the Balanced Budget Act of 1997, and the Deficit Reduction Act of 2005.

(2) The "Montana TANF Cash Assistance Manual" dated ~~October 1, 2010~~ July 1, 2011 is adopted and incorporated by this reference. A copy of the Montana TANF Cash Assistance Manual is available for public viewing at each local Office of Public Assistance, and at the Department of Public Health and Human Services, Human and Community Services Division, 111 N. Jackson St., 5th Floor, P.O. Box 202925, Helena, MT 59620-2925. Manual updates are also available on the department's web site at www.dphhs.mt.gov.

AUTH: 53-4-212, MCA
IMP: 53-4-211, 53-4-601, MCA

4. The Department of Public Health and Human Services (department) is proposing an amendment to ARM 37.78.102 pertaining to Temporary Assistance for Needy Families (TANF).

Statement of Reasonable Necessity

ARM 37.78.102

ARM 37.78.102 currently adopts and incorporates by reference the October 1, 2010 TANF policy manual. The department proposes to make some revisions to this manual that will take effect on July 1, 2011. The proposed amendments to this rule are necessary to incorporate into the Administrative Rules of Montana the revised versions of the policy manual and to permit all interested parties to comment on the department's policies and to offer suggested changes. It is estimated that changes to the TANF manual could affect approximately 9,161 TANF recipients, which is the average of the total number of recipients from October through December 2010. Manuals and draft manual materials are available for review in each local Office of Public Assistance and on the department's web site at www.dphhs.mt.gov.

Following is a brief overview of the TANF manual sections with substantive changes related to the above rule changes.

TANF 001 - Monthly Income Standards

This section incorporates TANF Bulletin 60 to reflect the change in eligibility standards to 30 percent of the 2006 Federal Poverty Level.

TANF 102-1 - Civil Rights

This section is updated to include the Non-Discrimination Notice policy, to distinguish state and federal protected classes; to clarify the process on how to handle complaints including complaints on a state protected class but not a federal protected class. Information is added on how central office staff will handle complaints. The address for the Office for Civil Rights was updated.

TANF 102-1a - ADA Accommodations

This section adds policies and procedures to ensure that persons with disabilities have an equal opportunity to participate in our services, activities, programs, and other benefits. The procedures outlined in the manual material are intended to ensure effective communication with patients/clients involving their medical conditions, treatment, services, and benefits.

TANF 103-1 - Verification and Documentation

This section incorporates TANF Bulletin 62 which outlines the process utilized for online applications. It provides individuals the option of applying online as well as

through the OPA; and, it clarifies the manner in which items are received through the online application system.

TANF 103-4 - Verification and Documentation

This section incorporates TANF Bulletins 55 and 62. TANF Bulletin 55 addresses the removal of the requirement for TANF households to comply with Third Party Liability (TPL for Medicaid) and Health Insurance Premium Insurance Payment System (HIPPS). The reference to the use of the Accurint System to verify resources was removed as it was no longer cost effective to continue with this service. If marital status is questionable, it has to be verified.

TANF 300 - Overview

This section incorporates TANF Bulletin 55 which removes the requirement for TANF households to comply with TPL for Medicaid and HIPPS.

TANF 301-2 - Alien Status

This section incorporates TANF Bulletin 59 addressing Special Immigrant Visa (SIV) eligibility. This section clarifies whom in central office, would receive the verification request form for a Systematic Alien Verification for Entitlements (SAVE) request.

TANF 307-1 - TPL/HIPPS

This section was removed from the manual as it is no longer a requirement for TANF eligibility.

TANF 701-3 - Participation Components

The Community Service component was updated to align with the information in the WoRC guidelines. Information regarding the voluntary disclosure of disability information was added to this section when referencing a request from an individual to be exempt from employment and training activities due to disability. Information was added regarding the information that must be provided prior to exempting an individual from employment and training activities. Information was added to clarify that the sanction does not need to be lifted in order to enter the Fair Hearing Pending (FHP) component.

TANF 702-4 - Fair Hearing Non-Compliance with FIA/EP or Tribal New – Continuation of Benefits

Clarification was added that the sanction does not have to be lifted in order to input the FHP component.

TANF 704-1 - Supportive Service Payments

This section adds requirements that a participant must certify that they have a valid driver's license, car registration, and insurance before a supportive service can be issued for gas and/or car repair. Requirements were also added in regards to issuing a supportive service for another person's vehicle. It clarifies that gift/incentive cards can no longer be used in the WoRC programs. Information was added on what cannot be purchased with supportive services.

TANF 1504-1 - Overpayments

Information was added to include the new procedure for clients to contact the Claims and Investigation unit to apply their Electronic Benefit Transfer (EBT) benefits to their TANF debt. The policy regarding the use of expunged TANF benefits to offset an existing overpayment was added to the manual. New contact information was added to the overpayment log section.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Kenneth Mordan, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail dphhslegal@mt.gov, and must be received no later than 5:00 p.m., May 13, 2011.

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

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

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

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

/s/ Lisa Swanson
Rule Reviewer

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

Certified to the Secretary of State April 4, 2011

BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 8.94.3726 pertaining to incorporation by reference of rules for the CDBG program	))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On February 10, 2011 the Department of Commerce published MAR Notice No. 8-94-88 pertaining to the public hearing on the proposed amendment of the above-stated rule at page 135 of the 2011 Montana Administrative Register, Issue Number 3.

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

3. No comments or testimony were received.

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

/s/ DORE SCHWINDEN
DORE SCHWINDEN
Director
Department of Commerce

Certified to the Secretary of State April 4, 2011.

BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 8.111.602 pertaining to the low income housing tax credit program	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On December 9, 2010 the Department of Commerce published MAR Notice No. 8-111-87 pertaining to the proposed amendment of the above-stated rule at page 2792 of the 2010 Montana Administrative Register, Issue Number 23.

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

3. No comments or testimony were received.

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

/s/ DORE SCHWINDEN
DORE SCHWINDEN
Director
Department of Commerce

Certified to the Secretary of State April 4, 2011.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.8.763 pertaining to revocation of permit	)))	NOTICE OF AMENDMENT (AIR QUALITY)

TO: All Concerned Persons

1. On December 23, 2010, the Board of Environmental Review published MAR Notice No. 17-310 regarding a notice of public hearing on proposed amendment of the above-stated rule at page 2878, 2010 Montana Administrative Register, issue number 24.

2. The board has amended the rule exactly as proposed.

3. No public comments or testimony were received.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

/s/ David Rusoff
DAVID RUSOFF
Rule Reviewer

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

Certified to the Secretary of State, April 4, 2011.

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.8.604, 17.8.610, 17.8.612, 17.8.613, 17.8.614, and 17.8.615 pertaining to open burning	))))	NOTICE OF AMENDMENT (AIR QUALITY)

TO: All Concerned Persons

1. On December 23, 2010, the Board of Environmental Review published MAR Notice No. 17-311 regarding a notice of public hearing on proposed amendment of the above-stated rule at page 2880, 2010 Montana Administrative Register, issue number 24.

2. The board has amended the rules exactly as proposed.

3. No public comments or testimony were received.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

/s/ David Rusoff
DAVID RUSOFF
Rule Reviewer

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

Certified to the Secretary of State, April 4, 2011.

BEFORE THE DEPARTMENT OF CORRECTIONS
OF THE STATE OF MONTANA

In the matter of the adoption of NEW RULE I pertaining to the Prison Rape Elimination Act and the amendment of ARM 20.9.602, 20.9.607, 20.9.609, 20.9.612, 20.9.613, 20.9.616, 20.9.617, 20.9.618, 20.9.619, 20.9.620, 20.9.621, 20.9.623, 20.9.624, and 20.9.630 pertaining to licensure of youth detention facilities	))))))))))))	NOTICE OF ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On February 24, 2011 the Department of Corrections published MAR Notice No. 20-9-44 pertaining to the public hearing on the proposed adoption and amendment of the above-stated rules at page 183 of the 2011 Montana Administrative Register, Issue Number 4.

2. On March 22, 2011, a public hearing was held on the proposed new rule and amendment of the above-stated rules in Helena. Several comments were received at the public hearing. No other comments were received by the March 24, 2011, deadline.

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

COMMENTS 1 AND 2 PERTAIN TO NEW RULE I:

COMMENT 1: One commenter stated that New Rule I(2) would require the facility to report youth with sexually aggressive behavior to law enforcement for prosecution, and, therefore, requested the department delete that section of New Rule I(2).

RESPONSE 1: New Rule I(2) only requires the facility to screen youth for tendencies to act out with sexually aggressive behavior so the facility can properly place the youth away from vulnerable youth. The rule does not require the facility to report such youth to law enforcement. Further, New Rule I(2) is a requirement of the American Correctional Association standards for juvenile detention facilities. The department will adopt New Rule I(2) as proposed.

COMMENT 2: One commenter opposed New Rule I(4). The commenter opposed the requirement for assessment by a mental health or other qualified professional as being too expensive for a small facility. The commenter also opposed the counseling requirement as being too expensive.

RESPONSE 2: New Rule I(4) is a requirement of the American Correctional Association standards for juvenile detention facilities. The department will adopt New Rule I(4) as proposed.

4. The department has adopted NEW RULE I (20.9.635) as proposed.

COMMENT 3 PERTAINS TO ARM 20.9.612:

COMMENT 3: One commenter maintained that 20.9.612(3) required the facility to have an employee on site for each gender youth regardless of whether a youth of that gender was in the facility.

RESPONSE 3: The comment is well taken and 20.9.612(3) will remain the same.

5. The department has amended the following rules as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

20.9.612 MANAGEMENT, STAFF, AND TRAINING (1) and (2) remain as proposed.

(3) The facility shall employ, train, and supervise an adequate number of staff~~, including immediately available same gender on-site staff,~~ in order to provide continuous awake supervision of youth and at least one immediately available staff member of the same gender as the youth.

(a) through (7) remain as proposed.

20.9.620 RIGHTS OF YOUTH (1) and (2) remain as proposed.

(3) The facility may require a detained youth to perform housekeeping functions such as necessary housekeeping in ~~his~~ the youth's own room and assisting with general housekeeping duties in the living unit except that:

(a) through (5) remain as proposed.

6. Additionally, the department amends the following rule, new matter underlined, deleted matter interlined.

20.9.618 SEARCHES (1) remains the same.

(2) Although control of weapons and contraband is essential to the order and security of the detention facility, indiscriminate searches of youth are prohibited. Searches of a youth, ~~his~~ the youth's possessions, room, or other areas of the facility are permitted only when there is sufficient reason to believe that the security of the facility is endangered or that contraband is present in the facility.

(3) through (7) remain the same.

AUTH: 41-5-1802, MCA
IMP: 41-5-1802, MCA

STATEMENT OF REASONABLE NECESSITY: The Department of Corrections amends ARM 20.9.618 to make the rule gender neutral.

7. The department has amended ARM 20.9.602, 20.9.607, 20.9.609, 20.9.613, 20.9.616, 20.9.617, 20.9.619, 20.9.621, 20.9.623, 20.9.624, and 20.9.630 as proposed.

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

Certified to the Secretary of State April 4, 2011

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

In the matter of the amendment of ARM 24.7.301, 24.7.304, 24.7.305, 24.7.306, 24.7.308, 24.7.312, 24.7.315, and 24.7.316, and the adoption of NEW RULE I, pertaining to the Board of Labor Appeals; the amendment of 24.11.204, 24.11.207, 24.11.320, 24.11.450A, 24.11.452A, 24.11.454A, 24.11.455, 24.11.457, 24.11.458, 24.11.475, 24.11.616, 24.11.1207, 24.11.2407, 24.11.2511 and 24.11.2515; and the adoption of NEW RULES II through X, pertaining to unemployment insurance	)	NOTICE OF AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On February 24, 2011, the Department of Labor and Industry (department) and the Board of Labor Appeals (board) jointly published MAR Notice No. 24-7-254 regarding the public hearing on the above-stated rules at page 195 of the 2011 Montana Administrative Register, Issue Number 4.

