

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 12

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 The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

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

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BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)	NOTICE OF PUBLIC HEARING ON
17.56.308 through 17.56.310 and the	)	PROPOSED AMENDMENT AND
adoption of New Rules I and II pertaining to	)	ADOPTION
operating tags and delivery prohibition)	
	)	(UNDERGROUND STORAGE
	)	TANKS)

TO: All Concerned Persons

1. On July 15, 2011, at 9:30 a.m., the Department of Environmental Quality will hold a public hearing in Room 35, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed amendment and adoption 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., July 5, 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:

17.56.308 OPERATING PERMIT REQUIRED (1) After March 31, 2003, except as provided in ~~(10)~~ (9), a person may not place a regulated substance in, dispense a regulated substance from, or otherwise operate an underground storage tank system unless the owner or operator has a valid operating permit ~~and an operating tag~~ for the system.

(2) through (5) remain the same.

~~(6) The department shall issue an operating tag for each underground storage tank for which the department has issued an operating permit as described in (3) and (5). The operating tag must be visibly affixed by the owner or operator to each tank's fill pipe or to another visible part of the tank if affixing the tag to the fill pipe is impracticable. If an operating permit is revoked, the owner or operator must remove each operating tag and return it to the department within 30 days of receipt of revocation.~~

~~(7)~~ (6) The department may suspend, revoke, or determine not to renew an operating permit ~~and tag~~ issued under this rule upon its finding that there is substantial evidence that:

(a) through (c) remain the same.

~~(8)~~ (7) Except as provided in ~~(9)~~ (8), the department shall suspend or revoke an operating permit and tag issued under this rule according to the provisions of 75-11-512, MCA.

(9) (8) If the department determines that noncompliance with Title 75, chapter 11, part 5, MCA, or rules adopted thereunder this chapter, poses an immediate or substantial threat to the public health, safety, or environment, it may immediately revoke the operating permit and tag. A permittee whose operating permit and tag have has been revoked in accordance with this rule may request a hearing before the department. The department shall schedule a hearing within ten days of the request for hearing.

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

AUTH: 75-11-505, MCA

IMP: 75-11-509, MCA

REASON: The department is proposing to end the use of operating tags. The department does not have the resources to continue the issuance and renewal of operating tags. For tank identification and recordkeeping purposes, the department is proposing to implement the use of a "permanent nonexpiring tag," as described in New Rule I, that would not have to be renewed.

17.56.309 REQUIREMENTS FOR COMPLIANCE INSPECTIONS

(1) through (2) remain the same.

(3) Underground storage tank systems that:

(a) under ARM 17.56.102(3), are exempt from ARM Title 17, chapter 56, subchapters 2, 3, and 4, are also exempt from compliance inspection requirements. Owners or operators of these underground storage tank systems may obtain an operating permit and tag by making a written request to the department and providing evidence, satisfactory to the department, that the UST systems qualify for this exemption; and

(b) remains the same.

~~(4) For an underground storage tank system that is installed before November 1, 2001, an initial inspection must occur no later than January 1, 2002.~~

(5) through (7) remain the same, but are renumbered (4) through (6).

~~(8)~~ (7) All underground storage tank systems at an individual facility, ~~except as provided in (4),~~ must be inspected at one time.

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

~~(10)~~ (9) The owner or operator shall submit to the department a follow-up inspection report either:

(a) within ~~30~~ seven days after completion of the corrective actions required under ~~(9)~~ (8), or at least 14 days before the expiration of the facility's operating permit, whichever occurs first; or

(b) within another time frame determined by the department.

AUTH: 75-11-505, 75-11-509, MCA

IMP: 75-11-509, MCA

REASON: The department is proposing to remove all references to operating tags for the same reason given in the statement of reasonable necessity for ARM 17.56.308.

The department is proposing to delete (4) because the compliance dates have passed and it is now moot.

The department is proposing to revise the number of days, from 30 to seven, for an owner or operator to submit a follow-up inspection report after the completion of the corrective actions. The department believes that seven days is more than enough time to submit a follow-up inspection report.

17.56.310 CONDITIONAL, ONE-TIME FILL AND EMERGENCY

OPERATING PERMITS (1) For an underground storage tank system installed after December 31, 2001, the department shall issue a conditional operating permit ~~and tag~~ upon the submission of all documentation required by ARM 17.56.1305, related to the installation of that underground storage tank system.

(2) remains the same.

(3) A conditional operating permit ~~and tag~~ issued under (1) or (2) expires 180 days after issuance.

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

(6) The department may issue an emergency operating permit to allow operation of an UST without a valid operating permit ~~and tag~~ when operation of the UST is necessary to protect the safety and welfare of persons, property, or national security from imminent harm or threat of harm, as follows:

(a) through (d) remain the same.

AUTH: 75-11-505, 75-11-509, MCA

IMP: 75-11-509, MCA

REASON: The department is proposing to remove all references to operating tags for the same reason given in the statement of reasonable necessity for ARM 17.56.308.

4. The proposed new rules provide as follows:

NEW RULE I PERMANENT NONEXPIRING TAG (1) For purposes of this rule, "permanent nonexpiring tag" means a tank tag issued by the department for an underground storage tank system for identification and recordkeeping purposes.

(2) After September 1, 2011, the department shall issue a permanent nonexpiring tag for each underground storage tank for which the department has newly issued an operating permit as described in ARM 17.56.308(3) and (5). The tag must be visibly affixed by the owner or operator to each tank's fill pipe or to another visible part of the tank if affixing the tag to the fill pipe is impracticable.

AUTH: 75-11-505, 75-11-509, MCA

IMP: 75-11-509, MCA

REASON: The department is proposing the use of permanent nonexpiring

tags for the same reasons given in the statement of reasonable necessity for ARM 17.56.308 and 17.56.309 for ending the use of operating tags.

NEW RULE II DELIVERY PROHIBITION (1) For purposes of meeting the delivery prohibition requirements of The Energy Policy Act of 2005, whenever the department finds that there has been significant noncompliance with Title 75, chapter 11, part 5, MCA, or with rules, permits, or orders issued pursuant to part 5, the department will classify such underground storage tank(s) as ineligible for delivery, deposit, or acceptance of product.

(2) The department shall:

(a) make every reasonable effort to notify tank owners, operators, or both prior to prohibiting the delivery, deposit, or acceptance of product;

(b) notify product deliverers when an underground storage tank is ineligible for delivery, deposit, or acceptance of product;

(c) issue a certificate that clearly identifies the ineligible underground storage tank classified in (1); and

(d) issue an operating permit to the owner or operator within ten business days to reclassify an ineligible underground storage tank as eligible following correction of violations identified as significant noncompliance based on a follow-up inspection report submitted to the department in accordance with ARM 17.56.309(8).

(3) The certificate issued in (2)(c) must be conspicuously displayed at the facility until the underground storage tank is reclassified as eligible for delivery, deposit, or acceptance of product.

AUTH: 75-11-505, 75-11-509, MCA

IMP: 75-11-590, MCA

REASON: EPA's delivery prohibition guidance document "Grant Guidelines to States for Implementing the Delivery Prohibition Provision of the Energy Policy Act of 2005, EPA-510-R-06-003" provides:

"Tank owners and operators and product deliverers are responsible for ensuring that product is not delivered, deposited, or accepted into an underground storage tank identified as ineligible to receive product. Therefore, a state must use a clear, concise mechanism or mechanisms for identifying ineligible underground storage tanks. The mechanism(s) a state uses must adequately indicate to product deliverers and underground storage tank owners/operators that an underground storage tank is ineligible to receive product.

Some examples of mechanisms for identifying ineligible underground storage tanks include:

(a) red tags attached to each fill pipe of the ineligible underground storage tank clearly identifying the tank as ineligible for delivery, deposit, or acceptance of product;

(b) green tags attached to each fill pipe of the eligible underground storage tank clearly identifying the tank as eligible for delivery, deposit, or acceptance of product; or,

(c) a certificate conspicuously displayed at the facility clearly identifying the

underground storage tank(s) at the facility as eligible for delivery, deposit, or acceptance of product."

The department is currently using a "green tag" system to satisfy the delivery prohibition requirements of the Energy Policy Act. Therefore, in New Rule II the department is proposing a "certificate" system to satisfy the delivery prohibition requirements of the Energy Policy Act.

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 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., July 21, 2011. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

6. Jane Amdahl, attorney, has been designated to preside over and conduct the 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 and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supplies; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; e-mailed to ejohnson@mt.gov; or may be made by completing a request form at any rules hearing held by the department.

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

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL
QUALITY

/s/ James M. Madden

JAMES M. MADDEN

Rule Reviewer

BY: /s/ Richard H. Opper

RICHARD H. OPPER, Director

Certified to the Secretary of State, June 13, 2011.

BEFORE THE DEPARTMENT OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF PROPOSED
ARM 32.3.433 and 32.3.434	)	AMENDMENT
pertaining to designated surveillance)	
area and animal identification within	)	NO PUBLIC HEARING
the DSA	)	CONTEMPLATED

1. On July 25, 2011, the Department of Livestock proposes to amend the above-stated rules.

2. The Department of Livestock will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Livestock no later than 5:00 p.m. on July 20, 2011 to advise us of the nature of the accommodation that you need. Please contact Christian Mackay, 301 N. Roberts St., Room 308, P.O. Box 202001, Helena, MT 59620-2001; telephone: (406) 444-9321; TTD number: 1 (800) 253-4091; fax: (406) 444-4316; e-mail: cmackay@mt.gov.

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

32.3.433 DESIGNATED SURVEILLANCE AREA (1) through (1)(b) remain the same.

(c) Madison County – south of Highway 84 from Gallatin-Madison County line to Norris, then east of U.S. Highway 287 from Norris to Ennis, then south of State Highway 287 from Ennis to Alder, then east of State Rd. 357 (Upper Ruby Road–~~becomes Centennial Divide Road~~) to Sweetwater Road, then south of Sweetwater Road to the Madison-Beaverhead County line; and

(d) Beaverhead County – from Madison-Beaverhead County line, ~~east of Forest Route 100 (becomes Road 204 – Gravelly Range Road), continuing east of 204~~ south of Sweetwater Road to East Bench Road near Dillon, then south of East Bench Road to Blacktail Road, then East of Blacktail Road to North Valley Road then north and east of North Valley Road to Stibel Lane (Road 202) ,then east of Stibel Lane, which becomes Price Lane, to south of South Valley Road Rd. (State Road 509) approximately 1 mile, then east of Price Peet Rd. (Road 207) running south , then south of South Valley Road to Price Peet Road, then east of Price Peet Road to the Montana/Idaho border.

AUTH: 81-2-102, 81-2-103, 81-2-104, MCA
 IMP: 81-2-101, 81-2-102, 81-2-103, 81-2-104, 81-2-105, 81-2-110, 81-2-111, MCA

REASON: A recent elk study in the southern Ruby Range and Snowcrest range (outside of the current Designated Surveillance Area), by the Montana Department

of Fish, Wildlife and Parks (FWP) revealed a significant number of brucellosis exposed elk. Due to the potential of Brucella exposure to livestock, and to help to protect Montana livestock producers, and its trading partners from the introduction of potentially infected livestock it is necessary to include cattle operations that overlap with the range of these elk in the Designated Surveillance Area.

32.3.434 ANIMAL IDENTIFICATION WITHIN THE DSA (1) All sexually intact cattle and domestic bison ~~12 months of age and older within~~ leaving the DSA must be identified with official individual identification.

AUTH: 81-2-102, 81-2-103, 81-2-104, MCA;
IMP: 81-2-101, 81-2-102, 81-2-103, 81-2-104, 81-2-105, 81-2-110, 81-2-111, MCA

REASON: Individual identification of all sexually intact cattle and domestic bison is imperative for disease surveillance and traceability. This change helps prevent multiple and varying identification requirements being place on Montana DSA livestock by trading partners.

4. Concerned persons may submit their data, views, or arguments in writing to Christian Mackay, 301 N. Roberts St., Room 308, P.O. Box 202001, Helena, MT 59620-2001, by faxing to (406) 444-1929, or by e-mailing to cmackay@mt.gov to be received no later than 5:00 p.m., July 25, 2011.

5. If persons who are directly affected by the proposed action wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments to Christian Mackay at the above address no later than 5:00 p.m., July 25, 2011.

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

7. An electronic copy of this proposal notice is available through the department's web site at www.liv.mt.gov.

8. The Montana Department of Livestock maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by this department. 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 area of interest that the person wishes to receive notices regarding. 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 Christian Mackay, 301 N. Roberts St., Room 308, P.O. Box 202001, Helena, MT 59620-2001; faxed to (406) 444-1929 "attention Christian Mackay"; or e-mailed to cmackay@mt.gov. Request forms may also be completed at any rules hearing held by the department.

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

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

DEPARTMENT OF LIVESTOCK

BY: /s/ Christian Mackay
Christian Mackay
Executive Officer
Board of Livestock
Department of Livestock

BY: /s/ George H. Harris
George H. Harris
Rule Reviewer

Certified to the Secretary of State June 13, 2011.

BEFORE THE DEPARTMENT OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF PROPOSED
ARM 32.3.1505 pertaining to blood	)	AMENDMENT
testing with salmonella antigens)	
	)	NO PUBLIC HEARING
	)	CONTEMPLATED

1. On July 25, 2011, the Department of Livestock proposes to amend the above-stated rule.

2. The Department of Livestock will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Livestock no later than 5:00 p.m. on July 20, 2011 to advise us of the nature of the accommodation that you need. Please contact Christian Mackay, 301 N. Roberts St., Room 308, P.O. Box 202001, Helena, MT 59620-2001; telephone: (406) 444-9321; TTD number: 1 (800) 253-4091; fax: (406) 444-4316; e-mail: cmackay@mt.gov.

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

32.3.1505 BLOOD TESTING WITH SALMONELLA ANTIGENS (1) through (6) remain the same.

(7) The Montana Department of Livestock, Animal Health Division may designate authorized testing agents who have demonstrated the ability to perform the duties of pullorum-typhoid testing to the satisfaction of the department.

(a) No dealer, broker, or poultry market operator may be designated.

(b) The department may charge a fee for designation.

(c) The department has the authority to revoke designations.