2. On March 17, 2011, a public hearing was held at which time members of the public made oral and written comments and submitted documents. Additional comments were received during the comment period.

3. No comments were made with respect to the rules the board proposed to amend or adopt. The department has thoroughly considered the comments and testimony received from the public. The following is a summary of the public comments received and the department's response to those comments:

Comment 1: One comment lauded the department for bringing the meal and lodging reimbursement rates for motor carriers in ARM 24.11.2511 into alignment with the current rates paid to truckers in the U.S. and Canada.

Response 1: The department acknowledges the comment.

Comment 2: One commenter distinguished unemployment insurance hearings, which adjudicate claim benefit and tax contribution determinations on appeal, from contested case proceedings held under the provisions of the Montana Administrative Procedure Act (Title 2, chapter 4, part 6, Montana Code Annotated).

Response 2: The department acknowledges the difference between unemployment insurance hearings and contested case proceedings and amends ARM 24.11.207 accordingly.

Comment 3: Another comment suggested that NEW RULE VI be amended to allow a claimant's designated agent to request an appeal or redetermination on behalf of the claimant via the department's internet application.

Response 3: The department concurs and amends NEW RULE VI accordingly.

4. The board has amended the following rules as proposed: ARM 24.7.301, 24.7.304, 24.7.305, 24.7.306, 24.7.308, 24.7.312, 24.7.315, and 24.7.316.

5. The board has adopted the following rule as proposed: NEW RULE I (24.7.320).

6. The department has amended the following rules as proposed: ARM 24.11.204, 24.11.320, 24.11.450A, 24.11.452A, 24.11.454A, 24.11.455, 24.11.457, 24.11.458, 24.11.475, 24.11.616, 24.11.1207, 24.11.2407, 24.11.2511 and 24.11.2515.

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

24.11.207 INTERESTED PARTY (1) through (5) remain as proposed.

(6) Only an interested party to an unemployment insurance proceeding has standing to request a redetermination, ~~contested case~~ hearing, or appeal to the Board of Labor Appeals.

(7) The department shall provide written notice of a determination, redetermination, ~~contested case~~ hearing, and appeal only to the identified interested parties to a particular proceeding as defined by this rule.

AUTH: 39-51-301, 39-51-302, MCA
IMP: Title 39, chapter 51, parts 11 and 12, 21 through 24, and 32, MCA

8. The department has adopted the following rules as proposed: NEW RULE II (24.11.476), III (24.11.490), IV (24.11.491), V (24.11.915) VII (24.11.487), VIII (24.11.485), IX (24.11.2506), and X (24.11.2208).

9. The department has adopted the following rule as proposed, but with the following changes from the original proposal, new material underlined, deleted matter interlined:

NEW RULE VI (24.11.210) CLAIMANT AGENT DESIGNATION

(1) remains as proposed.

(a) Level 1 designation allows the agent to provide information to the department related to the claim for benefits. Agent may respond to department requests for information by telephone or in writing. Agent may request a redetermination or appeal by submitting a written request on claimant's behalf;

(b) Level 2 designation allows the agent to file a new claim, reactivate an inactive claim, or file continued claim certifications on the claimant's behalf. Claimant must provide the agent with claimant's Personal Identification Number to allow the agent to access claimant's account and to use the department's internet application; or

(c) through (4) remain as proposed.

AUTH: 39-51-301, 39-51-302, MCA
IMP: 39-51-3201, MCA

10. The board's new rules and amendments are all effective April 15, 2011.

11. The following new rules and amendments of the department are effective April 15, 2011: New Rule V (24.11.915), IX (24.11.2506), and X (24.11.2208) and amendments to 24.11.207, 24.11.320, 24.11.616, 24.11.2407, 24.11.2511, and 24.11.2515.

12. The following new rules and amendments of the department are effective May 29, 2011: New Rule II (24.11.476), III (24.11.490), IV (24.11.491), VI (24.11.210), VII (24.11.487), and VIII (24.11.485) and amendments to 24.11.204, 24.11.450A, 24.11.452A, 24.11.454A, 24.11.455, 24.11.457, 24.11.458, 24.11.475, and 24.11.1207.

/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/ NORMAN GROSFIELD
Norman Grosfield, Acting Chair,
Board of Labor Appeals

Certified to the Secretary of State April 4, 2011

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
AND THE BOARD OF ATHLETIC TRAINERS
STATE OF MONTANA

In the matter of the amendment of ARM 24.101.413 renewal dates and requirements, 24.118.402 fee schedule, and the adoption of NEW RULES I through VII pertaining to licensure of athletic trainers	))))))	NOTICE OF AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On January 27, 2011, the Department of Labor and Industry (department) and the Board of Athletic Trainers (board) published MAR notice no. 24-118-2 regarding the public hearing on the proposed amendment and adoption of the above-stated rules, at page 94 of the 2011 Montana Administrative Register, issue no. 2.

2. On February 17, 2011, a public hearing was held on the proposed amendment and adoption of the above-stated rules in Helena. No comments were received by the February 24, 2011 comment deadline.

3. The department has amended ARM 24.101.413 exactly as proposed.

4. The board has amended ARM 24.118.402 exactly as proposed.

5. The board has adopted NEW RULE I (24.118.101), NEW RULE II (24.118.201), NEW RULE III (24.118.301), NEW RULE IV (24.118.507), NEW RULE V (24.118.504), NEW RULE VI (24.118.2301), and NEW RULE VII (24.118.2103) exactly as proposed.

BOARD OF ATHLETIC TRAINERS
CHRIS HEARD, CHAIRPERSON

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

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

Certified to the Secretary of State April 4, 2011

BEFORE THE BOARD OF REAL ESTATE APPRAISERS
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 24.207.401 fees, 24.207.502 application requirements, 24.207.504, 24.207.505, 24.207.506, 24.207.507 qualifying education requirements, 24.207.509 qualifying experience, 24.207.515 inactive license or certification, 24.207.516 inactive to active license, 24.207.517 trainee requirements, 24.207.518 mentor requirements, 24.207.2101 and 24.207.2102 continuing education	)))))))))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On December 23, 2010, the Board of Real Estate Appraisers (board) published MAR notice no. 24-207-31 regarding the public hearing on the proposed amendment of the above-stated rules, at page 2905 of the 2010 Montana Administrative Register, issue no. 24.

2. On January 13, 2011, a public hearing was held on the proposed amendment of the above-stated rules in Helena. No comments were received by the January 21, 2011 comment deadline.

3. The board has amended ARM 24.207.401, 24.207.502, 24.207.504 through 24.207.507, 24.207.509, 24.207.515 through 24.207.518, 24.207.2101, and 24.207.2102 exactly as proposed.

BOARD OF REAL ESTATE APPRAISERS
JENNIFER MCGINNIS, CHAIRPERSON

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

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

Certified to the Secretary of State April 4, 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 IX, the amendment of ARM 37.106.1130 and 37.106.1845, and the repeal of ARM 37.106.1001 pertaining to licensing requirements for outpatient facilities for primary care	)))))))	NOTICE OF ADOPTION, AMENDMENT, AND REPEAL

TO: All Concerned Persons

1. On November 26, 2010, the Department of Public Health and Human Services published MAR Notice No. 37-526 pertaining to the public hearing on the proposed adoption, amendment, and repeal of the above-stated rules at page 2690 of the 2010 Montana Administrative Register, Issue Number 22.

2. The department has adopted New Rules I (37.106.1002), II (37.106.1004), III (37.106.1006), IV (37.106.1008), V (37.106.1010), VII (37.106.1014), VIII (37.106.1016), and IX (37.106.1018) as proposed.

3. The department has amended ARM 37.106.1130 and 37.106.1845, and has repealed ARM 37.106.1001 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 VI (37.106.1012) MINIMUM STANDARDS FOR OUTPATIENT CENTERS FOR PRIMARY CARE: BIRTH CENTERS (1) through (1)(b) remain as proposed.

(c) establish a coordinated transfer of care through a mutually established agreement to the nearest hospital or critical access hospital that provides obstetrical and surgical services as required by the patient's acuity or the outpatient birth center 24 hour length of stay limitation.

(d) A transfer of care agreement must show that a physician who has admitting privileges at the hospital or critical access hospital that provides obstetrical and surgical services has agreed to admit and treat patients of the birthing center should the need arise. In transferring patients, the birth center shall:

(i) and (ii) remain as proposed.

AUTH: 50-5-103, 53-6-106, MCA
IMP: 50-5-103, 50-5-106, MCA

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

COMMENT #1: One comment was received from the Montana Nurses Association in conjunction with the Council on Advanced Practice. These two groups were very concerned that the language as written would cause all nurse managed centers and private nurse practitioner run clinics to be under the direct supervision of a licensed physician or have to contract with a physician to provide these services.

RESPONSE #1: The department does not agree. Title 37, MCA is the chapter under which the Department of Labor and Industry provides for occupational/professional licensing. The Department of Public Health and Human Services considers advanced practice registered nurses (APRNs) and any other practitioners licensed under Title 37, MCA as exempt from health care facility licensure. In other words, if a practitioner is already licensed to practice medicine they may open a private practice or clinic without having to license as a health care facility. Any licensed practitioner can sign up and bill Medicare/Medicaid for professional services rendered.

If a licensed healthcare practitioner additionally wants to bill for a facility fee (such as for a birthing center) a health care facility license must be acquired; hence the rule for licensing "outpatient facilities for primary care". The health care facility standards are only applicable to those healthcare professionals who would seek and qualify for a healthcare facility license, in addition to their professional credentials.

COMMENT #2: One comment was received indicating support of the proposed rule.

RESPONSE #2: The department thanks the commenter.

COMMENT #3: One comment was received with regard to naming a medical director and specifying their qualifications. Additionally, this commenter indicated that the rule should include a provision requiring that the center have insurance for professional staff. The commenter further requested the following language be inserted into the rule:

(1) the medical director is a qualified physician who has current obstetrical experience and is capable of performing cesarean sections

(2) an affiliation with their local hospital so that emergent cases can be transferred with ease

(3) the medical director has privileges at that hospital and covers these emergent cases when they present OR has an arranged coverage process in place

(4) Insurance coverage for all providers including the medical director

(5) Only certified midwives with Montana licensure are on staff at the outpatient birth center.

RESPONSE #3: The department has considered the suggested language and will not insert the language into the rule. It is not appropriate for the department to limit

the duties of licensed health care professionals who are practicing within the scope of their license. It is not necessary to require the medical director to have current obstetrical experience. The rule requires the medical director to either be a medical doctor (MD) or a doctor of osteopathy (DO). Cesarean sections are not performed in outpatient centers for primary care. Therefore, requiring a medical director to be an obstetrician or surgeon would be unnecessary and burdensome for licensure of a facility. Additionally, this requirement would severely limit the number of qualified physicians who could serve as medical director, causing undue hardships for those seeking licensure as an outpatient center for primary care.

In response to the comment on transferring cases and admitting privileges, these issues are addressed in ARM 37.106.1012(1)(c) and (1)(d) respectively. The medical director does not have to have admitting privileges, but the birth center must arrange for a coordinated transfer. The department disagrees with the suggestion that insurance coverage be required for all providers. This is beyond the scope of the rules. No statute or current health care administrative rule requires insurance for any health care facility. The department disagrees with the commenter's last suggestion regarding certified midwives with Montana licensure on staff at the outpatient birth center. There are a variety of duties for licensed personnel in health care facilities. The department does not have jurisdiction to limit a nurse or any other licensed health care professional operating within the scope of their practice.

COMMENT #4: It was suggested that the department modify its proposed rule to specify that the hospital to which a birth center will transfer patients be equipped to handle obstetric and surgical emergencies. If a birth center transfers a mother and/or baby to a hospital without such capacity, the need for emergency interventions will only be further delayed until a transfer to a facility with treatment capacity can be arranged. Emergencies involving delivery services usually have a very brief window of opportunity for successful intervention. A birth center should not expect transfer to a hospital without surgical and/or obstetric services to be an adequate protection of the mother and/or the baby.

RESPONSE #4: The department agrees, but believes this is addressed in 37.106.1012(1)(c) which requires coordination of transfer of care. In licensing birth centers, the department would not approve a proposed transfer of care agreement if the designated receiving hospital or critical access hospital (CAH) was unable to provide obstetric and surgical services. However, the department has revised the rule to clarify which hospitals and CAHs are eligible for transfer agreements.

COMMENT #5: One commenter suggested that the department require a birth center to perform newborn screening services, including screening for hearing impairment as is required of other health facilities.

RESPONSE #5: The department believes it is unnecessary to amend the proposed rules to include a requirement that a birth center perform newborn screening services, including screening for hearing impairment. These functions are performed as part of the practitioner's scope of practice under Title 37, MCA. This

rule package deals exclusively with the standards necessary to obtain a facility license. It is not intended to describe duties required under an individual's licensed scope of practice. Reiterating infant screening requirements in this rule serves no purpose.

COMMENT #6: One commenter recommended that the department require a birth center to report typical financial and utilization data on an annual basis similar to that collected from other health facilities.

RESPONSE #6: The department has the ability to require any health care facility to report financial and utilization data as required by 50-5-106, MCA. It is not necessary to include this requirement in administrative rule.

/s/ John Koch
Rule Reviewer

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

Certified to the Secretary of State April 4, 2011

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I (ARM 42.26.1201); II (ARM 42.26.1202); III (ARM 42.26.1203); IV (ARM 42.26.1204), and V (ARM 42.26.1205) relating to telecommunication services for corporation license taxes	)))))))	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On September 9, 2010, the department published MAR Notice No. 42-2-845 regarding the proposed adoption of the above-stated rules at page 1968 of the 2010 Montana Administrative Register, issue no.17 and subsequently on October 28, 2010 at page 2540 of the 2010 Montana Administrative Register, issue no. 20.

2. A public hearing was held on November 22, 2010, to consider the proposed adoption. David Gibson and Roy Adkins, representing Qwest; Nancy Riedel, representing Verizon; Adam Mylen, representing AT&T; Michael Green and Mary Whittinghill, representing Montana Taxpayers' Association (Montax); Norm Ross, representing Pacificorp; Lane Roquet, representing Devon Energy; Bill May, representing CenturyLink; Geoffrey Feist, representing Montana Telecommunications Association; and Carl Hotvedt, representing the Public Safety Services Bureau of the Montana Department of Administration (PSSB-DOA); appeared at the hearing.

Written comments were received from John McNamara, representing AT&T; Diann Smith, representing Sutherland, Asbill & Brennan, LLP (Sutherland); Nancy Riedel, representing Verizon; Tara Veazey, representing Montana Budget and Policy Center (MBPC); Mary Whittinghill, representing the Montana Taxpayers Association (Montax); and Senator Jeff Essmann, representing Senate District 28.

3. The department determined it would be beneficial to provide an Economic Impact Statement (EIS) to the Revenue and Transportation Interim Committee (Committee) concerning the subject of these rules. The department advised the Committee at the September 16, 2010 Committee meeting that the EIS would be prepared and presented to the Committee at their next scheduled meeting, which was set for November 18 and 19, 2010. On November 17, 2010 the department provided the EIS to the Committee for its consideration.

4. As provided for by 2-4-305(9), MCA, the Committee notified the department that it objected to the proposal notice. Therefore, the department was not permitted to adopt these rules until publication of the last issue of the register that is published before the expiration of the six-month period during which the adoption notice must be published.

The Committee has not met since this notification was given to the

department, nor has it reiterated its previous objection. Accordingly, the publication that will occur with the filing of this adoption notice is the last one prior to the expiration of the six-month period from the publication date of the proposed action on these rules.

One purpose of this delay was to allow time for the Legislature to review and take action on these rules. During the 2011 Legislative Session, there were no bills introduced, and no inquiries made to the department by either a legislator or a legislative committee concerning the subject of these rules. With all applicable legislative deadlines passed, the department notes that the Legislature chose not to address these rules in the normal course of its work.

The department has fully complied with, and met, its responsibilities to delay the publication of the adoption notice pursuant to 2-4-305(9), MCA. Accordingly, it is now proceeding to file this adoption notice with the Secretary of State.

5. The information that follows is the contents of that Economic Impact Statement provided to the Committee:

The Montana Department of Revenue is proposing to adopt new rules for the apportionment of income to Montana by multistate corporations that provide telecommunications services. The primary purpose of these rules is to fulfill the objective in 15-31-312, MCA, of ensuring that the income reported to Montana fairly represents the extent of the taxpayer's business activity in the state. The rules also seek to achieve greater equity among corporate taxpayers by treating income earned by telecommunication corporations in a similar and consistent manner as income earned by multistate corporations generally. The rules also aim to provide clear and specific guidance to telecommunications companies on how to apportion income to Montana for tax purposes.

The proposed rules provide for standard definitions for various telecommunications services that are drawn from the definitions enacted in Montana law for the Retail Telecommunications Excise Tax (RTET). The proposed rules address the issue of outer jurisdictional property - such as satellites and undersea cables - in calculating the property factor used in allocating taxable income to Montana by corporations providing telecommunications and ancillary services. The proposed property factor rule is intended to prevent the assignment of income earned in the United States (including Montana) to locations beyond the U.S. The proposed rules would require telecommunications companies to calculate their Montana sales factor to reflect sales made to Montana citizens and businesses, which is the same "market sourcing" method required of approximately 92 percent of 6,500 multistate corporate taxpayers and used by virtually all 8,100 Montana-based corporate taxpayers. The market sourcing method recognizes the contribution of Montana sales to the earning income in this state and is the predominant method of calculating the sales factor because it fairly represents business activity in this state. This market sourcing rule would replace a "greater cost-of-performance method" currently allowed for a small number of multistate telecommunications companies. The department has determined that the "greater cost-of-" method typically under-represents the extent of the Montana business activity of multistate telecommunications companies and, due to its lack of clarity and consistent

accountability, provides opportunities for such companies to manipulate the assignment of income among various states in ways not permitted for corporations generally.

Introduction: The four proposed rules do the following. New Rule I provides definitions for the new section; New Rule II provides that these rules apply to corporations providing telecommunications and ancillary services (ancillary services include call waiting, call forwarding, etc.); New Rule III provides direction on reporting outer jurisdictional property for Montana tax purposes; and New Rule IV provides direction on calculating the sales factor based upon gross receipts from sales of telecommunications services.

The proposed rules are based upon a model rule developed by the Multistate Tax Commission (MTC), of which Montana is a member by virtue of its adoption of the Multistate Tax Compact (15-1-601, MCA). The MTC consists of member states which focus its efforts on resolving taxation issues that impact the member states. The model rule was developed during the period from 2003 through 2007 with the involvement and leadership of a number of states including Montana. The MTC conducted a public participation process which included a public hearing and opportunities for comment. According to the hearing officer's report, industry representatives provided comments, some of which were incorporated in the model language. Several states, including Illinois, Massachusetts, Michigan, Ohio, and California have already adopted the model rule or key elements of the rule. But at least 15 other states have adopted some version of the principle that allocation of sales of services should be based on market data, not the greater cost-of-performance. According to the hearing officer's report, the model rule is designed to be consistent with the Streamlined Sales Agreement data. The MTC also consulted with Federal Communications Commission (FCC) staff regarding FCC required reporting data.

New Rule III updates the property apportionment factor for corporations providing telecommunications and ancillary services. New Rule I defines outer jurisdictional property as property, such as underseas cable and orbiting satellites that are not physically located in any particular state. Under the proposed rule, this kind of property would not be included in either Montana property or in the total amount of property used in calculating the property factor. This kind of property cannot be in the numerator of the property factor, since it is in outer space or in the ocean, not in any state, and therefore should not be in the total property denominator.

The MTC model rule updates the sales apportionment factor for corporations providing telecommunications and ancillary services. The hearing officer's report indicates that the reason for the development of the new model rule is the far greater degree of deregulation in the industry. As noted in the hearing officer's report (p. 4):

> "As regulated utilities, telecommunications carriers were excluded from UDITPA's coverage. This is, therefore, the first time the Commission has considered the adoption of an appropriate apportionment formula for income arising from the sale of telecommunications and ancillary services."

Montana apportionment factor calculations for corporate license tax are

based upon Uniform Division of Income for Tax Purposes Act (UDITPA). UDITPA was a model act developed in the 1950s and finalized in 1957. UDITPA was intended to reduce the issues and costs corporations may have in complying with different tax laws and definitions in the many different states.

Corporations with business activities in Montana and other states calculate the amount of taxable revenue to apportion to Montana using three factors - payroll, property, and sales - which are weighted equally. For example, a multistate corporation with $1 million in payroll in Montana and $10 million in total payroll would have a payroll apportionment factor of 0.1 ($1 million / $10 million = 0.1). Similarly the corporation would calculate the other two factors based upon the Montana property versus total property and Montana sales versus total sales. The average of the three factors produces the total apportionment factor. The total apportionment factor is multiplied by the total taxable income to get Montana taxable income. This method was adopted to make it easier for multistate corporations to calculate their taxable income in the states they operate, instead of requiring them to keep track of the revenues and costs associated with multiple individual transactions. The three factors - payroll, property, and sales - are thought to provide a reasonable representation of a corporation's business activity in the state.

Assigning sales to a state based upon sales actually made to customers in that state - market sourcing - is the predominant method of calculating the sales factor to apportion business income. As noted above, approximately 97 percent of multistate corporations filing in Montana are required to calculate their sales factor on this basis because of the general provisions of corporate tax law or various rules the department has adopted over several decades.

However the original UDITPA rules provided a different method for assigning sales, other than sales of tangible personal property, to a state. Sales, such as sales of services, are treated as in-state sales if the income-producing activity is performed in the state. If the income-producing activity is performed both inside and outside the state and the greater proportion of the income-producing activity is performed in the state versus any other state, based on cost-of-performance, then the total amount is assigned to the state. Conversely, if the greater cost of performing a service lies in another state, then the sales of the service is not assigned to this state.

This original language is reflected in 15-31-311, MCA. However, the following section, 15-31-312, MCA, provides language allowing the tax administrator to employ another method if the allocation and apportionment provisions do not produce a fair representation of the taxpayer's business activity in the state because it fails to recognize the contribution to corporate income from the Montana market-sales made to Montana citizens and businesses. Thus, the department has determined that the greater cost-of-performance for the sales factor calculation is inappropriate in the case of providers of telecommunications services - as it has several times in past decades for other service industries, including railroads, trucking, airlines, construction contracts, publishing companies, and television and radio broadcasting.