AUTH: 81-20-101, MCA

IMP: 81-20-101, MCA

REASON: Pullorum Typhoid (PT) is a disease of poultry regulated by the National Poultry Improvement Plan (NPIP). PT testing is required for interstate movement of animals, for NPIP certification, and for participation in some poultry exhibitions. Scheduling testing for flocks can be difficult and expensive for producers due to the lack of veterinarians who deal with poultry. MDOL has received more than a dozen requests for the development of an authorized testing agent program that would train and certify lay persons to conduct the testing. Other states have similar programs that provide certification of trainers for a fee.

4. Concerned persons may submit their data, views, or arguments in writing to Christian Mackay, 301 N. Roberts St., Room 308, P.O. Box 202001, Helena, MT

59620-2001, by faxing to (406) 444-1929, or by e-mailing to cmackay@mt.gov to be received no later than 5:00 p.m., July 25, 2011.

5. If persons who are directly affected by the proposed action wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments to Christian Mackay at the above address no later than 5:00 p.m., July 25, 2011.

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

7. An electronic copy of this proposal notice is available through the department's web site at www.liv.mt.gov.

8. The Montana Department of Livestock maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by this department. 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 area of interest that the person wishes to receive notices regarding. 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 Christian Mackay, 301 N. Roberts St., Room 308, P.O. Box 202001, Helena, MT 59620-2001; faxed to (406) 444-1929 "attention Christian Mackay"; or e-mailed to cmackay@mt.gov. Request forms may also be completed at any rules hearing held by the department.

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

DEPARTMENT OF LIVESTOCK

BY: /s/ Christian Mackay
Christian Mackay
Executive Officer
Board of Livestock
Department of Livestock

BY: /s/ George H. Harris
George H. Harris
Rule Reviewer

Certified to the Secretary of State June 13, 2011.

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

In the matter of the amendment of	)	NOTICE OF PUBLIC HEARING ON
ARM 37.12.301, 37.12.304,	)	PROPOSED AMENDMENT
37.12.305, 37.12.306, 37.12.310,)	
37.12.312, 37.12.313, 37.12.314,)	
37.12.315, 37.12.316, 37.12.320,)	
37.12.324, 37.12.325, 37.12.326,)	
37.12.333, 37.12.336, 37.12.337,)	
37.12.338, 37.12.341, 37.12.342,)	
37.12.345, and 37.12.346, pertaining)	
to licensure of laboratories)	
conducting analyses of public water)	
supplies)	

TO: All Concerned Persons

1. On July 13, 2011, at 10:00 a.m., the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on July 5, 2011, to advise us of the nature of the accommodation that you need. Please contact Kenneth Mordan, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

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

37.12.301 DEFINITIONS For the purpose of this subchapter:

(1) through (5) remain the same.

(6) "Conditional licensure" refers to a laboratory applying for a license for the first time that is in compliance with most requirements for licensure but has not yet met all of the requirements of this subchapter, but whose deficiencies do not affect the capability of the laboratory to perform valid analyses.

(6) through (9) remain the same but are renumbered (7) through (10).

~~(40)~~ (11) "EPA laboratory certification manual" means the EPA publication entitled "Manual for the Certification of Laboratories Analyzing Drinking Water,"

March, 1997, 4th edition (EPA 815-B-97-001) January 2005, 5th edition (EPA 815-R-05-004).

(11) through (13) remain the same but are renumbered (12) through (14).

(15) "Interim licensure" refers to a status that may be granted by the certifying agency to a fully licensed laboratory without an on-site inspection for a particular analyte or interdependent analyte group if the certifying agency determines with appropriate documentation that the laboratory has the appropriate instrumentation, is using a previously approved method, has adequately trained personnel to perform the analyses, and has satisfactorily analyzed PT samples, if available for the analytes in question.

(14) remains the same but is renumbered (16).

~~(15)~~ (17) "Method detection limit" means the minimum concentration of a substance that can be measured and reported with 99% confidence that the analyte concentration is greater than zero as determined from analysis of a sample containing the analyte in a given matrix as described in 40 CFR Part 136, Appendix B, July 1995 July 2003 edition.

(16) and (17) remain the same but are renumbered (18) and (19).

(20) "Proficiency testing (PT)" refers to testing an unknown sample to evaluate the ability of the laboratory to produce precise and accurate results and is used interchangeably with performance evaluation (PE).

(21) "Provisional licensure" refers to the downgraded status of a laboratory previously holding full certification due to noted deficiencies, but in the opinion of the certifying agency the laboratory can still demonstrate their ability to consistently produce valid data.

(18) through (22) remain the same but are renumbered (22) through (26).

AUTH: 50-1-202, MCA

IMP: 50-1-202, 75-6-106, MCA

37.12.304 LABORATORY LICENSURE: COVERAGE (1) A laboratory that conducts analyses of water from public water supplies must meet the licensure requirements of these rules before the analyses or reports of the analyses may be accepted by the Department of Environmental Quality (DEQ) for the purpose of meeting the requirements of Title 75, chapter 6, MCA, and rules of the ~~department of environmental quality~~ (DEQ) concerning public water supplies.

(2) A laboratory may be licensed to perform microbiology testing, ~~chemistry~~ chemical testing, or both. Microbiology testing and chemical testing are separate licensure categories. If a laboratory requests licensure for both categories, it must submit to the department a separate license application and undergo a separate inspection for each category, and it will receive a separate license for each category for which it qualifies.

(3) A license granted by the department constitutes permission to perform only those analyses of analytes and using only those methods for which the laboratory requests the licensure to cover and that the department finds the laboratory is capable of performing in accordance with the provisions of this subchapter.

AUTH: 50-1-202, MCA
IMP: 50-1-202, 75-6-106, MCA

37.12.305 PROCEDURE FOR LICENSURE (1) Any laboratory not currently licensed but desiring licensure under this subchapter must:

(a) submit a completed application to the Department of Public Health and Human Services, ~~Operations and Technology Division Laboratory Services Bureau, Environmental Laboratory~~, 1400 Broadway, Cogswell Building, P.O. ~~Box 202954~~ 4369, Helena, MT ~~59620-2954~~ 59604-4369, on forms provided by the department. The application must include:

(i) through (8) remain the same.

AUTH: 50-1-202, MCA
IMP: 50-1-202, 75-6-106, MCA

37.12.306 STANDARDS, INSPECTIONS, AND TESTS REQUIRED FOR LICENSURE (1) In order to be licensed, a laboratory must:

(a) remains the same.

(b) at least once during the three-year term of its license, pass an on-site inspection by an agent of the environmental laboratory that shows compliance with the requirements of these rules for the license category in question; ~~and~~

(c) if the laboratory performs chemical analyses, have performed analyses on at least two performance evaluation (PE) samples for each analyte or interdependent analyte group and each method each year during the term of its license, ~~at least one of which indicates a successful identification of each analyte that it is approved under its license to analyze. ; and~~

(d) if the laboratory performs microbiological analyses, have successfully performed analyses on at least two performance evaluation (PE) samples for each analyte and method each year during the term of its license.

AUTH: 50-1-202, MCA
IMP: 50-1-202, 75-6-106, MCA

37.12.310 LICENSURE FEES (1) The following fees calculated on a flat fee yearly schedule, must be submitted to the department, under the circumstances noted, by laboratories conducting analyses of public water supplies: All licensure fees are due January 1 of each calendar year. New laboratories that wish to be licensed prior to July 1 will pay full licensure fees; after July 1 of the fiscal year the licensure fees will be prorated 50%:

(a) \$250 with an application for an initial microbiology, inorganic chemistry, or organic chemistry license or renewal of a microbiology or chemistry license; This application fee will only be charged when issuing a first-time license or issuing a new license after a license has lapsed;

(b) \$550 licensure fee for an organic chemistry license for an in-state laboratory;

(c) \$990 licensure fee for an organic chemistry license for a laboratory licensed by reciprocity;

(d) \$350 licensure fee for an inorganic chemistry license for an in-state laboratory;

(e) \$600 licensure fee for an inorganic chemistry license for a laboratory licensed by reciprocity;

(f) \$350 licensure fee for a microbiology license for an in-state laboratory;

(g) \$600 licensure fee for a microbiology license for a laboratory licensed by reciprocity;

~~(b) \$150 for an inspection to determine if the holder of a provisional license qualifies for a full license;~~

~~(e) (h) \$250 \$300 plus travel expenses for an inspection to determine if the holder of a conditional license qualifies for a full license or for a second inspection during the three-year term of a license that is necessary for approval of a new laboratory location; there is no charge for one inspection during the term of the license;~~

~~(d) \$300 annually for a chemistry license;~~

~~(e) \$200 annually for a microbiology license;~~

~~(f) (i) \$125 per day for training in the environmental laboratory;~~

~~(g) (j) \$250 \$300 per day, plus travel expenses of environmental laboratory staff, for on-site training and technical assistance outside of licensure inspections by the environmental laboratory Laboratory Services Bureau staff.~~

AUTH: 50-1-202, MCA

IMP: 50-1-202, MCA

37.12.312 PROVISIONAL LICENSE (1) In the case of a laboratory applying for a license for the first time, the department may grant a ~~provisional~~ conditional license to a laboratory that:

(a) and (b) remain the same.

(2) ~~Provisional~~ Conditional licensure will be granted only after an on-site inspection, and is in effect for one year or until full licensure is granted under provisions of ARM 37.12.311, whichever is earlier.

(3) In order for a laboratory applying for a chemistry license for the first time to upgrade from ~~provisional~~ conditional licensure status to fully licensed status, it must perform analyses of a minimum of two PE samples over the course of a year that indicate at least two successful analyses of each analyte or interdependent analyte group and method for which they seek licensure to analyze, and undergo a second on-site inspection that shows full compliance with licensure standards.

(4) In order for a laboratory applying for a microbiology license for the first time to upgrade from ~~provisional~~ conditional licensure status to fully licensed status, a microbiology laboratory must be in continual operation for one year, accurately analyze and successfully pass at least two performance evaluation (PE) sets for each analyte and method ~~any required audit samples~~, and undergo a second on-site inspection to verify that its methodologies and quality control meet the standards of this subchapter.

AUTH: 50-1-202, MCA

IMP: 50-1-202, 75-6-106, MCA

37.12.313 RECIPROCITY (1) The department may issue a license to an out-of-state laboratory to perform analyses for public drinking water systems in Montana provided that the laboratory:

(a) through (d) remain the same.

(e) the laboratory performs, and accurately analyzes, and successfully passes PE samples audits for analytes from sources approved by the department. The provider of the PE samples shall report results of the analyses directly to the department; and

(f) remains the same.

(2) The department may license a laboratory that is accredited by the National Environmental Laboratory Accreditation Program (NELAP) if:

(a) it provides evidence of its accreditation and applies for licensure on that basis; ~~and~~

(b) it obtains approval from the department of the testing procedures for each analyte or interdependent analyte group and method and meets the approval requirements of this rule; ~~and~~

(c) the methods are approved by EPA for drinking water analysis.

AUTH: 50-1-202, MCA

IMP: 50-1-202, 75-6-106, MCA

37.12.314 RESTRICTION OF LICENSE (1) The department may downgrade a laboratory to provisional status and place conditions upon the license of a laboratory. The provisionally licensed laboratory must notify clients of its downgraded status in writing, on any applicable report. The department will notify the Department of Environmental Quality of any laboratories that have been downgraded to provisional status. Downgrading to provisional status may occur under the following circumstances:

(a) the laboratory reports results of an analysis of PE samples that are outside acceptable limits, or it fails to report results of a PE sample analysis for any analyte that the laboratory is approved to analyze. In this case:

(i) the laboratory's license is ~~conditional~~ provisional only in regard to the laboratory's approval to conduct analyses of the particular analyte or method involved;

(ii) the ~~conditional~~ provisional status remains in effect until the next available PE results are reported to the department, at which time:

(A) the conditions will be removed if acceptable PE results are reported to the department; or

(B) approval to conduct the analysis in question will be revoked if unacceptable PE results are reported to the department.

(b) the laboratory notifies the department, after the fact, of changes in personnel, equipment, or procedures a change in location that have a material effect on the analyses of analytes for which it is approved. In this case, ~~conditional~~ provisional approval will remain in effect until:

(i) and (ii) remain the same.

AUTH: 50-1-202, MCA
IMP: 50-1-202, 75-6-106, MCA

37.12.315 REVOCATION OR DENIAL OF LICENSE (1) The department may deny or revoke a license at any time that a laboratory is not in compliance with the requirements for licensure under this subchapter, including if the laboratory:

(a) through (g) remain the same.

(h) reports data that were obtained using equipment, procedures, analysts, methods, or facilities that are not approved by the department; or

(i) fails to report to the Department of Environmental Quality within the time frames described in ARM 37.12.341 the results of any sample required under ARM Title 17, chapter 38, subchapter 2, and accepted by the laboratory for analysis, that exceeds a maximum contaminant level (MCL) or triggers additional actions; or unsatisfactory test results of samples or maximum contaminant level (MCL) violations to the department of environmental quality as required under Title 17, chapter 38, subchapter 2 of the Administrative Rules of Montana.

(j) fails to report results on forms or formats acceptable to the Department of Environmental Quality.

(2) remains the same.

AUTH: 50-1-202, MCA
IMP: 50-1-202, 75-6-106, MCA

37.12.316 REISSUANCE OF LICENSE (1) through (3) remain the same.

(4) The department hereby adopts and incorporates by reference the EPA laboratory certification manual (~~EPA 815-B-97-004~~ EPA 815-R-05-004, "Manual for the Certification of Laboratories Analyzing Drinking Water", ~~March, 1997~~ January 2005), which contains criteria, procedures, and quality assurance standards required by the Environmental Protection Agency that must be met by laboratories analyzing drinking water to determine compliance with the federal Clean Water Act and its rules. A copy of the manual may be obtained from the Department of Public Health and Human Services, ~~Operations and Technology Division, Environmental Laboratory Services Bureau~~, 1400 Broadway, Cogswell Building, P.O. Box ~~202954~~ 4369, Helena, MT ~~59620-2954~~ 59604-4369, telephone: 406-444-3444, or may be downloaded at the EPA web site:
www.epa.gov/safewater/methods/pdfs/manual_labcertification.pdf.