While 15-31-312, MCA, provides the tax administrator the ability to modify the sales factor calculation if determined to be necessary to satisfy the "fair representation of business activity standard" state law, it does not inform these

taxpayers in advance as to how to do their tax calculations to meet this standard. Besides exposing the taxpayer to challenges, reviews, and audits of their business workpapers and tax returns, not providing clear guidance upfront is inconsistent with the Montana Taxpayer Bill of Rights. The Montana Taxpayer Bill of Rights, 15-1-222 (14), MCA, states "the taxpayer has the right to assistance from the department in complying with state and local tax laws that the department administers; . . .."

The telecommunications sector is complex and has changed over time, especially since the break-up of the Bell system in the early 1980s and the passage of the 1996 Telecommunications Act. Besides the legal and business framework, the technology has changed dramatically, creating new products and services, and allowing companies to computerize and centralize operations. So the MTC model rules fill a void by providing definitions and property and sales factor calculation information, including clarifying that the greater cost-of-performance method is not appropriate for telecommunications services by multistate corporations.

Montana has retained the original, equally weighted three-factor formula developed more than 50 years ago, but over time has found it necessary to adopt rules specific to an industry or activity to achieve the goal of using formulas which fairly represent the extent of the taxpayer's business activity in the state. To date these rules have addressed railroads, trucking, airlines, construction contracts, publishing companies, and television and radio broadcasting. The rules specific to an industry or activity were developed through the MTC as well, and are intended to provide better clarity and equity for taxpayers and greater efficiency for both the taxpayers and the tax administration agency.

A base assumption in the following answers to the questions required by an EIS is that state law, 15-31-312, MCA, will be followed by the tax administrator. That section states:

"15-31-312 Apportionment formula -- unitary business provisions. If the allocation and apportionment provisions of this part do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the tax administrator may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(1) separate accounting, provided the taxpayer's activities in this state are separate and distinct from its operations conducted outside this state and are not a part of a unitary business operation conducted within and without this state. For purposes of this part, a "unitary business" is one in which the business conducted within the state is dependent upon or contributory to the business conducted outside this state or if the units of the business within and without this state are closely allied and not capable of separate maintenance as independent businesses.

(2) the exclusions of any one or more of the factors;

(3) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or

(4) *the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income."* (Italics added)

Economic Impact Statement

- The class of persons affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule. (2-4-405(2)(a), MCA)

This rule applies to corporations who provide telecommunications services and who are doing business in the state of Montana and also in other states. It addresses apportionment of net business income and exclusion of outer jurisdictional property for Montana corporate tax purposes by those telecommunications firms that do business in more than one state. If the telecommunications corporation does business in multiple states, including Montana, this rule may affect calculation of the overall apportionment factor used to apportion income to Montana for corporate tax purposes because the rule removes the option of calculating the sales ratio using the greater cost-of-performance method for these corporations in many instances and it eliminates outer jurisdictional property in calculation of the property factor.

The department has determined that an estimated 15 multistate telecommunications corporations may be materially affected by the proposed rules. Another 32 multistate telecommunications corporations may be minimally affected. This estimate is based on returns from 245 companies that filed retail telecommunications excise tax returns for the last quarter of FY 2010. Of these 245 companies, more than 190 are judged not to be affected at all because they operated wholly within Montana and are not subject to income apportionment; they are cooperatives or pass-through entities instead of corporations; or they have little or no sales in Montana. The 32 multistate telecommunications corporations that may be minimally affected had Montana sales between $25,000 and $250,000 per quarter. The 15 multistate telecommunications corporations that may be materially affected had Montana sales of $250,000 or more per quarter.

In terms of the classes that benefit, for telecommunications firms doing business only in Montana, the proposed rule has no direct impact since 100 percent of their net income is earned in the state and is taxable only in the state, both currently and under this rule. However, this class benefits indirectly because the rule change improves equity in taxation, vis-a-vis multistate corporations providing telecommunications services. Equity in taxation means that taxpayers with comparable sales or income and similar circumstances (for example, not eligible for different tax credits) are taxed similarly.

Currently equity in taxation between single-state and multistate companies offering telecommunications services is not guaranteed. For example, a multistate firm who is providing services in multiple states, including Montana, and who has less than half of its costs for performing the service inside Montana may argue that none of its sales of services in Montana should be in the sales factor calculation. In fact, the hearing officer's report (p. 8-9) includes the following from the State of California:

> ". . . Recently, some members of the telecommunications industry have asserted claims that the numerator of the sales factor in California should be zero, even to the exclusion of intrastate calls, because the greatest cost-of-performance is located in another state."

The Montana-only company does not have the choice to lower its taxable income by claiming that in-state sales should be excluded. All of its net income is taxable.

A second equity issue involves access to the capital markets and capital. If a multistate corporation can reduce its taxes relative to its in-state competition and the rest of its expenses remain the same, the multistate corporation creates a relative advantage in obtaining capital in the markets both in terms of cost and availability. This advantage does not just play out in the telecommunications sector, but improves the multistate corporation's ability to compete against all businesses in the capital markets. This is inconsistent with the state interest in maintaining competitive neutrality. Approximately 14,000 corporations filing tax returns in Montana - either multistate corporations or Montana-only corporations that already report using Montana market sales for tax apportionment purposes - will benefit from better competitive equity when multistate telecommunications corporations are required to report sales on the same market basis.

- A description of the probable economic impact of the proposed rule upon affected classes of persons, including but not limited to providers of services under contracts with the state and affected small businesses, and quantifying, to the extent practicable, that impact. (2-4-405(2)(b), MCA)

The department does not anticipate the market-based sales factor calculation will have a direct effect on small businesses since the 15 multistate corporations that may be affected cannot be characterized as small businesses. Small Montana-based telecommunications businesses will benefit when competing with larger multistate businesses for contracts or when procuring resources such as capital and equipment from a more equitable tax treatment. The rule excluding use of outer jurisdictional property - satellites and underseas cable - in the property factor is not expected to affect small businesses.

Depending upon how the multistate telecommunications taxpayer calculated the sales factor, this may have some impact on its taxes owed or tax refunds. In order to determine the economic impact upon this class, a fairly extensive review of the corporate filings, and possibly additional information, may have to be requested from the companies in order to determine the economic impact on the class. In the absence of clear rules corporations can and do develop their own methods which may or may not be consistent with state law. The one case where an effect is known, was a change in the low six figures (individual taxpayer information is confidential). Without substantial additional audit resources devoted to the question, which the department cannot spare, it is not certain how many other corporations would be affected or if they are affected in the same way.

As discussed above, the current policy that allows a small set of taxpayers to choose the greater cost-of-performance method for calculating the sales factor is not consistent with competitive neutrality. It puts Montana providers at a competitive disadvantage, both in the private marketplace and in terms of securing contracts to provide services to the state. It distorts the cost of capital and access to capital for all corporations except for the select few, relative to the competitive norm. Revising

this 53 year-old concept for today's reality forwards the state goal of competitive neutrality.

The change in data is not expected to impose substantial costs on the taxpayers in terms of being able to comply with state tax rules. In Montana companies providing telecommunications services to retail customers are required to collect retail telecommunications excise taxes (RTET) based upon sales, as well as Public Service Commission (PSC), Consumer Counsel Tax and other taxes, either based upon sales or customer information. The department modified the MTC model rule definitions in order to utilize definitions already established in Montana law for the RTET. In fact, this modification represents the only substantial revision of the MTC model, and the intent was to reduce the cost to taxpayers. A number of other states have adopted the model rules for telecommunications services, including Massachusetts, Michigan, Illinois, and Ohio, and at least 16 other states have replaced the greater cost-of-performance with market based sales calculations for services. Furthermore, the MTC hearing officer's report notes that the model rules were drafted to track as closely as possible the sourcing rules for sales and use tax purposes in the Streamlined Sales and Use Tax Agreement. The MTC hearing officer's report also notes that FCC staff familiar with FCC reporting requirements for providers of telecommunications services were consulted in the process of developing the model rules.

Increased clarity in how these apportionment factors are to be calculated may reduce the costs of properly complying with state tax law for these taxpayers.

- The probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenue. (2-4-405(2)(c), MCA)

The department expects that the rules will provide clarification and guidance to the affected taxpayers and will make the process of ensuring that state tax law is complied with as efficient and effective as possible.

The department does not anticipate increased costs due to implementation to this agency or to other agencies, and has not projected additional revenue due to this rule. However, if companies affected are profitable in the future, there may be some additional revenue which goes directly to the state general fund. If this sector is not profitable and sustains losses, the net operating losses allocated to the state will be greater under this rule. Under current law Montana allows corporations to claim current year losses against the three prior years' net income, and file amended tax return(s). Adoption of the rule may therefore, lower state revenue, when there are higher net operating losses during an economic recession.

- An analysis comparing the costs and benefits of the proposed rule to the costs and benefits of inaction. (2-4-405(2)(d), MCA)

The costs of the proposed rule changes fall into two categories - compliance costs and changes in taxes owed due to the rule change. The costs accrue to two general parties - taxpayers and the tax administrator.

Over the last five years, the department's corporate license tax audit, penalty

and interest have averaged over $20 million per year - $13.4 million from audits and $6.7 million from penalties and interest. Shifting resources to focus more on a particular industry group, when the issue can be addressed by rules, is not an effective use of limited state resources and risks loss of revenue from the state's existing audit program. Another potential consequence of this alternative may be an increase in complaints or litigation, raising costs for the department and taxpayers, and potentially also putting state revenues at risk.

Taxpayer costs will be reduced because staff time taken up with questions from the tax administrator, audit work, protests, appeals, and litigation will be reduced.

The costs of compliance will be reduced for the tax administrator since the need to review and audit taxpayer work papers and tax returns should be reduced. The clarity brought to the process should reduce the tax administrator's litigation and appeal costs. It will also reduce the risk that the state's tax policy (and tax revenue) will be eroded over time by inadvertent or conscious failure to use formulas that fairly represent the extent of the taxpayer's business activity in the state.

- An analysis that determines whether there are less costly or less intrusive methods for achieving the purpose of the proposed rule. (2-4-405,(2)(e), MCA)

The department does not believe that there is a less costly or intrusive method for achieving the purpose of the proposed rule. The likely alternative is to increase the frequency and depth of review of this group of corporations' tax returns to determine if the apportionment of income adequately and equitably reflects the level of business activity within the state. Conduct-increased audits of multistate corporations in this industry would be significantly more intrusive of corporate business operations than adopting this rule.

The other alternative is to do nothing and the department believes that doing nothing does not support state law or state tax policy.

- An analysis of any alternative methods for achieving the purposes of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule. (2-4-405(2)(f), MCA)

Please see the response above.

- A determination as to whether the proposed rule represents an efficient allocation of public and private resources. (2-4-405(2)(g), MCA)

The department anticipates that the proposed rule will improve efficiency in terms of public resources and has the potential to improve allocation of resources in the private arena. The proposed rule improves efficiency for the department because it clarifies and standardizes the filing method for all members of the industry. Right now taxpayers can, and do, file using different methodologies. These proposed rules use information that is available to this group of taxpayers already. As noted already, some 20 or more other states have adopted this rule or a similar,

broader rule applying to all corporations. The state administers other telecommunications taxes which require companies to maintain market sales data.

In terms of the allocation of private resources, the rules, as described above, are judged to improve competitive equity within the telecommunications industry and potentially incorporate capital markets generally. Any improvement in competitive equity improves the efficiency of the capital markets in allocating private capital to its best uses.