AUTH: 50-1-202, MCA
IMP: 50-1-202, 75-6-106, MCA

37.12.320 PROFICIENCY TESTING (1) remains the same.

(2) In order to initially obtain and to maintain approval, the laboratory must:

(a) whenever required by the EPA, enroll and participate in a proficiency testing program approved by the environmental laboratory for each analyte or interdependent analyte group, or, for each analyte or interdependent analyte group and method for which proficiency testing is not available or required, the laboratory

must establish, maintain, and document the accuracy and reliability of its procedures through a quality assurance plan;

(b) successfully participate in at least two proficiency tests annually ~~to be evaluated to obtain or maintain approval to analyze an analyte or interdependent analyte group;~~

(c) prior to obtaining approval, notify the department of the authorized proficiency testing program or programs in which it has enrolled for each analyte or interdependent analyte group and method approved under its license to analyze;

(d) through (f) remain the same.

(3) In addition to the requirements of (2), in order to remain approved for testing an analyte or interdependent analyte group, a laboratory must:

(a) in each calendar year, successfully complete at least two separate proficiency testing audits for each analyte or interdependent analyte group and method;

(b) maintain a copy of all proficiency testing records, including analytical data and worksheets and a copy of the proficiency testing provider report forms authorized by the environmental laboratory and used by the laboratory to record proficiency testing results for a period of five years;

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

(5) Results of proficiency tests must be within the control limits established by the EPA as specified in ~~chapter IV of the EPA laboratory certification manual (EPA 815-R-05-004) "Manual for the Certification of Laboratories Analyzing Drinking Water", January 2005)~~ for each analysis for which the laboratory requests approval. ~~These limits are determined by using the known concentration of the analyte in the sample, and by the application of accepted statistical procedures.~~

(a) Specific chemistry acceptance criteria are listed in Table IV-10. "MCL and Proficiency Testing Sample Acceptance Criteria in the CFR, Primary and Secondary Drinking Water Regulations" of the EPA laboratory certification manual.

(b) Specific microbiology acceptance criteria is correctly analyzing a minimum of nine of ten samples, with no false negative result (i.e., a single false positive result would be considered acceptable).

(6) through (8) remain the same.

(9) The department adopts and incorporates by reference the acceptance limits for regulated parameters in chapter IV of the EPA laboratory certification manual (~~EPA 815-B-97-004~~ EPA 815-R-05-004, "Manual for the Certification of Laboratories Analyzing Drinking Water", ~~March, 1997~~ January 2005), which contains the critical elements for chemistry that a laboratory must meet, including the acceptance limits required by the EPA for metals, inorganics, volatic organic compounds, and synthetic organics in drinking water samples. A copy of chapter IV may be obtained from the Department of Public Health and Human Services, ~~Operations and Technology Division, Environmental Laboratory~~ Laboratory Services Bureau, 1400 Broadway, Cogswell Building, P.O. Box ~~202954~~ 4369, Helena, MT ~~59620-2954~~ 59604-4369, telephone: 406-444-3444, or may be downloaded at the EPA web site: www.epa.gov/safewater/methods/pdfs/manual_labcertification.pdf.

AUTH: 50-1-202, MCA

IMP: 50-1-202, 75-6-106, MCA

37.12.324 REQUIRED NOTIFICATION OF CHANGES (1) Whenever a laboratory makes any change in personnel, or equipment, or procedures that has a material effect on the analysis of analytes, the laboratory must notify the department of that fact within 30 days after making the change, but prior to reporting results of tests used in regulatory compliance. A change in personnel is defined as the loss or replacement of the laboratory supervisor or a situation in which a trained and experienced analyst is no longer available to analyze a particular parameter for which licensure has been granted.

(2) After receiving the above notification, the department ~~will~~ may place conditions upon the laboratory's license pursuant to ARM 37.12.314.

AUTH: 50-1-202, MCA
IMP: 50-1-202, 75-6-106, MCA

37.12.325 REQUIRED NOTIFICATION OF CHANGE IN NAME (1) A licensed laboratory that changes its name or business organizational status must report the change in writing to the department within 30 days of the change.

AUTH: 50-1-202, MCA
IMP: 50-1-202, 75-6-106, MCA

37.12.326 REQUIRED NOTIFICATION OF CHANGE IN LOCATION

(1) remains the same.

(2) If, in view of the information received pursuant to (1), the department is satisfied that the laboratory can produce valid results at the new location, it shall place conditions on the laboratory license as specified in ARM ~~37.12.324~~ 37.12.314.

(3) remains the same.

(4) Within 30 days after the on-site inspection, the department shall issue a determination either that the laboratory license is:

- (a) revoked;
 - (b) its ~~conditional~~ provisional status is retained; or
 - (c) the conditions are removed.
- (5) and (6) remain the same.

AUTH: 50-1-202, MCA
IMP: 50-1-202, 75-6-106, MCA

37.12.333 APPROVAL TO CONDUCT ANALYSES (1) and (2) remain the same.

(3) An applicant laboratory must request approval to analyze for an analyte or interdependent analyte group and the method(s) used as part of its application for licensure or renewal of a license.

(4) Approval for such analyses will be granted only after an on-site assessment. The applicant laboratory shall submit:

- (a) remains the same.

(b) for chemistry analysis, documentation that the laboratory has successfully passed two proficiency testing audits for the analyte and method in question from an approved in a proficiency testing program;

(c) through (5) remain the same.

(6) At a time other than when applying for a license renewal:

~~(a)~~ a licensed laboratory may request approval to analyze for an additional analyte or interdependent analyte group by submitting a written request together with the documentation required in (1).

~~(b)~~ (a) If the analyte for which approval is requested is an addition to, or a group similar to, analytes that have already received approval, the ~~state environmental laboratory~~ certifying agency may grant a ~~provisional~~ interim approval for the analyte which shall remain in effect until the next review for license renewal as long as the laboratory continues to successfully complete proficiency testing on the analyte.

~~(c)~~ (b) If the analyte for which approval is requested is unrelated to previously approved analytes, or requires specialized equipment and/or personnel training, the ~~state environmental laboratory~~ certifying agency shall require a new application packet and an application fee to be submitted, as well as an update of the laboratory licensure file, and shall perform an on-site assessment prior to approval.

AUTH: 50-1-202, MCA

IMP: 50-1-202, 75-6-106, MCA

37.12.336 QUALITY ASSURANCE (1) through (4) remain the same.

(5) As part of the quality assurance program, the laboratory must document and retain records for a period of five years demonstrating that it has maintained compliance with its quality assurance program. The laboratory may be requested by the department to provide quality assurance data to monitor compliance.

AUTH: 50-1-202, MCA

IMP: 50-1-202, 75-6-106, MCA

37.12.337 SAFETY (1) A laboratory shall develop and maintain a safety program, including an education-based safety program, which meets the requirements of the Montana Safety Culture Act, Title 39, chapter 71, part 15, MCA, and ARM ~~24.30.2501, 24.30.2503, 24.30.2507, 24.30.2521, 24.30.2541, 24.30.2542, 24.30.2551, 24.30.2553, 24.30.2554~~ and through 24.30.2558 implementing that act and adopted by the Department of Labor and Industry.

(a) The department adopts and incorporates by reference those portions of ARM ~~24.30.2501, 24.30.2503, 24.30.2507, 24.30.2521, 24.30.2541, 24.30.2542, 24.30.2551, 24.30.2553, 24.30.2554~~ and through 24.30.2558, which contain requirements that employers must meet concerning the establishment of educational safety programs and safety programs for employers who employ more than five employees. A copy of those rules may be obtained from the Department of Public Health and Human Services, Office of Legal Affairs, ~~1400 Broadway~~ 111 North Sanders, Cogswell Sanders Building, P.O. Box ~~202954~~ 4210, Helena, MT ~~59620-2954~~ 59604-4210.

(2) and (3) remain the same.

AUTH: 50-1-202, MCA

IMP: 50-1-202, 75-6-106, MCA

37.12.338 LABORATORY EQUIPMENT AND SUPPLIES (1) through (3) remain the same.

(4) The laboratory must have a source of distilled, or deionized, or reagent grade water that meets all the requirements listed in the EPA laboratory certification manual and the requirements of the analytical method being used.

~~(5) For chemical analyses of drinking water, the laboratory must have a source of reagent water having a specific resistance value of at least 0.5 megohms (less than 2.0 umhos/cm) at 25C. Reagent water for organic analysis must be free of interferences for the analytes being measured.~~

~~(6)~~ (5) The department adopts and incorporates by reference the standards contained in the EPA laboratory certification manual (~~EPA 815-B-97-004~~ EPA 815-R-05-004, "Manual for the Certification of Laboratories Analyzing Drinking Water", ~~March, 1997~~ January 2005) for sources of distilled, or deionized water, or reagent grade water. A copy of the manual may be obtained from the Department of Public Health and Human Services, Operations and Technology Division, Environmental Laboratory Laboratory Services Bureau, 1400 Broadway, Cogswell Building, P.O. Box ~~202954~~ 4369, Helena, MT ~~59620-2954~~ 59604-4369, telephone: 406-444-3444, or may be downloaded at the EPA web site: www.epa.gov/safewater/methods/pdfs/manual_labcertification.pdf.

AUTH: 50-1-202, MCA

IMP: 50-1-202, 75-6-106, MCA

37.12.341 REPORTING REQUIREMENTS (1) ~~Reporting requirements for laboratories performing microbiological or chemical analyses of water from public water supplies are as follows:~~

~~(a) All analyses of samples not meeting the requirements of Title 17, chapter 38, subchapter 2 of the Administrative Rules of Montana must be promptly, on that day or no later than noon of the next working day, reported by telephone to the department of environmental quality (phone 406-444-5313 for chemistry results and 406-444-3425 for microbiology results);~~

~~(b) When a maximum contaminant level set out in Title 17, chapter 38, subchapter 2 of the Administrative Rules of Montana is found to be exceeded in any sample, the laboratory must notify the water supplier within 24 hours after the analysis is completed and request resampling from the sampling point according to the requirements of Title 17, chapter 38, subchapter 2 of the Administrative Rules of Montana, with the exception noted in (1)(c) below;~~

~~(c) If a test shows a positive total coliform, fecal coliform, or E. coli result, a laboratory must immediately notify the supplier and within 24 hours notify the department of environmental quality (DEQ) of that fact. A total coliform-positive result is based on a confirmed phase for the multiple tube fermentation technique and presence-absence (P-A) coliform test, or verified test for membrane filter~~

~~technique. No requirement exists for confirmation of positive Colilert/Colisure tests, fecal coliform tests, or E. coli tests. In those rare cases where a presumptive total coliform-positive culture does not confirm or verify as such, but is found to be fecal coliform or E. coli positive, the sample is considered total coliform-positive and fecal coliform/E.coli positive;~~

~~(d) Written reports of contaminated microbiological samples must be sent to the department of environmental quality (DEQ) within 48 hours after the test is completed; and~~

~~(e) Written reports of all microbiological samples other than those which are contaminated must be sent to the department of environmental quality within 5 days after the tests are completed.~~

(1) The Montana Department of Environmental Quality must be promptly notified, on that day or no later than noon the next working day, of all results from samples collected from a public water supply system and accepted by the laboratory for analysis, that exceeds a maximum contamination level (MCL) or triggers additional actions under ARM Title 17, chapter 38, subchapter 2. Notice must be reported to the Public Water Supply Section of the Montana DEQ either electronically to dpws@mt.gov or by telephone to (406) 444-1947. The actual sample result must be reported on forms and in formats approved by the DEQ within 48 hours of completion of the analysis. When a maximum contaminate level as set out in ARM Title 17, chapter 28, subchapter 2 is found to be exceeded in any sample, the reporting laboratory accepting the sample for analysis from the water supplier must notify the water supplier within 24 hours after the analysis is completed.

(2) Result of all microbiological or chemical samples accepted by the laboratory for analysis, other than those which are defined in ARM 37.12.341(1), must be reported to the Department of Environmental Quality within a week upon completion of the analysis. The results must be reported on forms and in formats approved by the DEQ.

AUTH: 50-1-202, MCA

IMP: 50-1-202, 75-6-106, MCA

37.12.342 REPORTING RESULTS FROM OTHER LABORATORIES

(1) If a laboratory refers testing to another laboratory, that referral laboratory must be licensed in Montana to perform drinking water analysis for that analyte and method.

(2) A laboratory that reports analyses from performed by other laboratories is required to report all analyte results that are used for regulatory compliance must report all such laboratory results on the original reporting document, or a copy thereof, of the other laboratory performing the analyses and must attest that the laboratory performing the analyses is a laboratory licensed to perform drinking water analysis in Montana.

AUTH: 50-1-202, MCA

IMP: 50-1-202, 75-6-106, MCA

37.12.345 CRITICAL ELEMENTS FOR CHEMISTRY LABORATORY LICENSURE (1) through (3) remain the same.

(4) The laboratory's analysts must:

(a) meet all of the qualifications and conditions set forth in chapter IV of the EPA laboratory certification manual, ~~except those noted in (5) and (6),~~ and: if responsible for the operation of analytical instrumentation, complete specialized training offered by the manufacturer or another qualified training facility approved by the department, or served a period of apprenticeship under an experienced analyst. The duration of this apprenticeship should be proportional to the sophistication of the instrument; and

(b) ~~if operating~~ provide certification and/or training and experience documentation to the department for review and approval as part of the laboratory licensure and inspection process. ~~the following, have the training noted, unless the department approves a specialized training course as a substitute:~~

~~(i) if using a gas chromatograph, liquid chromatograph, mass spectrometer, or an inductively coupled plasma atomic emission spectrophotometer, have satisfactorily completed a short course in their operation offered by the equipment manufacturer, a professional organization, a university, or another department-approved training facility acceptable to the department; and~~

~~(ii) if operating an atomic absorption, an ion chromatograph, a gas chromatograph, or an inductively coupled plasma atomic emission spectrophotometer, have a minimum of 6 months previous experience in their operation;~~

~~(iii) if operating a gas chromatograph or mass spectrometer, have a minimum of 12 months previous experience in its operation.~~

~~(5) A test for ortho-phosphate may not be filtered.~~

~~(6) The wavelength settings of variable wavelength spectrophotometers must be verified quarterly with color standards.~~

~~(7)~~ (5) The department adopts and incorporates by reference chapter IV of the EPA laboratory certification manual (EPA 815-B-97-004 EPA 815-R-05-004, "Manual for the Certification of Laboratories Analyzing Drinking Water", ~~March, 1997~~ January 2005), which establishes qualifications for staff training and experience and conditions for approval of laboratories conducting chemical analyses of public drinking water. A copy of the above chapter IV may be obtained from the Department of Public Health and Human Services, ~~Operations and Technology Division, Environmental Laboratory~~ Laboratory Services Bureau, 1400 Broadway, Cogswell Building, P.O. Box ~~202954~~ 4369, Helena, MT ~~59620-2954~~ 59604-4369, or may be downloaded at the EPA web site: www.epa.gov/safewater/methods/pdfs/manual_labcertification.pdf.

AUTH: 50-1-202, MCA

IMP: 50-1-202, 75-6-106, MCA

37.12.346 CRITICAL ELEMENTS FOR MICROBIOLOGY LABORATORY LICENSURE (1) through (4) remain the same.

(5) A laboratory must meet all of the qualifications and conditions set forth in chapter V of the EPA laboratory certification manual, ~~except that:~~

(a) the first sentence of paragraph 6.4 is replaced by the following:

~~"The Total Coliform Rule (TCR), 40 CFR 141.21(f)(3), and EPA's Manual for the Certification of Laboratories Analyzing Drinking Water, Fourth Edition, March 1997, limit the time from sample collection to initiation of analysis to 30 hours. Public water systems (PWSs) must make every effort to meet the 30 hour holding time requirement. Laboratories may continue to analyze samples that are up to 48 hours old with the following two additional requirements:~~

~~1. Laboratories must flag samples that are greater than 30 and less than or equal to 48 hours old.~~

~~2. Laboratories must continue to invalidate a total coliform negative sample that shows signs of heterotrophic interference (40 CFR 141.21(c)(2)) regardless of the holding time. However, replacement samples may not exceed 30 hours; and~~

~~(b) (a) Analysts must have a minimum of four two days of training at the environmental laboratory with a successful evaluation from the state training personnel, with the exception that up to two days training may be waived at the discretion of the microbiology certification officer based upon education and experience of the analyst. Documentation of independent certification or prior experience and training as approved by the department may be substituted for this training.~~

~~(6) Each membrane filter lot must be checked by comparing recovery of coliform organisms against membrane filters from a previously acceptable lot.~~

~~(7) (6) The department adopts and incorporates by reference chapter V of the EPA laboratory certification manual (EPA 815-B-97-004 EPA 815-R-05-004, "Manual for the Certification of Laboratories Analyzing Drinking Water", ~~March, 1997~~ January 2005), which establishes qualifications for staff training and experience and conditions for approval of laboratories conducting microbiological analyses of public drinking water. A copy of chapter V may be obtained from the Department of Public Health and Human Services, Operations and Technology Division, Environmental Laboratory Laboratory Services Bureau, 1400 Broadway, Cogswell Building, P.O. Box 202954 4369, Helena, MT ~~59620-2954~~ 59604-4369, or may be downloaded at the EPA web site:
www.epa.gov/safewatermethods/pdfs/manual_labcertification.pdf.~~

AUTH: 50-1-202, MCA

IMP: 50-1-202, 75-6-106, MCA

4. STATEMENT OF REASONABLE NECESSITY:

The Department of Public Health and Human Services, Laboratory Services Bureau (the department) is proposing rule changes to ARM 37.12.301, subchapter 3, Licensure of Laboratories Conducting Analyses of Public Water Supplies. These rules govern the licensing procedures, including inspections, fees, reciprocity, proficiency testing, reporting requirements, quality assurance, and required notifications. It is necessary to amend these rules to provide clarification in the existing licensing rules, including the fee schedule, proficiency testing, and reporting requirements.

The last time these rules were revised was 2003, and there are some provisions that need to be updated. The Department of Environmental Quality, as the agency that receives reports of testing from licensed laboratories, has also been involved with these revisions.

The majority of the changes are general housekeeping, with updated citations and accesses. We have included additional definitions, clarified that proficiency testing (PT) must be successful and what constitutes a successful PT challenge, updated the fees to be commensurate with the actual cost of providing the service, revised the reporting requirements and requirements for training at the environmental laboratory, removed some detailed language and cited a published standard instead, and removed the 30-day rule exemption.

Over a period of months, staff from the Laboratory Services Bureau, including the laboratory director and two EPA-certified water certification officers, along with staff from the Department of Environmental Quality, Water Quality Section, met to review and revise these rules. After a draft was agreed upon, the proposed changes were presented to a group of certified in-state laboratory staff members. Feedback from this informal session was incorporated into the proposed rules that are being proposed.

ARM 37.12.301 – Definitions

The department is proposing to change and redefine "provisional licensure" to "conditional licensure" to be in accordance with EPA guidelines. "Interim licensure" is being added to be in accordance with EPA guidelines. "Proficiency testing" is proposed to be added since it is used interchangeably with performance evaluation throughout the rules.

ARM 37.12.306 – Standards, Inspections, and Tests Required for Licensure

The department is proposing to add language to clarify that performance evaluation samples (PE) must be "successfully" performed on at least two performance evaluation (PE) samples for each analyte and interdependent group and each method each year during the term of its license.

ARM 37.12.310 – Licensure Fees

The department is proposing to clarify the fee schedule, change fees to be commensurate with the actual cost of providing the service and put the fee schedule on a flat fee yearly basis for ease in tracking. Licenses are being proposed to be awarded on a calendar year with payment due January 1 of each year. New laboratories that wish to be licensed prior to July 1 would pay full annual license fees; after July 1 of the fiscal year, the fees will be 50% of the published annual license fee.

The department is proposing a new laboratory application fee of \$250 for each certification (microbiology, organic, inorganic). This fee is proposed to be charged when issuing a first-time license or issuing a new license after a license has lapsed.

Proposed Fee Schedule

Annual License Fee payable yearly:	In-state Laboratories	Laboratories Licensed by Reciprocity
Microbiology	\$350	\$600
Chemistry (Organic)	\$550	\$900
Chemistry (Inorganic)	\$350	\$600

The department is proposing \$300 for an inspection to determine if the holder of a conditional license qualifies for a full license or for a second inspection during the 3-year term of a license that is necessary for approval of a new laboratory location. There is no proposed charge for one inspection during the term of the 3-year license.

The department is proposing \$125 per day for training in the environmental laboratory and \$300 per day, plus travel expenses for laboratory staff, for on-site training and technical assistance outside of the licensure inspections by Laboratory Services Bureau staff.

ARM 37.12.312 – Conditional License

The department is proposing to replace "provisional" with "conditional" in this section to be in accordance with EPA guidelines, as "provisional" has a different definition than the conditions outlined in this section. The term "conditional" was selected to reflect the status of a laboratory that is newly licensed and needs to be operating successfully for a period of time prior to issuing a full license.

ARM 37.12.314 – Restriction of License

The department is proposing to add language that a provisionally licensed laboratory must notify clients of its downgraded status in writing, on any applicable report. The department would notify the Department of Environmental Quality (DEQ) of any laboratories that have been downgraded to provisional status. This is being proposed to ensure that DEQ and clients are informed that a license status has been downgraded.

ARM 37.12.315 – Revocation or Denial of License

The department is proposing to clarify language about what results need to be reported to DEQ and the specified time frames. Also the department is proposing to add the following language: "fails to report on forms or formats acceptable to the DEQ" so that a standardized reporting format is used.

ARM 37.12.320 – Proficiency Testing

The department is proposing to clarify proficiency testing (PT) criteria by citing the EPA laboratory certification manual and adding a provision to maintain records for a period of five years for record look-back and to monitor quality assurance.

ARM 37.12.324 – Required Notification of Changes

The department is proposing to clarify when notifications of changes must be done by adding the language "prior to reporting results of tests used in regulatory compliance".

ARM 37.12.336 – Quality Assurance

For the purposes of record look-back and quality assurance compliance, the department is proposing to add a time frame for record retention (a period of five years) and that the laboratory may be requested by the department to provide quality assurance data to monitor compliance.

ARM 37.12.338 – Laboratory Equipment and Supplies

The department is proposing to include reagent water with the distilled and deionized requirements, and remove the specific reagent water section.

ARM 37.12.341 – Reporting Requirements

The department is proposing to change the entire language in this rule, to clarify what samples must be reported within certain timeframes, how that reporting is to be done (e-mail or updated telephone number), when notification must be made to the public water supplier, and that formats must be acceptable to DEQ for standardization.

ARM 37.12.342 – Reporting Results From Other Laboratories

The department is proposing to clarify language that referral laboratories must be licensed in Montana, and the reporting of referral laboratory results.

ARM 37.12.345 – Critical Elements for Chemistry Laboratory Licensure

The department is proposing to clarify the training requirements for analysts and remove language about specific instrumentation.

ARM 37.12.346 – Critical Elements for Microbiology Laboratory Licensure

The department is proposing to remove the language that allows testing of samples that exceeded the 30-hour time limit but were received within 48 hours to bring the

rules into compliance with federal standards, and clarify training requirements for analysts.

Fiscal Impact

Currently, the average yearly total fees collected for microbiology and chemistry licensure activities is \$19,783.33. The new proposed fees projected average yearly total for microbiology and chemistry licensure activities is \$33,550. The current number of in-state licensed laboratories is 17, and the number of laboratories licensed by reciprocity is 18.

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., July 21, 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/ Shannon McDonald
Rule Reviewer

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

Certified to the Secretary of State June 13, 2011

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

In the matter of the adoption of New	)	NOTICE OF PUBLIC HEARING ON
Rules I through XII, amendment of	)	PROPOSED ADOPTION,
37.40.1406, 37.40.1407, 37.40.1408,	)	AMENDMENT, AND
37.40.1415, 37.40.1420, 37.40.1426,	)	REPEAL
37.40.1430, 37.40.1435, 37.40.1438,)	
37.40.1446, 37.40.1448, 37.40.1449,)	
37.40.1451, 37.40.1452, 37.40.1465,)	
37.40.1488, and repeal of)	
37.40.1437, 37.40.1464, 37.40.1466,)	
and 37.40.1467 pertaining to home)	
and community-based services)	
(HCBS) for the elderly and people)	
with physical disabilities)	

TO: All Concerned Persons

1. On July 13, 2011 at 2:00 p.m., the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed adoption, amendment, and repeal of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on July 5, 2011, to advise us of the nature of the accommodation that you need. Please contact Kenneth Mordan, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

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

NEW RULE I HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSON: DEFINITIONS (1) "Adult residential care" means a residential habilitation option for consumers residing in an adult foster home, a residential hospice, or an assisted living facility.

(2) "Case management" means a service that provides the planning for, arranging for, implementation of, and monitoring of the delivery of services available through the program to a consumer.

(3) "Community supports" means services that are inclusive of personal assistant services (Attendant PAS and Socialization/Supervision PAS), homemaker, chore, transportation, and respite type services.

(4) "Community transitions services" means nonrecurring set-up expenses for individuals who are transitioning from an institutional or other provider-operated living arrangement to a living arrangement in a private residence where the person is directly responsible for his or her own living expenses.

(5) "Consultative clinical and therapeutic services" means services that assist unpaid and/or paid caregivers in carrying out individual service plans and are necessary to improve the individual's independence and inclusion in the community.

(6) "Consumer-directed goods and services" means services, supports, supplies, or goods not otherwise provided through this waiver or the Medicaid state plan.

(7) "Family training and support" means a service that provides training to families and others who work or play with a child with a disability.

(8) "Financial management services" means services provided by an individual called a financial manager who provides finance, employer, payroll, and related functions for the consumer or personal representative.

(9) "Habilitation" means the provision of intervention services designed for assisting a consumer to acquire, retain, and improve the self-help, socialization, and adaptive skills necessary to reside successfully at home and in the community.

(10) "Health and wellness" means services that assist consumers in acquiring, retaining, and improving self-help, socialization, and adaptive skills to reside successfully in the community.

(11) "Homemaker chore" means services provided for individuals who are unable to manage their own home or when the consumer, normally responsible for homemaking, is absent.

(12) "Independence advisor services" means services that provide an array of consumer-directed support activities to ensure the ability of consumers to direct their care successfully.

(13) "Nonmedical transportation" means the provision to a consumer of transportation through common carrier or private vehicle for access to social or other nonmedical activities.

(14) "Pain and symptom management" means a service that allows the provision of traditional and nontraditional methods of pain management.

(15) "Participant direction" means an option available to individuals who elect to direct their own care and that participants, or their representatives, have decision-making authority over certain services and take direct responsibility to manage their services with the assistance of a system of available support.

(16) "Personal assistant services" (PAS) is defined at 53-6-145, MCA and includes attendant PAS and socialization/supervision PAS.

(17) "Post-acute rehabilitation services" means the provision of therapeutic intervention to a consumer with a brain injury or other related disability in a residential or nonresidential setting.

(18) "Respite care" means the provision of supportive care to a consumer to relieve those unpaid persons normally caring for the consumer from that responsibility.

(19) "Senior companion" means services directed at providing companionship and assistance.

(20) "Service plans" means a written plan of supports and interventions based on an assessment of the status and needs of a consumer.

(21) "Specialized child care for medically fragile children" means the provision of day care, respite care, and other direct and supportive care to a consumer under 18 years of age who is medically fragile and who, due to medical and other needs, cannot be served through traditional child care settings.

(22) "Specially trained attendant care" means an option under personal assistance that is the provision of supportive services to a consumer residing in their own residence.

(23) "Supported living" means the provision of supportive services to a recipient residing in an individual residence or in a group living situation. It is a comprehensive service designed to support a person with brain injury or other severe disability.

AUTH: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-402, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-402, MCA

NEW RULE II HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: COMMUNITY TRANSITION SERVICES, REQUIREMENTS (1) Community transition services is defined in [New Rule I].

(2) Allowable expenses are those necessary to enable a person to establish a basic household and may include:

(a) usual and customary security deposits that are required to obtain a lease on an apartment or home;

(b) essential household furnishings required, including furniture, window coverings, food preparation items, and bed/bath linens;

(c) moving expenses;

(d) usual and customary setup fees or deposits for utility or service access, including telephone, electricity, heating, and water;

(e) activities to assess need, arrange for and procure resources.