- Quantification or description of the data upon which subsections (2)(a) through (2)(g) are based and an explanation of how the data was gathered. (2-4-405(2)(h), MCA)

The information on which the responses above were based includes discussion with department's audit and legal staff. Also, the following MTC documents: Report of the Hearing Officer (April 2008) and the Supplemental Report of the Hearing Officer (May 2008) Regarding the Proposed Model Regulation for Apportionment of Income from the Sale of Telecommunications and Ancillary Services were reviewed. Information was also gathered from the MTC and a number of other state tax administration agencies regarding use of market versus cost-of-performance for services. The most recent corporate license tax return masterfile (2008), updated in May 2010, was used for the total number of corporations filing in Montana and the number with Montana addresses. The information on corporate gross revenue and retail revenue is from the Retail Telecommunications Excise Tax return data for quarter 4, FY 2010 and the audit, penalty and interest revenue is from the statewide accounting, budgeting, and human resource system (SABHRS).

5. Oral and written testimony received at, and subsequent to, the hearing is summarized as follows along with the response of the department:

COMMENT NO. 1: Support - Mr. Carl Hotvedt, with the PSSB -DOA and Ms. Tara Veazey, with the MBPC commented that they strongly support the proposed rules.

Mr. Hotvedt stated they believe the rules clarify the responsibility for collecting and remitting fees supporting the 9-1-1 emergency services throughout Montana.

The MBPC stated that the new rules, which adopt the recommendations of the highly regarded Multistate Tax Commission (MTC) in relation to the apportionment of business income of telecommunications companies, would ensure that Montana receives income taxes that more fairly and adequately represent the extent of the business conducted by telecommunications companies in the state. The existing method results in lower tax revenue to the state, which is unfair given the amount of business activity in the state.

The MBPC further commented that the department's Economic Income Statement (EIS) indicates that the new rules would affect a very small number of corporations doing business in Montana, and that the rules would bring those corporations into alignment with thousands of others doing business in the state and achieve tax and competitive equity within the telecommunications and other

Montana industries. At least 20 states have already adopted similar rules.

RESPONSE NO. 1: The department thanks the Public Safety Services Bureau of the Montana Department of Administration and the Montana Budget and Policy Center for the comments by their representatives.

COMMENT NO. 2: Legislative intent/Uniform Division of Income for Tax Purposes Act (UDITPA) - Senator Jeff Essmann and representatives of AT&T, Verizon, and Montax provided comments stating that the proposed rules represent an unlawful application of the department's authority and that the rules violate or circumvent the legislative intent and, therefore, are unenforceable.

They further stated the department is ignoring the plain meaning of the law and ignoring obvious legislative intent. The proposed rules establish a sourcing scheme for the telecommunications industry that is plainly at odds with Montana statute, which provides that a multistate corporation "shall allocate and apportion its net income as provided in this part" and requires use of an equally weighted, three-factor formula - consisting of a property factor, payroll factor, and sales factor to apportion income to the state. They stated the overall allocation or the apportionment of services should be handled by the Legislature, rather than by the department.

Montax stated the department already has the authority under 15-31-312, MCA, to adjust apportionment factors as it believes is appropriate under the fair and equitable standards of that, so-called relief provision.

AT&T stated the proposed rules exceed the department's authority to deviate from the statutory formula. They stated that the Legislature has delegated to the department the authority to deviate from the statutory apportionment formula, within established boundaries, and that 15-31-312, MCA, provides for a modification to the statutory formula where those allocation and apportionment provisions "do not fairly represent the extent of the taxpayer's business activity in Montana." However, they further stated, the proposed rules do not constitute a proper use of the departments discretion allowed by the law.

Verizon stated that most states across the nation, particularly those active in the Streamlined Sales Tax Project (SSTP) recognize that tax policies intended to apply to digital goods need to be the result of separate and thoughtful consideration by the Legislature rather than the result of an administrative reinterpretation of statutes that were enacted well before this form of commerce even existed. There are myriad problems associated with taking short cuts to expand tax policies based merely on administrative procedures, including the fact that the legislative intent has not been determined. As noted, there are many providers of digital products and services that are not providing traditional telecommunication services, and as such, these rules create an increased likelihood of confusion, competitive inequities, administrative burden, and disparate tax treatment.

Verizon further stated that the enactment of the MTC recommendation was vigorously opposed by the telecommunications industry primarily due to the observation that the model regulation could result in a violation of the Commerce Clause requirement of fair apportionment. Montana's reliance on the same language that was disputed in the adoption of the MTC model regulation perpetuates

the same constitutional arguments. Specifically, proposed Rule IV (6) recommends apportionment of wholesale revenues, not on the basis of the location of the buyer of the services, but rather by reliance on industry average data obtained from the Federal Communications Commission. Because this suggestion utilizes random data from many other companies, it does not reflect a reliable in-state apportionment of the individual taxpayer's portion of interstate wholesale revenues; a clear violation of the constitutional fair apportionment standards.

Verizon further stated legislative intent is missing from an administrative procedure that makes sweeping changes to long-standing, established methods applicable to a broad group of taxpayers. Principles of uniformity and equity generally provide that variations from statutorily prescribed formulas should be imposed only in uncommon situations. If there are concerns with the constitutional apportionment statute, the appropriate remedy would be to amend the statute to be applied uniformly and fairly to all similarly situated taxpayers.

Verizon further requested the department seek a statutory amendment which clearly signifies legislative intent to adopt a new apportionment standard.

Montax stated that part of the justification in the Economic Impact Statement (EIS), prepared for this rule action, was that the original UDITPA excluded regulatory unity. Montana never did include that exception and now, 27 years after the enactment of the statutes, is not the time to do it.

Montax further stated that it is an inappropriate use of the UDITPA relief provision in 15-31-312, MCA. They also stated it does not require the department to establish that the cost-of-performance method does not fairly represent a taxpayer's business in the state nor does it require the department to demonstrate that this proposed method is more equitable than some other method. They stated that few states have adopted the MTC model regulation or any kind of uniform or comprehensive change to the cost-of-performance system.

AT&T cited 15-31-311, MCA, which prescribes how the sales factor should be computed and, with respect to sales other than sales of tangible personal property, that the statute applies UDITPA's long-standing income-producing activity (IPA) test and said the Montana Legislature has chosen to look to the activities of the vendor in generating a particular stream of income as the appropriate proxy for determining where sales other than sales of tangible personal property have occurred.

AT&T also commented that the proposed rules would abandon the IPA test with respect to the telecommunications industry and replace it with a series of standards that postulate where each of various types of telecommunications services may have been consumed. They further commented that this "market state" approach does not purport to create an improved system for implementing the Legislature's IPA test with respect to telecommunications service providers, but rather it constitutes a wholesale rejection of the IPA test; and that by fundamentally altering the methodology by which the sales factor is computed for telecommunications services, the proposed regulation changes the impact of a legislative enactment and, therefore would be unenforceable. AT&T also commented that the Montana Legislature embraced UDITPA by statutory enactment and any decision to make a conceptual shift should be made by the Legislature and not by administrative rule.

AT&T explained that their conclusion is not altered by ARM 42.26.261(2), and

that they view this right to establish "appropriate procedures" as conveying only the right to identify, and require the use of calculation methodologies that will best carry out the Legislature's directive. As applied to the sales factor, the department may mandate the use of specific tools that it deems most effective in measuring a taxpayer's IPAs. However, AT&T further stated they do not view this regulation as investing in the department the right to reject an apportionment standard selected by the Legislature in favor of a different one of its own choosing.

AT&T further commented that if the IPA test distorts any particular taxpayer's business activity in Montana, such distortion must be demonstrated before the department may invoke its remedial authority under statute, and that the department's own rule (ARM 42.26.261(1)), acknowledges that the department's authority under 15-31-312, MCA, should be applied only in limited and specific cases where unusual fact situations produce incongruous results. AT&T explained that to meet this standard, before rejecting the statutory apportionment formula, the department must first document the unusual fact situations that produce incongruous results and, for an industry as diverse as the telecommunications industry, they doubt this showing may be made persuasively on an industrywide basis. They also commented that while the reasonable necessity in the proposed regulation asserts that the IPA/Cost-of-Performance (COP) test produces distortion on an industrywide basis, they are not aware of any study conducted by the department to support that conclusion. In the absence of a showing of actual distortion, AT&T does not believe the department may lawfully invoke the remedial authority permitted by statute.

AT&T commented that as a corollary to a demonstration of distortion, before deviating from the statutory sourcing methodology, the department should also be capable of showing that its alternative methodology would in fact produce a superior reflection of business activity in Montana, yet, the department has made no such showing. They further commented that it is not at all apparent to them that the proposed regulation would produce a better reflection of each telecommunications service provider's Montana sales.

Verizon stated concerns with New Rule IV (8), which requires that "gross receipts from the sale of telecommunications services which are not taxable in the state to which they would be apportioned pursuant to (1) through (6) shall be excluded from the denominator of the sales factor." This policy is extremely controversial because the in-state apportionment is skewed depending on a taxpayer's taxability in other states. In other words, the "throwout" provision that requires taxpayers to exclude some but not all of the receipts from the apportionment formula is fundamentally flawed because of its random results. Industry's position during the discussions of the MTC model regulation was the same as it is today; apportionment using cost-of-performance formulas, which exist in the majority of states, reflects the contributions of the taxing state to the creation and performance of the services that generate income and, as such, is an appropriate methodology resulting in equitable apportionment.

Verizon further stated any change in the apportionment rules will result in changes in the way tax returns are prepared, and understanding these changes and applying them to a taxpayer's particular facts and circumstances takes time and resources. Therefore, a compliance burden on taxpayers is the direct result of such a change. Section 15-31-312, MCA, which permits an apportionment formula that

deviates from the statutory mandate, was derived from Section 18 of the UDITPA.

Section 18 of the UDITPA was originally established to provide exceptions to the general apportionment principles that were deemed necessary to maintain fairness and equity in unusual, nonrecurring circumstances for individual taxpayers. However, Verizon opposes relying on the relief provisions of 15-31-312, MCA, to invoke broad-based changes to the statutorily prescribed formula in the absence of an actual change to the statutes.

RESPONSE NO. 2: The department thanks Senator Essmann for his comments and thanks AT&T, Verizon, and Montax for the comments of their representatives.

Senator Essmann, AT&T, Verizon, and Montax's statement that the proposed rules exceed the department's authority to deviate from the statutory formula provided for in Title 15, chapter 31, part 3, and that the department's reliance upon the relief provision found at 15-31-312, MCA, is unsupported.

The department does not agree that these rules are inconsistent with legislative intent. Quite the opposite, the department finds that these rules are fully consistent with and supportive of 15-31-312, MCA, that authorizes, in clear and plain terms, the department to modify apportionment provisions to fairly represent the extent of taxpayer business activity in Montana. Further, the adoption of these rules is supported by substantial precedent existing in this state. Between 1977 and 2004, the department adopted industry-specific rules for railroads, trucking, airlines, construction contracts, publishing companies, and television and radio broadcasting - rules that implemented, in part, the relief provision found at 15-31-312, MCA. To the department's knowledge, none of the above rules have been successfully challenged on the grounds that the utilization of the relief provision found at 15-31-312, MCA, on an industrywide basis was somehow prohibited. In addition, the Montana Legislature has never restricted the department's ability to enact industry rules under Title 15, chapter 31, part 3, generally, or 15-31-312, MCA, specifically. Similarly, the Montana Legislature has not acted to amend or rescind the industrywide rules that were previously adopted by the department from 1977 forward, and which similarly relied upon 15-31-312, MCA, for support. The precedent of the department adopting specific apportionment rules for a wide variety of service sector industries to better represent their business activity in this state is a long-standing practice.