(3) Community transition services do not include monthly rental or mortgage expenses, food, regular utility charges, household appliances, or items that are intended for purely diversion/recreational purposes.

(4) Refunded security deposits must be paid to the department.

AUTH: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-402, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-402, MCA

NEW RULE III HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: FINANCIAL MANAGEMENT, REQUIREMENTS (1) Financial management (FM) service is defined in [New Rule I].

(2) The financial manager acts as the common law employer (employer of record) and the consumer acts as the managing employer. Since the financial

manager is the employer, this entity is responsible for all employee-related expenses and liability risks that may be incurred if a worker's compensation or unemployment claim is filed.

(3) On behalf of the consumer/personal representative the financial manager will:

(a) accept referral from the consumer/personal representative to process the employment packet;

(b) prepare and distribute an application package of information that is clear and easy for the potential employee to understand and follow;

(c) provide needed counseling and technical assistance regarding the role of the FM to consumer, their personal representatives, and others;

(d) process employment application package and documentation for prospective individual to be employed (as agency employee);

(e) complete criminal background checks on prospective consumer-referred worker and maintain results on file, if requested by the consumer;

(f) establish and maintain record for each individual employed and process all employment records;

(g) withhold, file, and deposit Federal Insurance Contributions Act (FICA), Federal Unemployment Tax Act (FUTA), and State Unemployment Tax Act (SUTA) taxes in accordance with Federal Internal Revenue Service (IRS), Federal Department of Labor (DOL), and state rules (if applicable);

(h) process all judgments, garnishments, tax levies or any related holds on a consumer's worker as may be required by local, state, or federal laws;

(i) generate and distribute IRS W-2s and 1099s, wage and tax statements and related documentation annually to all member-employed providers who meet the statutory threshold earnings, amounts during the tax year by January 31st;

(j) withhold, file, and deposit federal and state income taxes (if applicable) in accordance with federal IRS and state Department of Revenue Services rules and regulation;

(k) administer benefits for member-employed providers (if applicable);

(l) generate payroll checks in a timely and accurate manner, as approved in the consumer's self-direct spending plan, and in compliance with all federal and state regulations;

(m) develop a method of payment of invoices and monitoring expenditures against the self-direct spending plan for each consumer;

(n) receive, review, and process all invoices from individuals, vendors, or agencies providing consumer-directed goods or services as approved in the consumer's self-direct spending plan authorized by the division;

(o) process and pay non-labor-related invoices;

(p) generate utilization reports along with payroll reflecting accurate balances for a consumer/personal representative, independence advisor, the regional program officer (RPO), and the division;

(q) establish and maintain all consumer records with confidentiality, accuracy, and appropriate safeguards;

(r) respond to calls for consumer or their personal representatives and employees regarding issues such as withholdings and net payments, lost or late checks, reports, and other documentation;

(s) file claims through the Medicaid Management Information System (MMIS) for consumer-directed goods and services and prepare checks for individually hired workers; and

(t) generate service management and statistical information and reports.

(4) This is a mandatory service for consumer-direction.

(5) The fiscal manager provider must be certified by the department to provide the service.

AUTH: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-402, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-402, MCA

NEW RULE IV HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: INDEPENDENCE

ADVISOR, REQUIREMENTS (1) Independence advisor (IA) is defined in [New Rule I].

(2) The IA may help consumers or their personal representatives:

(a) learn how to successfully direct services;

(b) develop a service plan;

(c) access waiver services, Medicaid State Plan services, and other needed medical, social, or educational services regardless of funding source;

(d) develop, implement, and monitor a monthly spending plan;

(e) identify risks and develop a plan to manage those risks;

(f) develop an individualized emergency backup plan;

(g) negotiate payments for necessary and allowable goods and services;

(h) work with the financial manager (FM) to track expenditures;

(i) monitor the provision of the services to ensure the consumer's health and welfare; and

(j) coordinate with the FM to ensure that consumers or personal representatives budget appropriately to meet their needs as defined in the service plan.

(3) This is a mandatory service for consumer-direction.

(4) An IA must be certified by the department to provide the service.

AUTH: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-402, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-402, MCA

NEW RULE V HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: CONSUMER-DIRECTED GOODS AND SERVICES, REQUIREMENTS (1) Consumer directed goods and services is defined in [New Rule I].

(2) These items could include the purchase of appliances and vans, with or without modifications.

(3) These items or services must address an identified need in the consumer's service plan and must meet any or all of the following requirements:

(a) decrease the need for other Medicaid services;

(b) promote inclusion in the community;

(c) promote the independence of the consumer;

- (d) fulfill a medical, social, or functional need based on unique cultural approaches; or
 - (e) increase the person's safety in the community or home environment.
- (4) Goods and services purchased must meet the following criteria:
- (a) meet the consumer's identified needs and outcomes as outlined in their service plan;
 - (b) collectively must provide an alternative to institutional placement;
 - (c) be a cost-effective means of addressing an identified need in the service plan; and
 - (d) be of sole benefit to the consumer.

AUTH: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-402, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-402, MCA

NEW RULE VI HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: PAIN AND SYMPTOM MANAGEMENT, REQUIREMENTS (1) Pain and symptom management is defined in [New Rule I].

- (2) Treatments include but are not limited to:
- (a) acupuncture;
 - (b) reflexology;
 - (c) massage therapy;
 - (d) craniosacral therapy;
 - (e) hyperbaric oxygen therapy;
 - (f) mind-body therapies such as hypnosis and biofeedback;
 - (g) pain mitigation counseling/coaching;
 - (h) chiropractic therapy; and
 - (i) nursing services by a nurse specializing the pain and symptom management.

AUTH: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-402, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-402, MCA

NEW RULE VII HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: FAMILY TRAINING AND SUPPORT, REQUIREMENTS (1) Family training and support is defined in [New Rule I]. Services include:

- (a) general orientation about the child's disability; and
 - (b) training specific to the needs of the child and his or her family on how to best meet the child's needs.
- (2) Providers of this service may:
- (a) serve as consultants to families in terms of developmental stages and teaching activities that families can engage in with their child that help in the developmental process;
 - (b) collaborate with case managers and families to develop strategies for environmental modifications or adaptations that would be beneficial to the child;

(c) periodically assess the child, including conducting developmental assessments, in order to discover unmet needs, determine progress or lack of progress, and identify areas of strength that can be emphasized;

(d) provide emotional support to families, including active listening, problem solving;

(e) recommend resources within the community that could offer support;

(f) advocate for the family; and

(g) assist the family with transition and referral to special education.

(3) The provider of this service must be an employee of a Child and Family Services provider under contract with the Developmental Services Division.

AUTH: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-402, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-402, MCA

NEW RULE VIII HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: HOMEMAKER CHORE, REQUIREMENTS (1) Homemaker chore services is defined in [New Rule I].

Services include:

(a) extensive cleaning beyond the scope of general household cleaning; and

(b) heavy cleaning such as:

(i) washing windows and walls;

(ii) yard care;

(iii) walkway maintenance;

(iv) minor home repairs; and

(v) firewood cutting, splitting, and stacking.

AUTH: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-402, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-402, MCA

NEW RULE IX HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: COMMUNITY SUPPORTS SERVICES, REQUIREMENTS (1) Community supports services is defined in [New Rule I]. These services will be offered as a group only under the consumer-directed option. The personal assistance services normally provided under the Medicaid State Plan will be provided as an integral part of this service. Individuals performing the duties are recruited, selected, hired, and managed by the consumer.

(2) Services include assisting the consumer with:

(a) basic living skills such as eating, drinking, toileting, personal hygiene, and dressing;

(b) transferring and other activities of daily living;

(c) improving and maintaining mobility and physical functioning;

(d) maintaining health and personal safety;

(e) carrying out household chores and preparation with meals and snacks;

(f) accessing and using transportation (with providers possessing a valid Montana driver's license);

(g) participating in community experiences and activities;

(h) relieving unpaid caregivers at those times when such relief is in the best interest of the consumer or caregiver; and

(i) receiving day care for medically fragile children who, because of their disability, cannot be served in traditional child care settings.

AUTH: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-402, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-402, MCA

NEW RULE X HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: HEALTH AND WELLNESS, REQUIREMENTS (1) Health and wellness services is defined in [New Rule I].

(2) The service includes adaptive health, wellness, and therapeutic recreational services such as:

- (a) hippotherapy;
- (b) hydrotherapy;
- (c) living well with a disability; and
- (d) access to fitness and exercise facilities.

AUTH: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-402, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-402, MCA

NEW RULE XI HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: SENIOR COMPANION SERVICES, REQUIREMENTS (1) Senior companion services is defined in [New Rule I].

(2) The service includes:

- (a) respite;
- (b) socialization;
- (c) supervision; and
- (b) homemaking.

(3) Providers of this service are Senior Companion Programs that are a part of Senior Corps.

AUTH: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-402, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-402, MCA

NEW RULE XII HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: PARTICIPATION DIRECTION (1) Participant direction is defined in [New Rule I].

(2) Services may be directed by:

- (a) an adult who has the capacity to self-direct;
- (b) a legal representative of the member, including a parent, spouse, or legal guardian; or
- (c) a nonlegal representative freely chosen by the member or his/her legal representative.

(3) The person directing the services must:

- (a) be 18 years of age or older;

- (b) successfully complete required training for self-direction; and
- (c) if acting in the capacity of a representative demonstrate understanding of the consumer's needs and preferences.

AUTH: 53-2-201, 53-6-101, 53-6-111, 53-6-113, 53-6-402, MCA

IMP: 53-2-201, 53-6-101, 53-6-111, 53-6-402, MCA

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

37.40.1406 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: SERVICES (1) The services available through the program are limited to those specified in this rule.

(2) The department may determine the particular services of the program to make available to a recipient based on, but not limited to, the following criteria:

- (a) the recipient's need for a service generally and specifically;
- (b) the availability of a specific service through the program and any ancillary service necessary to meet the recipient's needs;
- (c) the availability otherwise of alternative public and private resources and services to meet the recipient's need for the service;
- (d) the recipient's risk of significant harm or of death if not in receipt of the service;
- (e) the likelihood of placement into a more restrictive setting if not in receipt of the service; or
- (f) the financial costs for and other impacts on the program arising out of the delivery of the service to the person.

(3) A person enrolled in the program may be denied a particular service available through the program that the person desires to receive or is currently receiving.

- (4) Bases for denying a service to a person include, but are not limited to:
- (a) the person requires more supervision than the service can provide;
 - (b) the person's needs, inclusive of health, can no longer be effectively or appropriately met by the service;
 - (c) access to the service, even with reasonable accommodation, is precluded by the person's health or other circumstances;
 - (d) a necessary ancillary service is no longer available; and
 - (e) the financial costs for and other impacts on the program arising out of the delivery of the service to the person.

(5) The department may make program services for persons with intensive needs available to a recipient whom it determines, based on past medical history and current medical diagnosis, would otherwise require on a long-term basis the level of care of an inpatient hospital or a rehabilitation service setting.

(6) The following services, as defined in these rules, may be provided through the program:

- (a) ~~case management services~~ adult day health;
- (b) ~~homemaking~~ adult residential care;
- (c) ~~personal assistance~~ case management services;

- (d) ~~adult day health~~ community supports services;
- (e) ~~habilitation~~ community transition services;
- (f) ~~respite care~~ consultative clinical and therapeutic services;
- (g) ~~personal emergency response systems~~ consumer-directed goods and services;
- (h) ~~nutrition services~~ day habilitation;
- (i) ~~environmental accessibility adaptations~~ dietetic services;
- (j) ~~nonmedical transportation~~ environmental accessibility adaptations;
- (k) ~~outpatient physical therapy~~ family training and support;
- (l) ~~outpatient occupational therapy~~ financial management;
- (m) ~~speech pathology and audiology~~ habilitation;
- (n) ~~respiratory therapy~~ health and wellness;
- (o) ~~nursing~~ homemaker chore services;
- (p) ~~psycho-social consultation~~ homemaker; and
- (q) ~~dietetic services~~ independence advisor;
- (r) ~~adult residential care~~ nonmedical transportation;
- (s) ~~specially trained attendant care~~ nursing;
- (t) ~~chemical dependency counseling~~ nutrition services;
- (u) ~~cognitive rehabilitation~~ occupational therapy;
- (v) ~~comprehensive day treatment~~ pain and symptom management;
- (w) ~~community residential rehabilitation~~ personal assistance;
- (x) ~~supported living~~ personal emergency response systems;
- (y) ~~specialized medical equipment and supplies~~ physical therapy;
- (z) ~~specialized child care for children with AIDS~~ post-acute rehabilitation services; and
- (aa) ~~behavioral programming~~ respiratory therapy;
- (bb) respite care;
- (cc) senior companion services;
- (dd) speech pathology and audiology;
- (ee) specially trained attendants;
- (ff) specialized child care for medically fragile children;
- (gg) specialized medical equipment and supplies;
- (hh) supported living; and
- (ii) vehicle modifications.

(7) Monies available through the program may not be expended on the following:

- (a) room and board; and
- (b) special education and related services as defined at 20 USC 1401(16) and (17); and
- (c) vocational rehabilitation.

(8) The program is considered the payor of last resort. A service available through the program is not available to any extent that a service of another program is otherwise available to a recipient to meet the recipient's need for that service.

AUTH: 53-2-201, 53-6-101, 53-6-113, 53-6-402, MCA

IMP: 53-2-201, 53-6-101, 53-6-402, MCA

37.40.1407 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: GENERAL REQUIREMENTS

(1) Services of the program may only be provided by ~~or through~~ a provider that is enrolled with the department as a Medicaid provider or, in rare instances, through that is under contract with a provider with whom the department is contracting with for home and community-based case management services.

(2) A facility providing services to a recipient must meet all licensing requirements including fire and safety standards as well as other service-specific requirements set forth by the department in this chapter.

(3) A provider of service must meet the requirements necessary for the receipt of reimbursement with Medicaid monies.