Article VII of the Multistate Tax Compact, located at 15-1-601, MCA, explicitly authorizes the MTC to adopt recommended uniform regulations related to the division of income. Article VII specifically contemplates that each state tax agency will enact its uniform regulations, and in doing so, may consider "adoption in accordance with its own laws and procedures." (Article VII, (3)). And, the department is unaware of any court decision holding that a state revenue agency, by adopting a uniform MTC regulation promulgated under the procedures prescribed in the compact, somehow "violated" the legislatively enacted compact by adopting industry-specific rules that were themselves drafted by the MTC.

Enacting the MTC model regulation is consistent with legislative intent as set forth in Montana's constitution and statutes. In the department's view, promulgating rules in a UDITPA jurisdiction, such as Montana, and that were drafted by the MTC,

is more likely to result in uniform treatment of comparably situated taxpayers and all corporate taxpayers generally. The department recognizes that rulemaking is not a guarantee of absolute uniformity in every jurisdiction. However, the department believes that the promulgation of these rules is a step toward uniformity, which the Montana Legislature understood is a primary purpose of UDITPA.

Respectfully, the department does not agree that proving "distortion" is a necessary or useful objective because to utilize 15-31-312, MCA, the department must demonstrate that the normal formula (cost-of-performance) does not fairly represent the extent of the applicable business activity in the state. *Dep't of Revenue v. United Parcel Service, Inc.* (1992), 252 Mont. 476, 481, 830 P.2d 1259, 1262. The department is confident that such a requirement is met; assigning most, if not all sales, to a state other than where the customer resides does not fairly represent the extent of the company's business activity in Montana, particularly when thousands of customers residing in Montana contribute to the revenue generated by the companies on an annual basis. Similar to the need for, and subsequent adoption of those other industrywide rules pursuant to 15-31-312, MCA, substituting a market-sourcing method for a cost-of-performance method is necessary for the telecommunications industry.

COMMENT NO. 3: MTC regulations/litigation - Sutherland, AT&T, Montax, and Verizon provided comments regarding the Multistate Tax Commission's regulations for apportionment by stating that the MTC rules received considerable objections from the industry and the hearings examiner even stated, in his report, that he did not believe it was appropriate for MTC to wait for legislative and statutory changes because that was simply moving the process along too slowly.

Sutherland stated that they were directly and consistently involved in the MTC's drafting and adoption of the Model Regulation for Apportionment of Income from the Sale of Telecommunications and Ancillary Services. To the extent that Montana's proposed New Rules adopt the same language as the MTC's model, Montana's proposal suffers from the same deficiencies as the MTC's model.

Sutherland and Verizon stated the proposed New Rules incorporate several material differences from the MTC model that introduce additional legal and procedural issues. Deviations in the proposed New Rules occur in the following sections:

- The definition of "ancillary service";
- The definition of "telecommunications service"; and
- The itemized exclusions from the definition of "telecommunications service."

Sutherland and Verizon further stated the third deviation in the department's rules from the MTC model will expand the scope of services subject to the special apportionment rules to taxpayers in industries not traditionally associated with telecommunications. The MTC model regulation, but not Montana's proposed New Rules, exclude from the definition of telecommunications service internet access service; audio and video programming services; ancillary services; and digital products delivered electronically such as software, music, video, reading materials, and ring tones. Each of these services or products specifically not subject to the MTC's special apportionment rules for telecommunications services is at risk of becoming subject to Montana's special apportionment rules. These deviations are

important and unacceptable because the concept of uniformity disappears and taxpayers providing these services may be completely unaware of Montana's intent because the proposed New Rules are promoted as being based on the MTC's model. Significantly, many of the services specifically excluded by the MTC's language were excluded precisely because representatives of companies providing such services convinced MTC representatives that these were not the type of services that should be connected with telecommunications services.

Sutherland further stated by removing these services from the list of items that are not telecommunications services, but not adding these items to the definition of telecommunication services, Montana is providing absolutely no guidance to taxpayers providing these services as to the expected apportionment rule. If Montana adopts the proposed New Rules as written, does a company that sells digital books follow the sourcing provisions in the New Rules or under the standard apportionment statute? Montana, under the cloak of uniformity, is proposing a rule that was rejected by the MTC and further confuses the proper sourcing for a significant number of taxpayers.

Verizon stated they are aware that the department's position is that digital products are "related services" that are subject to the retail telecommunications excise (RTE). However, Verizon's position is that the current RTE definitions do not include digital products and they believe it is inappropriate to adopt a rule to attempt to enhance or influence a position that is currently the subject of litigation. Furthermore, they believe an expansion of the RTE base to include these new products or services clearly requires a statutory change that would need to be enacted by the Montana Legislature. Accordingly, the proposed rule is not using terms that are consistent with the MTC recommendation, despite the indication to the contrary.

Montax and Verizon commented that they are concerned about the departures from the MTC model, which they believe are an effort in the department's efforts to enhance its litigation position regarding the retail telecommunications excise tax. Specifically, the addition of digital downloads, and ringtones for the definition of telecommunication services. They stated that this is not in the MTC model and it is not in keeping with the nationwide treatment of the sale of digital products.

They stated that the momentum across the country addressing taxation of digital goods and services is getting a lot of focus and it is clear among the streamlined states that those type of services and products not be lumped in with the telecom service category. They are different and even though they are being provided by traditional telecom service providers they are not the same type of service that has historically been offered.

RESPONSE NO. 3: The department thanks Sutherland, AT&T, Montax, and Verizon for their comments about the definitions contained in the rules. The department does not believe that these rules affect the litigation underway with respect to the retail telecommunications excise tax. Instead, the department's objective was intended to maintain consistency in the interpretation of certain terms for multiple tax purposes in Montana. Doing so ensures better clarity and understanding of Montana's tax practices affecting telecommunications services. As

Verizon acknowledges, the clarification is consistent with the department's historic interpretation of those terms. In the department's view, the definition of the affected terms in these rules is supported by the definitions adopted by the Montana Legislature for the RTET in 15-53-129, MCA, and the department's subsequent interpretation of those terms in the RTET and now in the corporate license tax contexts. Moreover, the clarification provided by the definitions helps ensure that services that produce business income are fairly and equitably apportioned. The department believes that the limited divergence from the MTC definitions is warranted to achieve those goals and is authorized under Montana law.

COMMENT NO. 4: Applicability - Montax questioned when the effected taxpayers could expect the rules to be applicable to their business. Since this is a change in business, would they take effect immediately upon adoption?

RESPONSE NO. 4: The department appreciates Montax's question concerning the applicability date for these rules and agrees that the rules should be clarified in that regard. The department intends for these rules to have a prospective application for tax years beginning after December 31, 2011. This application date will allow taxpayers to implement any reporting changes that may be required to comply with these rules.

The new rule shown in section 6 below reflects the applicability date.

Also, as stated during the hearing, the department will instruct corporate taxpayers of the implementation date of these rules.

COMMENT NO. 5: Uniformity - AT&T stated that the goal of the Multistate Tax Compact - and its centerpiece, UDITPA is to advance uniformity among state taxing regimes. Among the Compact's core purposes: "[to] promote uniformity or compatibility in significant components of tax systems," and "[to] avoid duplicative taxation." Consistent with these stated ends, Montana's Supreme Court has acknowledged that "UDITPA was drafted as a practical means of assuring that a multistate taxpayer is not taxed on more than its total net income. "*American Tel. & Tel. Co. v. State Tax Appeal*, L. 241 Mont. 440.447(1990).

They further stated the proposed rule would undermine these core purposes. States which are not home to significant IPAs of telecommunications service providers will find in the MTC's model telecommunications apportionment regulation a ready vehicle to source additional revenue to their jurisdictions. It seems beyond debate that contributing to a landscape of competing sourcing regimes is poor policy. It does not serve the interests of the Montana business community. Nor does it serve the interests of Montana consumers, who likely will face higher costs as a result of the increased tax burden.

AT&T encouraged the department to defer any industry-specific rules until after the National Conference of Commissioners on Uniform State Laws (NCCUSL), acting on the request of the MTC, completes its review of UDITPA generally, and Section 17 specifically. If and when that process results in the MTC's recommendation of legislation that would source services revenue more broadly under a market state approach, the danger of multiple taxation that accompanies selective application of a market state regime would be substantially lessened.

RESPONSE NO. 5: The department thanks AT&T for its comments. However, the department does not agree that the adoption of the proposed MTC model regulations will conflict with the core purpose of uniformity. The entire premise of creating and adopting model rules is to promote consistency throughout the states and to provide a platform of model regulations to which all states can adopt. Without these model regulations, the ability to fulfill that core purpose as states review and update their apportionment practices would be more difficult. In addition, the predominant method of apportionment for multijurisdictional corporate taxpayers is the market approach. Uniformity of treatment among taxpayers is served by applying the market approach to the sales factor of telecommunications companies as it does to most multijurisdictional corporations. Therefore, the adoption of these rules actually advances the core purpose of uniformity among states and among taxpayers.

The department also respectfully disagrees that states lacking significant income-producing activities find the MTC model regulations as a ready vehicle to source additional revenue to their jurisdictions. These states, including Montana, simply find that the cost-of-performance method does not adequately or fairly reflect the business activity of the telecommunication industry occurring in their states.

COMMENT NO. 6: Efficiency - AT&T urged the department to consider the administrative inefficiencies the proposed rules would create. Once the relevant COPs are evaluated for any revenue stream, the provider has determined where to source that revenue stream for all states following the IPA standard. The IPA/COP methodology serves the Multistate Tax Compact's primary goals, to "facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration."

AT&T stated the proposed rule would increase administrative burdens on many levels. In place of the consistent application of an IPA yardstick to each revenue stream, the proposed rule creates at least a half-dozen different sourcing methodologies which require application of a series of sub-rules. Providers would be required to make many sourcing decisions at the transactional level. These complexities will materially increase providers' compliance costs, and increase costs for Montana consumers. The proposed rule would increase auditing costs for both taxpayers and the department, and likely result in more sourcing disputes between taxpayers and the department.

RESPONSE NO. 6: The department appreciates the concerns and comments offered by AT&T with respect to perceived inefficiencies within the application of the proposed rules.

The current greater cost-of-performance method for apportioning telecommunications services does not fairly represent the extent of the telecommunications industry in the state. No evidence was provided to the department demonstrating that the cost-of-performance method is easier to administer or that there is consistent application of that method by telecommunications companies among the states or over time.

The department finds that there are sound policy and administrative reasons

for using the gross receipts definition enacted by the Montana Legislature for the RTET as the foundation for the definition of receipts for corporate income tax apportionment. Maintaining consistency between the definitions - and interpretations under those definitions - between these apportionment rules and RTET definitions means that telecommunications taxpayers can use their already existing calculations for Montana excise tax purposes for their Montana corporation tax apportionment reporting. Telecommunications receipts will mean the same thing and be calculated in the same way for both excise tax and corporate tax purposes. Such consistency should create the potential for greater administrative ease and lower burdens for telecommunications taxpayers through common use of an existing calculation for two tax reporting purposes.

In the department's view, the potential administrative convenience offered by AT&T simply does not outweigh the inequity of the cost-of-performance method as applied to this industry. Pursuant to the proposed rules, in most instances, the sale of telecommunication services will be sourced to the customer's service address. This information is readily available to taxpayers and should not cause excessive administrative burdens to the taxpayer.

COMMENT NO. 7: Proposed amendment presented at the hearing - Sutherland, Verizon, and Montax stated they were concerned about the proposed amendments presented by the department at the hearing. Specifically, the ability for the public to comment on these amendments since these amendments were not published anywhere for the public to review and provide comment.