~~(4) A recipient's immediate family members may not provide services to the recipient as a reimbursed provider or as an employee of a reimbursed provider. Immediate family members include: Immediate family members and legally responsible individuals may be paid for the provision of certain services under the following conditions:~~

~~(a) the service is identified in the federally approved waiver;~~

~~(b) the service is specified in the individual's service plan;~~

~~(c) the family member or legally responsible individual meets the provider qualifications and training standards for that service as specified in the federally approved waiver;~~

~~(d) the services do not supplant tasks that are customarily performed by legally responsible individuals; and~~

~~(e) the family member or legally responsible individual may not provide more than 40 hours of service in a seven-day period.~~

~~(5) Immediate family members include:~~

~~(a) a spouse; and~~

~~(b) a natural or adoptive parent of a minor child.~~

~~(6) A provider may also provide support to other family members in the recipient's household during hours of program reimbursed service if approved by the case management team or FM.~~

AUTH: 53-2-201, 53-6-101, 53-6-113, 53-6-402, MCA

IMP: 53-2-201, 53-6-101, 53-6-402, MCA

37.40.1408 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: ENROLLMENT

(1) A person in order to be considered by the department for enrollment in the program, must be determined by the department to qualify for enrollment in accordance with the criteria in this rule.

(2) A person is qualified to be considered for enrollment in the program if the person:

(a) meets one of the following criteria:

(i) is 65 years of age or older; or

(ii) is certified as disabled by the social security administration but does not have a primary diagnosis of mental retardation or serious mental illness.

(b) is Medicaid eligible;

(c) requires the level of care of a nursing facility as determined in accordance with the preadmission screening provided for in ARM 37.40.202, 37.40.205, 37.40.206, and 37.40.207; ~~and~~

~~(d) does not reside in a hospital or a nursing facility; and~~

~~(e)~~ (d) has needs that can be met through the program.

(3) The department considers for an available opening for services those persons who, as determined by the department:

(a) are actively seeking services;

(b) are in need of the services available;

(c) are likely to benefit from the available services; and

(d) have a projected total cost of ~~plan of care~~ service plan that is within the limits specified at ARM 37.40.1421.

(4) The department offers an available opening for services to the person, as determined by the department, who is most in need of the available services and most likely to benefit from the available services.

(5) Factors to be considered in the determinations of whether a person is in need of the available services and likely to benefit from those services and as to which person is most likely to benefit from the available services include, but are not limited to, the following:

(a) medical condition;

(b) degree of independent mobility;

(c) ability to be alone for extended periods of time;

(d) presence of problems with judgment;

(e) presence of a cognitive impairment;

(f) prior enrollment in the program;

(g) current institutionalization or risk of institutionalization,

(h) risk of physical or mental deterioration or death;

(i) willingness to live alone;

(j) adequacy of housing;

(k) need for adaptive aids or environmental modifications;

(l) need for 24-hour supervision;

(m) need of person's caregiver for relief;

(n) need, in order to receive services, of a waiver of the Medicaid deeming financial eligibility requirement;

(o) appropriateness for the person, given the person's current needs and risks, of services available through the program;

(p) status of current services being purchased otherwise for the person; and

(q) status of support from family, friends, and community.

(6) A person enrolled in the program may be removed from the program by the department. Bases for removal from the program, include, but are not limited to, the following:

(a) a determination by the case management team or program managers that the services, as provided for in the ~~plan of care~~ service plan, are no longer appropriate or effective in relation to the person's needs;

(b) the failure of the person to use the services as provided for in the ~~plan of care~~ service plan;

(c) the behaviors of the person place the person, caregivers or others at serious risk of harm or substantially impede the delivery of services as provided for in the ~~plan of care~~ service plan;

(d) the health of the person is deteriorating or in some other manner placing the person at serious risk of harm;

(e) a determination by the case management team or program managers that the service providers necessary to the delivery of services as provided for in the ~~plan of care~~ service plan are unavailable; and

(f) a determination that the total cost of ~~plan of care~~ service plan is not within the limits specified at ARM 37.40.1421.

AUTH: 53-2-201, 53-6-101, 53-6-113, 53-6-402, MCA

IMP: 53-2-201, 53-6-101, 53-6-113, 53-6-131, 53-6-402, MCA

37.40.1415 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: REIMBURSEMENT (1) Services available through the program are reimbursed as specified in this rule.

(2) The following services are reimbursed as provided in (3):

(a) ~~environmental accessibility adaptations~~ adult day health;

(b) ~~homemaking~~ adult residential care;

(c) ~~adult day health~~ case management services;

(d) ~~habilitation~~ community supports services;

(e) ~~personal emergency response systems~~ community transition services;

(f) ~~nutrition~~ consultative clinical and therapeutic services;

(g) ~~psycho-social consultation~~ consumer-directed goods and services;

(h) ~~nursing~~ dietetic services;

(i) ~~respiratory therapy~~ environmental accessibility adaptations;

(j) ~~dietetic services~~ family training and support;

(k) ~~specially trained attendant care~~ financial management;

(l) ~~behavioral programming~~ habilitation;

(m) ~~chemical dependency counseling~~ health and wellness;

(n) ~~cognitive rehabilitation~~ homemaker chore services;

(o) ~~comprehensive day treatment~~ homemaker;

(p) ~~community residential rehabilitation~~ independence advisor;

(q) ~~supported living~~ nonmedical transportation;

(r) ~~specialized child care for children with AIDS~~ nursing;

(s) ~~adult residential care~~ nutrition services;

(t) ~~respite care not provided by a nursing facility~~ pain and symptom management; and

(u) ~~nonmedical transportation~~ personal emergency response systems;

(v) ~~post-acute rehabilitation~~ services;

(w) ~~respite care~~;

(x) ~~senior companion~~ services;

(y) ~~specialized child care for medically fragile children~~;

(z) ~~supported living~~; and

(aa) ~~vehicle modifications~~.

(3) The services specified in (2) are, except as otherwise provided in (4), reimbursed at the lower of the following:

- (a) the provider's usual and customary charge for the service; or
- (b) the rate negotiated with the provider by the case management team up to the department's maximum allowable fee.

(4) The services specified in (2) are reimbursed as provided in (3) except that reimbursement for components of those services that are incorporated by specific cross reference from the general Medicaid program may only be reimbursed in accordance with the reimbursement methodology applicable to the component service as a service of the general Medicaid program.

(5) The following services are reimbursed in accordance with the referenced provisions governing reimbursement of those services through the general Medicaid program:

- (a) personal assistance as provided at ARM 37.40.1105 and 37.40.1302;
- (b) outpatient occupational therapy as provided at ARM 37.86.610;
- (c) outpatient physical therapy as provided at ARM 37.86.610;
- (d) speech therapy as provided at ARM 37.86.610; and
- (e) audiology as provided at ARM 37.86.705.
- (6) Case management services are reimbursed, as established by contractual terms, on either a per diem or hourly rate.

(7) Respite care services provided by a nursing facility are reimbursed at the rate established for the facility in accordance with ARM Title 37, chapter 40, subchapter 3.

(8) Specialized medical equipment and supplies are reimbursed as follows:

(a) equipment and supplies which are reimbursable under ARM 37.86.1801, 37.86.1802, 37.86.1806₁ and 37.86.1807 shall be reimbursed as provided in ARM 37.86.1807;

(b) equipment and supplies which are not reimbursable under ARM 37.86.1801, 37.86.1802, 37.86.1806₁ and 37.86.1807 shall be reimbursed at the lower of the following:

- (i) the provider's usual and customary charge for the item; or
- (ii) the negotiated rate ~~negotiated with the provider by the case management team~~ up to the department's maximum allowable fee.

(9) Reimbursement is not available for the provision of a service to a person that may be reimbursed through another program.

(10) No copayment is imposed on services provided through the program but recipients are responsible for copayment on other services reimbursed with Medicaid monies.

(11) Reimbursement is not available for the provision of services to other members of a recipient's household or family unless specifically provided for in these rules.

(12) Payment for the following services may be made to legally responsible individuals, if all program criteria in ARM 37.40.1407 are met:

- (a) personal assistance;
- (b) homemaker;
- (c) specially trained attendant;
- (d) specialized child care for medically fragile children;

- (e) private duty nursing;
- (f) transportation;
- (g) respite;
- (h) community supports;
- (i) consumer-directed goods and services;
- (j) homemaker chore;
- (k) pain and symptom management;
- (l) vehicle modifications; and
- (m) environmental accessibility adaptations.

(13) When the Legislature funds a direct care wage initiative, waiver providers targeted by the initiative must report to the department, for a determined time period, actual hourly wage and benefit rates paid for all direct care workers or the lump sum payment amounts for all direct care workers that will receive the benefit of the increased funds. The reported data shall be used by the department for the purpose of tracking distribution of direct care wage funds to designated workers.

(a) The department will pay targeted waiver providers that submit an approved request to the department a lump sum payment in addition to the Medicaid reimbursement rate to be used only for wage and benefit increases or lump sum payments for direct care workers.

(b) To receive the direct care workers' lump sum payment, a targeted provider shall submit for approval a request form to the department stating how the direct care workers' lump sum payment will be spent to comply with all department requirements. The provider shall submit all of the information required on the form in order to continue to receive subsequent lump sum payment amounts.

(c) If these funds will be distributed in the form of a wage increase to direct care workers the form for wage and benefit increases will request information including, but not limited to:

(i) the number of category of each direct care worker that will receive the benefit of the increased funds;

(ii) the actual per hour rate of pay before benefits and before the direct care wage increase has been implemented for each worker that will receive the benefit of the increased funds;

(iii) the projected per hour rate of pay with benefits after the direct wage increase has been implemented;

(iv) the number of staff receiving a wage or benefit increase by category of worker, effective date of implementation of the increase in wage and benefit; and

(v) the number of projected hours to be worked in the budget period.

(d) If these funds will be used for the purpose of providing lump sum payments (i.e., bonus, stipend, or other payment types) to direct care workers the form will request information including, but not limited to:

(i) the number of category of each direct care worker that will receive the benefit of the increased funds;

(ii) the type and actual amount of lump sum payment to be provided for each worker that will receive the benefit of the lump sum funding;

(iii) the breakdown of the lump sum payment by the amount that represents benefits and the direct payment to workers by category of worker; and

(iv) the effective date of implementation of the lump sum benefit.

(e) A provider that does not submit a qualifying request for use of the funds distributed under (2), or does not include all of the information requested by the department, within the time established by the department, or a provider that does not wish to participate in this additional funding amount shall not be entitled to their share of the funds available for wage and benefit increases or lump sum payments for direct care workers.

(14) A provider that receives funds under this rule must maintain appropriate records documenting the expenditure of the funds. This documentation must be maintained and made available to authorize governmental entities and their agents to the same extent as other required records and documentation under applicable Medicaid record requirements, including but not limited to the provisions of ARM 37.40.345, 37.40.346, and 37.85.414.

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

IMP: 53-6-101, 53-6-111, 53-6-113, 53-6-402, MCA

37.40.1420 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: ~~PLANS OF CARE SERVICE PLANS~~

~~(1) A plan of care service plan is a written plan of supports and interventions based on an assessment of the status and needs of a recipient consumer. The plan of care service plan describes the needs of the recipient consumer and the services available through the program and otherwise that are to be made available to the recipient consumer in order to maintain the recipient consumer at home and in the community.~~

~~(2) The services that a recipient consumer may receive through the program and the amount, scope, and duration of those services must be specifically authorized in writing through an individual plan of care for the person service plan.~~

~~(3) The plan of care service plan is initially developed upon the person's entry into the program. The plan must be reviewed and, if necessary, revised at intervals of at least six months beginning with the date of the initial plan of care service plan.~~

~~(4) Each plan of care is developed, reviewed and revised by the case management team.~~

~~(5) (4) The case management team in developing tThe plan of care service plan is developed in conjunction consults with the recipient consumer or the recipient's consumer's legal representative, with treating and other appropriate health care professionals and others who have knowledge of the recipient's consumer's needs.~~

~~(6) (5) Each plan of care service plan must include the following:~~

~~(a) diagnosis, symptoms, complaints, and complications indicating the need for services;~~

~~(b) a description of the recipient's consumer's functional level;~~

~~(c) consumer's goals and objectives;~~

~~(d) any orders for:~~

~~(i) (d) medication;~~

~~(ii) (e) treatments;~~

~~(iii) (f) restorative and rehabilitative services;~~

- (iv) (g) activities;
- (v) (h) therapies;
- (vi) (i) social services;
- (vii) (j) diet; and
- (viii) (k) other special procedures recommended for the health and safety of the recipient consumer to meet the objectives of the plan of care service plan;
- (e) (l) the specific services to be provided, the frequency of the services, and the type of provider to provide them;
- (f) (m) the projected annualized costs of each service; and
- (g) (n) names and signatures of all persons who have participated in developing the plan of care service plan (including the recipient consumer, unless the recipient's consumer's inability to participate is documented) which will verify participation, agreement with the plan of care service plan, and acknowledgement of the confidential nature of the information presented and discussed.
- (7) (6) The case management team consumer must be provided a copy of the service plan to the recipient consumer.
- (8) (7) Plan of care Service plan approval is based on:
 - (a) completeness of plan;
 - (b) consistency of plan with screening criteria; and
 - (c) feasibility of service provision, including cost-effectiveness of plan as provided for in ARM 37.40.1421.

AUTH: 53-2-201, 53-6-101, 53-6-113, 53-6-402, MCA

IMP: 53-2-201, 53-6-101, 53-6-402, MCA

37.40.1426 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: NOTICE AND FAIR HEARING

- (1) The department provides written notice to an applicant for and recipient a consumer of services when a determination is made by the department concerning:
 - (a) financial eligibility;
 - (b) level of care;
 - (c) feasibility, including cost-effectiveness of services to the recipient consumer; and
 - (d) termination of recipient's consumer's eligibility for the program.
- (2) The department provides a recipient consumer of services with notice ten working days before termination of services due to a determination of ineligibility.
- (3) A person aggrieved by any adverse final determinations as listed in (1)(a) through (1)(d) or any adverse determinations regarding services in the plan of care service plan may request a fair hearing as provided in ARM 37.5.304, 37.5.307, 37.5.313, 37.5.316, 37.5.318, 37.5.322, 37.5.325, 37.5.328, 37.5.331, 37.5.334, and 37.5.337.
- (4) Fair hearings will be conducted as provided for in ARM 37.5.304, 37.5.307, 37.5.313, 37.5.316, 37.5.318, 37.5.322, 37.5.325, 37.5.328, 37.5.331, 37.5.334, and 37.5.337.

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

IMP: 53-2-201, 53-6-101, 53-6-402, MCA

37.40.1430 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: CASE MANAGEMENT, REQUIREMENTS

(1) Case management is the planning for, arranging for, implementation of, and monitoring of the delivery of services available through the program to a recipient consumer.

(2) Case management services includes:

(a) developing a ~~plan of care~~ service plan for a recipient consumer;

(b) monitoring and managing a ~~plan of care~~ service plan for a recipient consumer;

(c) establishing relationships ~~and contracting~~ with service providers and community resources;

(d) maximizing a ~~recipient's~~ consumer's efficient use of services and community resources such as family members, church members, and friends;

(e) facilitating interaction among people working with a recipient consumer;

(f) prior authorizing the provision of all services; and

(g) managing expenditures.

(3) The case management team consists of a registered nurse and a social worker.

(4) The case management team must:

(a) function as directed by the department;

(b) assure that services provided to ~~recipients~~ consumers are of appropriate quality and cost effective;

(c) provide case management services to no more than the number of persons specified by the department;

(d) manage expenditures within the allocated monies; and

(e) meet the department's reporting requirements.

AUTH: 53-2-201, 53-6-101, 53-6-113, 53-6-402, MCA

IMP: 53-2-201, 53-6-101, 53-6-402, MCA

37.40.1435 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: ADULT RESIDENTIAL CARE, REQUIREMENTS

(1) Adult residential care is ~~the provision of supportive services to a recipient~~ a residential habilitation option for consumers residing in an adult foster home, a residential hospice, or a ~~personal care~~ an assisted living facility.

(2) Adult residential care is a bundled service that may include:

(a) personal care services ~~as specified at ARM 37.40.1101(1) through (5)~~;

(b) homemaking ~~as specified at ARM 37.40.1450~~;

(c) social activities;

(d) recreational activities;

(e) medication oversight; and

(f) assistance in arranging transportation for medical care.

(3) Adult residential care must provide for 24-hour on-site response staff to meet scheduled or unpredictable needs of ~~recipients~~ consumers and to provide supervision of ~~recipients~~ consumers for safety and security.

- (4) A ~~recipient~~ consumer of adult residential care may not receive the following services through the program:
- (a) personal assistance as specified at ARM 37.40.1447;
 - (b) homemaking services as specified at ARM 37.40.1450;
 - (c) environmental accessibility adaptation services as specified at ARM 37.40.1485;-
 - (d) respite care as specified at ARM 37.40.1451; and
 - ~~(e) medical alert personal emergency response system as specified at ARM 37.40.1486; and~~
 - ~~(f) (e) nutrition as specified in ARM 37.40.1476.~~
- (5) Adult residential care facilities must be licensed by the state of Montana.
- (6) A provider of adult residential care must report serious occurrences to the department in accordance with serious occurrence policy requirements.
- (7) An assisted living facility providing adult residential services must have the following features:
- (a) Provide a home-like environment in either:
 - (i) an apartment style living unit with a bedroom, easy access to a bath, and cooking areas; or
 - (ii) a home style living unit with a bedroom, easy access to a bath, and reasonable access to food and beverages, unless against medical advice.
 - (b) Small dining areas or ability to eat with a private party.
 - (c) Residents must have control of lockable access to living unit and egress from the facility (unless Category C). The facility may have a master key for emergencies.
 - (d) Residents must have the ability to furnish and decorate living unit.
 - (e) Access to private areas for telephone and visitors.
 - (f) Provide reasonable assistance coordinating and arranging for the resident's choice of community pursuits outside the residence. This is in addition to the regular outings provided by the facility.
 - (g) Residents must have reasonable access to unscheduled activities and resources in the community.
 - (h) Policies and practices allow resident risk, through family and resident education, risk assessment, and negotiated risk agreement.
 - (i) Aging in place must be a common practice of the assisted living facility, within scope of license.
 - (j) The facility should make concerted efforts to allow consumers to remain in the facility when changing from private pay to waiver funding.
 - (k) Education and documentation of the facility policies around room changes needs to have been given and explained to the consumer prior to admission and reviewed as financial status changes.
- (8) Providing waiver funding for adult residential services in assisted living facilities that do not meet the above criteria is not allowed.
- (9) Effective September 1, 2011, Medicaid funding will no longer be available for newly admitted home and community services consumers in an assisted living facility, unless the facility meets the above criteria.

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

IMP: 53-6-402, MCA

37.40.1438 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: SUPPORTED LIVING, REQUIREMENTS

(1) Supported living is the provision of supportive services to a recipient consumer residing in an individual residence or in a group living situation. It is a comprehensive service designed to support a person with brain injury or other severe disability.

- (2) Supported living services may include:
- (a) independent living evaluation;
 - (b) service coordination;
 - (c) 24-hour supervision of the person;
 - (d) health and safety supervision;
 - (e) homemaking services as specified at ARM 37.40.1450;
 - (f) day habilitation as specified at ARM 37.40.1448;
 - ~~(g) habilitation aide as specified at ARM 37.40.1448;~~
 - ~~(h) behavioral programming as specified at 37.40.1465;~~
 - ~~(i) supported employment as specified at ARM 37.40.1448;~~
 - ~~(j) prevocational training as specified at ARM 37.40.1448;~~
 - ~~(k) nonmedical transportation as specified at ARM 37.40.1488; and~~
 - ~~(l) specially trained attendants as specified at ARM 37.40.1449.~~
- (3) An entity providing supported living services must ~~meet the following~~

~~criteria:~~

~~(a) be accredited by the commission on accreditation of rehabilitation facilities (CARF) or by the council on quality in the areas of integrated living, congregate living, personal, social and community services, community employment services and work services; and~~

~~(b) have two years' experience in providing services to persons with physical disabilities.~~

(4) This service must be prior authorized by the department.

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

IMP: 53-6-402, MCA

37.40.1446 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: COMPREHENSIVE DAY TREATMENT POST-ACUTE REHABILITATION SERVICES, REQUIREMENTS

~~(1) Comprehensive day treatment Post-acute rehabilitation is the provision of therapeutic intervention to a recipient consumer with brain injury ~~on a week day basis or other related disability~~ in a residential or nonresidential setting. ~~Comprehensive day treatment Post-acute rehabilitation assists in reducing the dependency of the recipient consumer and in facilitating the integration of the recipient consumer into the community.~~~~

~~(2) Comprehensive day treatment services Post-acute rehabilitation may include:~~

- ~~(a) cognitive rehabilitation as specified at ARM 37.40.1467;~~

~~(b)~~ (a) behavioral programming consultative clinical and therapeutic services as specified at ARM 37.40.1465;

~~(c)~~ (b) chemical dependency counseling as specified at ARM 37.40.1466;

~~(d)~~ (c) therapeutic recreational activities;

~~(e)~~ (d) nutrition services as specified in ARM 37.40.1476;

~~(f)~~ (e) nonmedical transportation as specified at ARM 37.40.1488; and

~~(g)~~ (f) counseling.

~~(3)~~ An entity providing comprehensive day treatment services, must provide services from 8 a.m. to 5 p.m. during the 5 working days of the week.

~~(4)~~ (3) An entity providing comprehensive day treatment post-acute rehabilitation services must be under the direction of an interdisciplinary team consisting of a licensed psychologist, a licensed neuropsychologist, a board-certified physiatrist, therapists, and other appropriate support staff.

~~(5)~~ (4) An entity providing comprehensive day treatment post-acute rehabilitation services must be accredited or in the process of becoming accredited by the commission on accreditation of rehabilitation facilities (CARF) as a community reentry program for persons with brain injury.

~~(6)~~ This service must be prior authorized by the department.

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

IMP: 53-6-402, MCA

37.40.1448 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: HABILITATION, REQUIREMENTS

(1) Habilitation is the provision of intervention services designed for assisting a recipient consumer to acquire, retain, and improve the self-help, socialization, and adaptive skills necessary to reside successfully at home and in the community.

(2) Habilitation services may include:

(a) residential habilitation;

(b) day habilitation;

(c) prevocational services; and

(d) supported employment; and

~~(e) habilitation aide.~~

(3) Residential habilitation is habilitation provided in a community licensed group home for persons with physical disabilities or a specialized licensed adult residential care facility.

(4) Day habilitation is habilitation provided in a day service setting.

(5) Prevocational services are habilitative activities that foster employability for a recipient consumer who is not expected to join the general work force or participate in a transitional sheltered workshop within a year by preparing the recipient consumer for paid or unpaid work. Prevocational services include teaching compliance, attendance, task completion, problem solving and safety.

(6) Supported employment is intensive ongoing support to assist a recipient consumer who is unlikely to obtain competitive employment in performing work activities in a variety of settings, particularly work sites where nondisabled persons are employed. Supported employment service includes supervision, training, and other activities needed to sustain paid work by a recipient consumer.

~~(7) Habilitation aide is the assistance of an aide directed at fostering the recipient's ability to achieve independence in instrumental activities of daily living such as homemaking, personal hygiene, money management, transportation, housing and use of community resources. Habilitation aide services include conducting an assessment and the provision of training and teaching.~~

~~(8) (7) An entity inclusive of its staff, providing habilitation services must be qualified generally to provide the services and specifically to meet each recipient's consumer's defined habilitation needs.~~

AUTH: 53-2-201, 53-6-101, 53-6-113, 53-6-402, MCA

IMP: 53-2-201, 53-6-101, 53-6-402, MCA

37.40.1449 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: SPECIALLY TRAINED ATTENDANT CARE, REQUIREMENTS (1) Specially trained attendant care ~~is the provision of~~ is an option under personal assistance that provides supportive services to a ~~recipient~~ consumer residing in their own residence.

(2) Specially trained attendant care services may include:

(a) personal assistance services directed at fostering the consumer's ability to achieve independence in instrumental activities of daily living such as homemaking, personal hygiene, money management, transportation, housing, and the use of community resources;

(b) services that assist consumers in acquiring, retaining, and improving self-help, socialization, and adaptive skills to reside successfully in the community;

~~(a) (c)~~ (c) personal assistance services as specified at ARM 37.40.1447; and

~~(b) (d)~~ (d) personal care services as specified at ARM 37.40.1101(1) through (5), and 37.40.1301, 37.40.1302, 37.40.1305, 37.40.1306, 37.40.1307, and 37.40.1308; and

(e) continuous and extensive nursing services.

(3) A person providing specially trained attendant care must be trained in accordance with the department's training requirements by the provider and others to deliver the services that meet the specific needs of the ~~recipient~~ consumer.

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

IMP: 53-6-402, MCA

37.40.1451 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: RESPITE CARE, REQUIREMENTS

(1) Respite care is the provision of supportive care to a ~~recipient~~ consumer so as to relieve those unpaid persons normally caring for the ~~recipient~~ consumer from that responsibility.

(2) Respite care services may be provided only on a short term basis, such as part of a day, weekends, or vacation periods.

(3) Respite care services may be provided in a ~~recipient's~~ consumer's place of residence or through placement in another private residence or other related community setting, a hospital, a nursing facility, or a therapeutic camp.

(4) A person providing respite care services must be:

- (a) physically and mentally qualified to provide this service to the recipient consumer; and
- (b) aware of emergency assistance systems.
- (5) A person who provides respite care services to a recipient consumer may be required by the ~~case management team~~ to have the following when the recipient's consumer's needs so warrant:
 - (a) knowledge of the physical and mental conditions of the recipient consumer;
 - (b) knowledge of common medications and related conditions of the recipient consumer; and
 - (c) capability to administer basic first aid.

AUTH: 53-2-201, 53-6-101, 53-6-113, 53-6-402, MCA

IMP: 53-2-201, 53-6-101, 53-6-141, 53-6-402, MCA

37.40.1452 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: SPECIALIZED CHILD CARE FOR MEDICALLY FRAGILE CHILDREN WITH AIDS, REQUIREMENTS (1) Specialized child care for medically fragile children ~~with AIDS~~ is the provision of day care, respite care, and other direct and supportive care to a recipient consumer under 18 years of age who is ~~HIV positive or has a diagnosis of AIDS~~ medically fragile and who, due to medical and other needs, cannot be served through traditional child care settings.

(2) A person providing specialized child care for medically fragile children ~~with AIDS~~ services must be:

- (a) physically and mentally able to perform the duties;
- (b) aware of emergency assistance systems; and
- (c) literate and able to follow written orders.

(3) A person providing specialized child care for medically fragile children ~~with AIDS~~ services may be required, if appropriate to the circumstances of the recipient consumer, to have:

- (a) knowledge of the physical and mental conditions of the recipient consumer;
- (b) knowledge of the recipient's consumer's commonly needed medications and the conditions for which they are administered; and
- (c) the capability to administer basic first aid.

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

IMP: 53-6-402, MCA

37.40.1465 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: BEHAVIORAL PROGRAMMING CONSULTATIVE CLINICAL AND THERAPEUTIC SERVICES, REQUIREMENTS

(1) Behavioral programming is the continuous in-depth assessment on a short term basis of a recipient with brain injury. These are services that assist unpaid and/or paid caregivers in carrying out individual service plans and are necessary to improve the individual's independence and inclusion in the community.

~~(2) Behavioral programming services includes assessment, if appropriate, of the abilities and effectiveness of caregivers. Consultation activities are provided by professionals in psychiatry, psychology, neuro-psychology, physiatry, nursing, nutrition, behavior management, or occupational/speech/physical/recreational therapy.~~

~~(3) A person providing behavioral programming services, must:~~

~~(a) have a bachelor's degree;~~

~~(b) be employed by a rehabilitation agency; and~~

~~(c) be under the direct supervision of a licensed neurologist, board certified psychiatrist, or board certified physiatrist who has experience in working with persons with brain injury.~~

~~(3) The service may include:~~

~~(a) assessment;~~

~~(b) development of a home/community treatment plan;~~

~~(c) monitoring plan; and~~

~~(d) one-on-one consultation and support for paid and nonpaid caregivers.~~

~~(4) This service is limited to 80 hours per plan of care year unless otherwise authorized by the department. An entity, described in (2), inclusive of its staff providing consultative clinical and therapeutic services must be qualified generally to provide the services and specifically to meet each consumer's defined needs.~~

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

IMP: 53-6-402, MCA

37.40.1488 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: NONMEDICAL TRANSPORTATION, REQUIREMENTS

(1) Nonmedical transportation is the provision to a recipient consumer of transportation through common carrier or private vehicle for access to social or other nonmedical activities.