They stated that with the proposed amendments, the department is intending to remove yet another service from the scope of services that are specifically defined in the MTC model regulation as not being telecommunication services - data processing, and information where the purchaser's primary purpose for the underlying transaction is the processed data. The reference deleted at the hearing expands the types of services considered to be telecommunication services and, as such, will subject many taxpayers beyond those that provide traditional telecommunications services to these apportionment regulations.

This change is a concern as it pertains to lack of uniformity and potential apportionment of a product that has no relation to telecommunication services other than the use of telecommunication services as a transmittal medium.

Sutherland stated the changes proposed by the department at the hearing may make the reasonable necessity insufficient because it does not put the public on notice of the material changes to the MTC model regulations or that these changes may cause many taxpayers selling digital goods and information services to potentially become subject to a different apportionment regime.

RESPONSE NO. 7: The department would like to thank Sutherland, Verizon, and Montax for voicing their concern that other impacted taxpayers, who were not present at the hearing, would not have the opportunity to pose questions and offer concerns for the supplemental amendment offered by the department at the hearing. Based on these comments, the department will not include the proposed amendments presented at the hearing in this rulemaking action. The department will present those amendments at a later date in another rulemaking action, which will

allow all interested parties an opportunity to present any concerns at that time.

COMMENT NO. 8: EIS - Montax presented comments concerning the Economic Impact Statement provided to the Revenue and Transportation Interim Committee on November 17, 2010. Montax stated that the introduction to the EIS states that several states have adopted the MTC model or key elements of it. The states listed include Illinois, Massachusetts, Michigan, Ohio, and California. In fact, only Massachusetts has adopted the model. Michigan and Ohio have adopted similar special rules but recall, they are gross receipts states. Illinois has a slightly different model, but it was fully vetted as it was adopted by statute. California has recently reaffirmed the use of the COP methodology and telecommunications carriers use a net plant approach, not the market approach being considered by Montana. The market approach is only applicable to taxpayers who opt to use a single sales factor apportionment methodology.

Montax questioned what is meant by at least 15 other states (in addition according to the report, to Illinois, Massachusetts, Michigan, Ohio, and California) have adopted some version of the principle that allocation of sales of services should be based on market data. They further commented that they were aware of only ten states in total that rely on the market approach being suggested in Montana those being Georgia, Illinois, Iowa, Maine, Maryland, Michigan, Minnesota, Ohio, Utah, and Wisconsin.

Montax further stated that the EIS says that this rule indirectly benefits telecommunications firms doing business only in Montana because it somehow creates equity in taxation. The existing COP rules are applicable to interstate revenues not intrastate revenues. The intrastate revenues of firms only doing business in Montana, as well as the intrastate revenues of firms doing business both within and outside of Montana, are currently assigned to Montana. Equity with regards to intrastate revenues already exists.

RESPONSE NO. 8: The department appreciates Montax's comments on the EIS. The information on which the EIS was based includes discussion with department audit staff and legal staff. Also the following MTC documents: Report of the Hearing Officer (April 2008), and the Supplemental Report of the Hearing Officer (May 2008) Regarding the Proposed Model Regulation for Apportionment of Income from the Sale of Telecommunications and Ancillary Services, were reviewed. The department believes that its conclusions concerning the states that use a market approach for measuring business activity for tax purposes is fundamentally accurate. The fact that the context may vary from state to state does not change the conclusion.

Montax appears to misapply the requirements of an EIS. The last paragraph of its comment above misconstrues the intent of 2-4-405(2)(a), MCA - "The class of persons affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule." It is the department's opinion that the EIS accurately reflects and illustrates the requirements of 2-4-405(2)(a), MCA.

The rules create equity between intrastate telecommunication and interstate firms. Because intrastate firms must fully account for all the income they earn in

Montana, and that full accountability ensures that the intrastate firms reported income fairly represents business activity in the state. With regard to interstate firms the cost-of-performance method does not ensure full accountability of income to Montana in a manner that fairly represents the taxpayer's business activity in the state. Therefore, interstate firms under the cost-of-performance method gain an unfair competitive advantage in the market place as compared to intrastate telecommunication firms.

These rules help restore competitive equity among all of these firms by achieving better accountability of income earned in relationship to business activity that each company conducts in Montana.

6. Based on the comments presented at the hearing the department agrees that the rules should have included an applicability date. The following rule addresses that question:

NEW RULE V (42.26.1205) APPLICABILITY (1) The rules contained in this subchapter are effective for tax years beginning after December 31, 2011.

AUTH: 15-1-201, 15-31-201, 15-31-313, MCA
IMP: 15-1-601, 15-31-301, 15-31-302, 15-31-303, 15-31-304, 15-31-305, 15-31-306, 15-31-307, 15-31-308, 15-31-309, 15-31-310, 15-31-311, 15-31-312, MCA

7. Therefore, the department adopts New Rules I (ARM 42.26.1201), II (ARM 42.26.1202), III (ARM 42.26.1203, IV (ARM 42.26.1204) as proposed, and V as shown above.

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.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

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

Certified to Secretary of State April 4, 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.

GENERAL PROVISIONS, Title 1

1.2.419 Scheduled Dates for the 2011 Montana Administrative Register - p. 1878, 2410

ADMINISTRATION, Department of, Title 2

I Examination Procedures, p. 1585, 1884
2.21.215 and other rules - Annual Leave Policy, p. 804, 1356, 1603
2.21.305 and other rules - Disaster and Emergency Leave Policy, p. 808, 1358, 1605
2.21.501 and other rules - Jury Duty - Witness Leave Policy, p. 1362, 1792
2.21.1701 and other rules - Overtime - Nonexempt Compensatory Time, p. 1365, 1793
2.21.1801 and other rules - Exempt Compensatory Time Policy, p. 811, 1360, 1606
2.21.3702 and other rules - Recruitment - Selection, p. 1368, 1633, 2208
2.21.3801 and other rules - Probation, p. 1382, 1794
2.59.1708 and other rule - Renewal Fees for Mortgage Brokers - Mortgage Lenders - Mortgage Loan Originators, p. 274
2.59.1718 and other rules - Exemptions Under 32-9-104, MCA, Determining the Amount of the Surety Bond Required for New Applicants - Date by Which the Montana Test Must Be Completed in Order to Be Licensed

as a Mortgage Loan Originator in Montana - Temporary Licenses - Transition Fees, p. 2627, 2956

(Public Employees' Retirement Board)

2.43.1306 Actuarial Rates - Assumptions, p. 1433, 1881

2.43.2105 Basic Period of Service, p. 132

2.43.3501 and other rule - Adoption by Reference of the State of Montana Public Employees Pooled Trust - Adoption by Reference of the State of Montana Public Employee Defined Contribution Plan Document - State of Montana Public Employee Deferred Compensation (457) Plan Document, p. 941, 1229, 1725

2.43.3502 and other rule - Investment Policy Statement for the Defined Contribution Retirement Plan - Investment Policy Statement for the 457 Deferred Compensation Plan, p. 937, 1227, 1724

2.43.3502 and other rule - Investment Policy Statement for the Defined Contribution Retirement Plan - Investment Policy Statement for the 457 Deferred Compensation Plan, p. 1831, 2571

2.43.5104 Adoption by Reference of the Declaration of Trust- State of Montana Public Employees Pooled Trust, p. 1920, 2572

(Teachers' Retirement System)

2.44.304 and other rule - Qualifications of the Actuary Engaged by the Teachers' Retirement System - Annual Report of Employment Earnings by Disabled Retirees of the Teachers' Retirement System, p. 1763, 2344

(State Compensation Insurance Fund)

2.55.320 Classifications of Employments, p. 2675, 142

(Burial Preservation Board)

2.65.102 and other rules - Repatriation of Human Skeletal Remains - Funerary Objects - Protection of Burial Sites - Scientific Analysis, p. 2276

AGRICULTURE, Department of, Title 4

4.5.210 Priority 3 Regulated Plants, p. 1588, 1985

4.12.102 and other rules - Apiculture, p. 2018, 2650

4.12.601 and other rules - Fertilizer Regulations, p. 1436, 1795

4.12.3503 and other rule - Certified Seed Potatoes, p. 2867, 232

4.14.303 Montana Agricultural Loan Authority, p. 2424, 2810

4.16.701 and other rules - Agricultural Marketing Development Program, p. 2633, 2957

4.17.103 and other rules - Organic Program, p. 1923, 2573

STATE AUDITOR, Title 6

6.6.2401 and other rules - Group Coordination of Benefits, p. 2426, 2958

COMMERCE, Department of, Title 8

I Administration of the 2011-2012 Federal Community Development Block Grant (CDBG) Program, p. 2678
8.94.3726 Administration of the 2010-2011 Federal Community Development Block Grant (CDBG) Program, p. 1834, 2728
8.94.3726 Incorporation by Reference for the CDBG Program, p. 135
8.99.301 and other rules - Certified Regional Development Corporations Program, p. 1231, 1885
8.99.901 and other rules - Award of Grants and Loans Under the Big Sky Economic Development Program, p. 2281, 2811

(Board of Housing)
8.111.602 Low Income Housing Tax Credit Program, p. 2792

EDUCATION, Department of, Title 10

10.7.106A and other rules, School Finance, p. 1635, 1990

FISH, WILDLIFE AND PARKS, Department of, Title 12

12.10.103 and other rules - Shooting Range Development Grants, p. 2794, 101

(Fish, Wildlife and Parks Commission)
12.6.2201 and other rules, Exotic Species, p. 1643, 1928, 2812
12.11.202 and other rules - Recreational Water Use of the Beaverhead and Big Hole Rivers, p. 968, 1726
12.11.805 and other rules - Recreational Use Rules in Montana, p. 83

ENVIRONMENTAL QUALITY, Department of, Title 17

17.50.213 (Motor Vehicle Recycling and Disposal) Reimbursement Payments for Abandoned Vehicle Removal, p. 91, 379
17.53.706 and other rules - Hazardous Waste and Underground Storage Tanks - Emergency Preparedness, Prevention, and Response at Transfer Facilities - Reporting of Suspected Releases - Reporting and Cleanup of Spills and Overfills - Reporting of Confirmed Releases, p. 25, 234
17.55.102 and other rules - Definitions - Facility Listing - Facility Ranking - Delisting a Facility on the CECRA Priority List - Incorporation by Reference - Proper and Expeditious Notice - Third-Party Remedial Actions at Order Sites - Additional Remedial Actions Not Precluded - Orphan Share Reimbursement - Purpose, p. 1730, 2077, 816, 2346
17.56.101 and other rules - Underground Storage Tanks, p. 1450, 1888
17.56.102 and other rules - Underground Storage Tanks - Applicability - Compliance Inspections - Petroleum UST Systems - Fee Schedule - Permit Issuance - Anti-Siphon Requirements, p. 2899, 145

17.80.201 and other rules - Tax Certification - Pollution Control Equipment - Energy Facilities - Certification of Certain Energy Production or Development Facilities or Equipment for Property Tax Classification or Abatement - Monitoring of Compliance With Certification Criteria - Revocation of Certification, p. 2886, 233

(Board of Environmental Review)

17.8.102 Incorporation by Reference of Current Federal Regulations and Other Materials Into Air Quality Rules, p. 2636, 143
17.8.604 and other rules - Air Quality - Open Burning, p. 2880
17.8.763 Air Quality - Revocation of Permit, p. 2878
17.30.201 and other rule - Water Quality - Permit Application - Degradation Authorization - Annual Permit Fees - General Permits, p. 2870
17.30.502 and other rules - Department Circular DEQ-7, p. 818, 1385, 1796
17.30.617 and other rule - Water Quality - Outstanding Resource Water Designation for the Gallatin River, p. 2294, 328, 1398, 438, 1953, 162, 1324, 264, 1648, 89
17.38.204 Maximum Organic Chemical Contaminant Levels, p. 2639, 144
17.50.403 and other rule - Definitions - Annual Operating License Requirements, p. 833, 1799

(Petroleum Tank Release Compensation Board)

17.58.201 and other rules - Procedural and Substantive Rules - Petroleum Tank Release Compensation, p. 1, 377

TRANSPORTATION, Department of, Title 18

18.2.101 and other rules - Incorporation of Model Rules - Contested Case Procedures, p. 1387, 1731
18.9.102 and other rules - Licensed Distributors - Special Fuel Users - Invoice Errors - Multi-Distributor Invoice Requirements, p. 2454, 2814, 2961
18.9.111 and other rules - Gasohol and Alcohol Blended Fuel, p. 2460, 2815
18.12.401 and other rules, Aeronautics Division, p. 1650, 1991

CORRECTIONS, Department of, Title 20

I & II Day Reporting Program, p. 29, 235
I & II Satellite-Based Monitoring Program, p. 33, 236
20.9.602 and other rules - Prison Rape Elimination Act - Licensure of Youth Detention Facilities, p. 183
20.25.101 and other rules - Board of Pardons and Parole, p. 2816

JUSTICE, Department of, Title 23

23.3.148 Release of Driving Records, p. 1237, 2213

(Gambling Control Division)

23.16.116 and other rule - Transfer of Interest Among Licensees - Loan Evaluation, p. 1393, 1732

23.16.120 Loans and Other Forms of Financing, p. 2903, 146

LABOR AND INDUSTRY, Department of, Title 24

Boards under the Business Standards Division are listed in alphabetical order following the department rules.

I Carbon Monoxide Detector Standard, p. 978, 2385

I-XIII Approved Construction Techniques for Fire Mitigation, p. 980, 1966, 237, 319

24.7.301 and other rules - Board of Labor Appeals - Unemployment Insurance, p. 195

24.11.203 and other rules - Independent Contractor Exemption Certificates - Employment Status Determinations by the Department, p. 1139, 1608

24.16.7506 and other rules - Collective Bargaining Proceedings Heard by the Board of Personnel Appeals, p. 1652, 2841, 47

24.17.103 and other rules - Prevailing Wage Rates for Public Works Projects - Building Construction Services - Heavy Construction Services - Highway Construction Services - Nonconstruction Services, p. 2681, 102

24.21.401 and other rules - Apprenticeship Training Programs, p. 2466, 2962

24.29.1401 and other rules - Implementing Utilization and Treatment Guidelines - Medical Services Rules for Workers' Compensation Matters, p. 2025

24.29.1432 and other rules - Workers' Compensation Medical Fee Schedules, p. 2642

24.29.2701 and other rules - Silicosis Benefits - Subsequent Injury Fund, p. 2476, 2967

24.301.131 and other rules - Incorporation by Reference of International Building Code - Building Code Modifications - Incorporation by Reference of International Existing Building Code - Incorporation by Reference of International Mechanical Code - Incorporation by Reference of International Fuel Gas Code - Plumbing Requirements - Electrical Requirements - Inspection Fees - Refunds - Credits - Definitions, p. 1244, 1733

(Board of Athletic Trainers)

24.101.413 and other rules - Renewal Dates and Requirements - Fee Schedule - Licensure of Athletic Trainers, p. 94

(Board of Barbers and Cosmetologists)

24.121.301 and other rules - Definitions - Implements - Equipment - Continuing Education - Unprofessional Conduct, p. 837, 2378

(Board of Chiropractors)

24.126.510 and other rules - Endorsement - Inactive Status and Conversion - Minimum Requirements for Impairment Evaluators - Prepaid Treatment Plans, p. 2284, 380

(Board of Massage Therapy)

24.155.301 and other rules - Definitions - Continuing Education - Unprofessional Conduct, p. 1239, 2382

(Board of Medical Examiners)

I Qualification Criteria for Evaluation and Treatment Providers, p. 1467, 2729

(Board of Nursing)

24.159.301 and other rules - Definitions - Fees - Nursing Education Programs - LPN Practice Permit - LPN Licensure - LPN Foreign Requirements - RN Practice Permit - RN Licensure - RN Foreign Requirements - Delegation Practices - Nondisciplinary Track - Conduct of Nurses - Program Standards - Continuing Education - Clinical Practice Settings, p. 1930, 2651

(Board of Outfitters)

24.101.403 and other rules - Renewal Dates and Requirements - Fees, p. 1590, 2384

24.171.401 and other rules - Safety Provisions -Unprofessional Conduct - Misconduct - Provisional Guide License - Emergency Guide License, p. 1472, 1889

(Board of Pharmacy)

24.174.303 and other rules - Definitions - Examination for Licensure - Administration of Vaccines - Prescription Requirements - Internship Requirements - Preceptor Requirements - Registered Pharmacist Continuing Education - Disciplinary Action, p. 277

24.174.401 and other rules - Fee Schedule - Change in Address - Change of Pharmacist-in-Charge - Class IV Facility - Identification of Pharmacist-in-Charge - Wholesale Drug Distributor - Telepharmacy Operations - Dangerous Drugs - Cancer Drug Repository - Clinical Pharmacist Practitioner, p. 2041, 2968

(Board of Plumbers)

24.180.401 and other rule - Fee Schedule - Continuing Education Provider Qualifications, p. 974, 1609

(Board of Professional Engineers and Professional Land Surveyors)

I-IV Professional Land Surveyor Scope of Practice Activities, p. 2288, 385

24.183.502 and other rule - Application Processes for Professional Engineers and Professional Land Surveyors, p. 286

(Board of Public Accountants)

24.201.301 and other rules - Definitions - Fee Schedule - CPA/LPA Designation - Licensing Examinations - Professional Conduct Rules - Profession Monitoring Rules - Renewal and Continuing Education - Complaint Procedures - Exercise of Practice Privilege in Other Jurisdictions - Profession Monitoring of Holders of Special Practice Permit - Compliance With Continuing Education for Nonresidents - Renewal and Continuing Education, p. 1836, 2574

(Board of Real Estate Appraisers)

24.207.401 and other rules - Fees - Application Requirements - Qualifying Education Requirements - Qualifying Experience - Inactive License or Certification - Inactive to Active License - Trainee Requirements - Mentor Requirements - Continuing Education, p. 2905

(Board of Sanitarians)

24.216.402 and other rules - Fee Schedule - Applications - Minimum Licensure Standards - Examination - Continuing Education - Sanitarian-in-Training - Inactive Status Licensure, p. 364

(Board of Veterinary Medicine)

24.225.401 and other rules - Fees - Examination Application Requirements - Examination for Licensure - Board-Approved Training Program Criteria - Euthanasia Technician Test Criteria - Certified Euthanasia Agency Inspection Criteria, p. 371

LIVESTOCK, Department of, Title 32

32.3.108 and other rules - Game Farm Regulations - Deputy State Veterinarians, p. 2492, 2974

32.3.220 and other rules - Semen Shipped Into Montana - Brucellosis Definitions - Designated Surveillance Area - Penalties, p. 2485, 2797, 147

32.6.712 Food Safety - Inspection Service - Meat - Poultry, p. 2483, 2973

32.8.101 and other rule - Grade A Pasteurized Milk - Time From Processing That Fluid Milk May Be Sold for Public Consumption, p. 289

32.23.102 and other rule - Transactions Involving the Purchase and Resale of Milk Within the State - Quota Transfers, p. 1477, 1800

(Board of Horse Racing)

32.28.801 and other rule - Eligibility for Maidens Over Seven Years Old - Conditions Accompanying a Claim, p. 1594, 1992

NATURAL RESOURCES AND CONSERVATION, Department of, Title 36

36.11.111 and other rule - Export of Timber Harvested in the State - Maximum Size of Nonadvertised Timber Permits, p. 988, 1269, 1735

(Board of Water Well Contractors)
36.21.410 and other rules - Board of Water Well Contractors, p. 843, 1614

(Board of Land Commissioners)
36.11.402 and other rules - Forest Management Rules for Implementing Conservation Easements - Habitat Conservation Plans, p. 2687, 320
36.25.205 Procedures for the Issuance of State Oil and Gas Leases, p. 858, 1617

PUBLIC HEALTH AND HUMAN SERVICES, Department of, Title 37

I-VI Medicaid for Workers with Disabilities, p. 1271, 2733
I-X Permissive Licensing of Drop-in Child Care Facilities, p. 1165, 2390
37.5.117 and other rules - Healthy Montana Kids Plan, p. 1768, 2217
37.27.128 and other rules - Emergency Care - Inpatient and Transitional Living Chemical Dependency Programs, p. 2053, 2975
37.34.206 and other rules - Developmental Disabilities Eligibility Rules for Medicaid Only, p. 312
37.50.901 Interstate Compact on the Placement of Children, p. 2297, 106
37.70.115 and other rules - Low Income Energy Assistance Program (LIEAP), p. 2700, 108
37.78.102 Temporary Assistance for Needy Families (TANF), p. 1597, 2215
37.78.102 and other rule - Temporary Assistance for Needy Families (TANF), p. 2515, 107
37.79.102 and other rules - Healthy Montana Kids, p. 2521, 2845, 70
37.80.101 Child Care Assistance, p. 1600, 2216
37.80.101 and other rule - Child Care Assistance, p. 2171, 2661, 2743
37.80.101 and other rules - Child Care Assistance, p. 2925, 323
37.81.304 and other rules - Big Sky RX Benefit - Medicaid Dental Services - Outpatient Drugs - Prescriptions for Durable Medical Equipment - Prosthetics and Orthotics (DMEPOS) - Early and Periodic Screening - Diagnostic and Treatment (EPSDT) - Qualified Medicare Beneficiaries Chiropractic Services, p. 2528, 2986
37.86.2206 and other rules - Provider Requirements - Reimbursement for Therapeutic Group Homes (TGH) - Therapeutic Family Care (TFC) - Therapeutic Foster Care (TFOC), p. 2085, 49
37.86.3515 Case Management Services for Adults With Severe Disabling Mental Illness - Reimbursement, p. 2807, 449
37.87.903 and other rules - Psychiatric Residential Treatment Facility Reimbursement, p. 293
37.87.1331 Home and Community-based Services (HCBS) for Youth With Serious Emotional Disturbance (SED), p. 2512, 2983

42.19.401 and other rules - Property Tax Assistance Programs for the Disabled Veterans and Elderly Homeowners, p. 2546, 336
42.20.107 Valuation Methods for Commercial Properties, p. 2544, 334
42.21.113 and other rules - Property Taxes - Trend Tables for Valuing Property, p. 2314, 3022
42.21.140 and other rules - Property Taxes, p. 2554, 345
42.22.101 and other rules - Centrally Assessed Appraiser Certification Requirements, p. 1695, 2221
42.22.101 and other rules - Centrally Assessed Property, p. 1977, 2542, 2993
42.25.1801 and other rules - Oil and Gas Taxes, p. 1783
42.25.1801 and other rules - Oil and Gas Taxes, p. 1872, 2580
42.31.1002 Hospital Utilization Fee, p. 2301, 2847

SECRETARY OF STATE, Office of, Title 44

1.2.419 Scheduled Dates for the 2011 Montana Administrative Register - p. 1878, 2410
44.6.104 and other rule - Filing Fees Charged by the Business Services Division for Federal Tax Liens - Uniform Commercial Code Documents, p. 1789, 2232

(Commissioner of Political Practices)
44.12.204 Payment Threshold - Inflation Adjustment for Lobbyists, p. 1983, 2411
44.12.204 Payment Threshold - Inflation Adjustment for Lobbyists, p. 2726