(2) Nonmedical transportation services are provided only after volunteer transportation services, or transportation services funded by other programs, have been exhausted.

(3) Nonmedical transportation providers must provide proof of:

(a) a valid Montana driver's license;

(b) adequate automobile insurance; and

(c) assurance of vehicle compliance with all applicable federal, state, and local laws and regulations.

(4) Nonmedical transportation services must be provided by the most cost effective mode.

~~(5) Nonmedical transportation services are available only for the transport of recipients to and from activities that are included in the individual plan of care.~~

AUTH: 53-2-201, 53-6-101, 53-6-113, 53-6-402, MCA

IMP: 53-2-201, 53-6-101, 53-6-141, 53-6-402, MCA

5. The department proposes to repeal the following rules:

37.40.1437 HOME AND COMMUNITY-BASED SERVICES TREATMENT FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: COMMUNITY RESIDENTIAL REHABILITATION, REQUIREMENTS, is found on page 37-9221 of the Administrative Rules of Montana.

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

37.40.1464 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: PSYCHOSOCIAL CONSULTATION, REQUIREMENTS, is found on page 37-9243 of the Administrative Rules of Montana.

AUTH: 53-2-201, 53-6-101, 53-6-113, 53-6-402, MCA
IMP: 53-2-201, 53-6-101, 53-6-141, 53-6-402, MCA

37.40.1466 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: CHEMICAL DEPENDENCY COUNSELING, REQUIREMENTS, is found on page 37-9244 of the Administrative Rules of Montana.

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

37.40.1467 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: COGNITIVE REHABILITATION, REQUIREMENTS, is found on page 37-9245 of the Administrative Rules of Montana.

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

6. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (the department) is proposing the adoption of New Rules I through XII, amendment of 37.40.1406, 37.40.1407, 37.40.1408, 37.40.1415, 37.40.1420, 37.40.1426, 37.40.1430, 37.40.1435, 37.40.1438, 37.40.1446, 37.40.1448, 37.40.1449, 37.40.1451, 37.40.1452, 37.40.1465, 37.40.1488, and repeal of 37.40.1437, 37.40.1464, 37.40.1466, and 37.40.1467 pertaining to home and community-based services (HCBS) for the elderly and people with physical disabilities. Since July 15, 1983 the United States Department of Health and Human Services (HHS) has granted the department, under 42 CFR 441.300 through 441.310, the authority to establish a program of Medicaid funded home and community-based services for persons who are elderly or who have physical disabilities and who would otherwise have to reside in and receive Medicaid reimbursed care in a hospital or nursing facility.

The HCBS waiver for the elderly and people with physical disabilities will be renewed July 1, 2011. The proposed rules and amendments are necessary to make them consistent with the renewal waiver. The renewed waiver will contain a number of changes and the administrative rules must be updated to reflect those changes. Modifications to the waiver are twofold: some are mandated by HHS; others are those resulting from stakeholder input throughout the years. The specific proposals are described below:

New Rule I

The department is adding a definition section to these rules in order to make it easier for the reader to locate and understand terms used in the subchapter.

New Rule II

Community Transition Service is a new service added to support individuals transitioning from an institution into the community. Community Transition Service is proposed to facilitate the transition of individuals from institutional settings to community placement. Sometimes individuals have no option but to move into an assisted living facility when transitioning back into the community after having been in an institution. Many times they have no resources to assist them in accessing housing. This service will make resources available to establish a basic household, such as deposits and basic furnishings.

New Rule III

Financial Manager (FM) is a new service for participant direction. It provides finance, employer, payroll, and related functions for consumers in this option.

New Rule IV

Independent Advisor (IA) is a new service that offers an array of support activities to ensure that consumers are successful under the participant directed option.

New Rule V

Consumer-Directed Goods and Services is a new service for participant direction that was available under Big Sky Bonanza Waiver (BSB). It allows for the purchase of services, supports, supplies, or goods not otherwise provided through the waiver.

New Rule VI

Pain and Symptom Management is a new service that allows for the provision of traditional and nontraditional methods of pain management. Many waiver consumers live with chronic pain that is not easily treated by medication.

New Rule VII

Family Training and Support is a new service that provides support and training to families and others who work or play with disabled children.

New Rule VIII

Homemaker Chore is a new service which allows for more extensive cleaning beyond the scope of general household cleaning as well as walkway maintenance, minor home repairs, and wood chopping and stacking.

New Rule IX

Community Support Service is a participant-directed service that was available under BSB and includes attendant-type services and homemaking as well as respite and transportation.

New Rule X

Health and Wellness is a new service that includes adaptive health, wellness, and therapeutic recreational services.

New Rule XI

Senior Companion Services is a new service that allows for the purchase of senior companions from programs that are part of the Senior Corps.

New Rule XII

An option has been made available to individuals who elect to direct their own care.

Throughout the waiver rules the term "plan of care" is proposed to be changed to "service plan". The term "recipient" is proposed to be changed to "consumer" to identify the individual enrolled in the waiver program. The list of services has been alphabetized for ease of reading.

Senior Companion is also a new service and will allow the waiver to purchase senior companion services for HCBS recipients.

Behavioral Programming has been redefined and renamed Consultative Clinical and Therapeutic Services (CCTS).

Psychosocial Rehabilitation, Chemical Dependency Counseling, and Cognitive Rehabilitation have been removed. The supports they provided can be obtained through either state plan services or the new CCTS.

Habilitation Aide has been removed from Habilitation and placed under Specially Trained Attendant. The latter is now a variation of personal assistance and includes some nursing. This falls in line with the caregiver responsibilities.

Community Residential Rehabilitation and Comprehensive Day Treatment have been combined and renamed Post-Acute Rehabilitation.

Specialized Child Care has been expanded to serve all medically fragile children, not just those with AIDS.

Qualifications for Supported Living and Adult Residential have been updated to reflect current practices and CMS mandates.

Participant direction and the payment of legally responsible persons have been added to these rules to cover individuals in the BSB option.

ARM 37.40.1406

The department alphabetized and added new services and names.

ARM 37.40.1407

The department has more clearly defined when immediate family members could provide services.

ARM 37.40.1415

The department has alphabetized and added provisions for new services as well as payment to legally responsible individuals.

ARM 37.40.1420

The department proposes to change plan of care to service plan and remove the reference to case management team.

ARM 37.40.1435

The department is proposing to redefine a residential habilitation option to match waiver renewal definition, add requirements to report serious occurrences, and add required features.

ARM 37.40.1437

The department is proposing to move community residential rehabilitation service to post-acute rehabilitation.

ARM 37.40.1446

The department is proposing to rename Community Residential Rehabilitation and Comprehensive Day, both Bridges and Headway Programs, more appropriately renamed post-acute rehabilitation.

ARM 37.40.1449

The department proposes more detail in the definition of specially trained attendant care and redefines as an option under personal assistance.

ARM 37.40.1452

The department is proposing to rename Specialized Child Care for Medically Fragile Children to encompass not only children with AIDS but all medically fragile children.

ARM 37.40.1464

The department is proposing to delete psychosocial rehabilitation and add under Clinical and Therapeutic Services.

ARM 37.40.1465

This used to be entitled Behavioral Program, which is not included in CCTS. CCTS encompasses a wide variety of therapeutic services mainly geared towards individuals with severe disabilities, brain injuries, or other cognitive and neurological disabilities. The department proposes to rename Consultative Clinical and Therapeutic Services to more clearly reflect the service.

ARM 37.40.1466

The department proposes to delete this service because it is available under CCTS, if needed. Most chemical dependency counseling is available under state plan counseling.

ARM 37.40.1467

The service was deleted and is available under CCTS.

ARM 37.40.1488

The department proposes to remove the mandate that the service is only allowable for transportation to and from activities that are included in the individual service plan. Some outings are free to destinations covered by other payers.

7. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Kenneth Mordan, Department of Public Health and Human Services,

Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail dphhslegal@mt.gov, and must be received no later than 5:00 p.m., July 21, 2011.

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

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

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

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

/s/ John Koch
Rule Reviewer

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

Certified to the Secretary of State June 13, 2011.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I)
and II; amendment of ARM 42.23.107,)
42.23.605, 42.26.201, 42.26.202, 42.26.206,)
42.26.207, 42.26.208, 42.26.234, 42.26.237,)
42.26.241, 42.26.242, 42.26.244, 42.26.253,)
42.26.254, 42.26.255, 42.26.256, 42.26.261,)
42.26.262, 42.26.263, 42.26.264, 42.26.302,)
42.26.303, 42.26.310, 42.26.311, and)
42.26.312; amendment and transfer of ARM)
42.23.414; transfer of ARM 42.23.412,)
42.23.413, and 42.23.415; and repeal of)
ARM 42.23.105 and 42.26.305 relating to)
corporation license tax - general and)
corporate multistate activities)

TO: All Concerned Persons

1. On July 21, 2011, at 9:00 a.m., a public hearing will be held in the Third Floor Reception Area Conference Room of the Sam W. Mitchell Building, at Helena, Montana, to consider the adoption, amendment, amendment and transfer, transfer, and repeal of the above-stated rules.

Individuals planning to attend the hearing shall enter the building through the east doors of the Sam W. Mitchell Building, 125 North Roberts, Helena, Montana.

2. The Department of Revenue will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Revenue no later than 5:00 p.m., July 13, 2011, to advise us of the nature of the accommodation that you need. Please contact Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-5828; fax (406) 444-4375; or e-mail canderson@mt.gov.

3. The proposed new rules do not replace or modify any section currently found in the Administrative Rules of Montana. The proposed new rules provide as follows:

NEW RULE I TREATMENT OF NET OPERATING LOSSES SPANNING A CHANGE IN REPORTING METHODS (1) For purposes of this rule:

(a) "combined year" means a taxable period in which a corporation filed a unitary combined report as set forth in ARM 42.26.204;

(b) "water's-edge year" means a taxable period in which a corporation filed a valid water's-edge combined report as set forth in ARM 42.26.301; and

(c) "separate company year" means a taxable period in which a corporation

filed as a separate and distinct entity, not as part of a unitary group.

(2) A corporation that makes a valid water's-edge election or does not renew a prior election is agreeing that unused net operating loss carryover from a water's-edge year may only be carried to a water's-edge year, and unused net operating loss carryover from a non-water's-edge year may only be carried to a non-water's-edge year. When applying the three-year carry-back, and seven-year carry-forward limitations, provided for in 15-31-119, MCA, all taxable periods are included, even though the loss can only be deducted in those periods in which the filing method is the same.

(3) Except as provided in (2), if a corporation incurs a net operating loss and files a return for the year to which the loss is carried under a different filing method, the net operating loss deduction may be limited. The net operating loss must be recalculated to the filing method of the year in which the loss is being deducted. For example, if a corporation incurs a net operating loss in a prior separate company year, and wishes to carry that loss to a future combined year, the loss must be recalculated as if it were filed on a combined, unitary basis before being carried to the combined year.

AUTH: 15-31-501 MCA

IMP: 15-31-119, 15-31-312, 15-31-322 MCA

REASONABLE NECESSITY: The department is proposing to adopt New Rule I in response to concerns expressed by taxpayers and department personnel about the administrative complexity of recalculating net operating losses for tax periods in which changes in filing methods occurred. This proposed new rule simplifies the net operating loss calculation for multinational taxpayers.

To achieve this simplification the proposed rule changes the application of a net operating loss carry-back and carryover to tax periods that include the water's-edge and non-water's-edge years. Specifically, the rule states that you can apply a net operating loss incurred in a water's-edge year only to tax periods within the statutorily prescribed carry-back and carryover period in which a water's-edge election is in effect. Likewise, net operating losses incurred during tax periods filed on a combined basis can only be applied to tax periods, without recalculation of the net operating loss, within the carry-back and carryover period that are also filed on a combined basis.

The department is also proposing to implement New Rule I to ensure that the application of net operating losses is consistent with Montana law in that when a net operating loss is applied, the net result provides an equitable allocation and apportionment of the taxpayer's income. The application of a net operating loss when an entity changes from a worldwide combined filing method to a water's-edge election does not provide an equitable allocation and apportionment of the taxpayer's income because the taxpayer's filed return does not consist of the same affiliates that it filed on the previous return when it created the net operating loss.

The language in (3) addresses the treatment of net operating losses for all other changes in filing methods. This language reflects current department practice and is included to inform the public of that practice.

NEW RULE II REORGANIZATIONS OF WATER'S-EDGE TAXPAYERS

(1) A taxpayer who becomes a member of a water's-edge group, subsequent to an election by the group, will be deemed to have elected and will be bound by the election. Procedures provided in ARM 42.26.302 for renewal of a water's-edge election would apply.

(2) If a water's-edge taxpayer is purchased or otherwise acquired by an entity not subject to tax under 15-31-101, MCA, and whose parent and affiliates are not subject to tax under 15-31-101, MCA, the water's-edge election carries over to each member of the new affiliated group.

(3) If a water's-edge taxpayer is purchased or otherwise acquired by a non-water's-edge taxpayer, who is subject to tax under 15-31-101, MCA, the water's-edge election will be terminated as of the purchase date.

(4) If a water's-edge taxpayer is a party to reorganization, and as a result ceases to exist, the water's-edge election will be terminated as of the date of the reorganization.

(5) If a water's-edge taxpayer is a party to a reorganization, and survives the reorganization, the water's-edge election carries over to the new affiliated group. Procedures provided for in ARM 42.26.302 for renewal of a water's-edge election would apply.

AUTH: 15-31-501, MCA

IMP: 15-31-324, MCA

REASONABLE NECESSITY: The department proposes to adopt New Rule II to create more tax administration transparency and to inform the public of the department's current practice regarding reorganizations of water's-edge taxpayers and how reorganizations affect their water's-edge elections.

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

42.23.107 DEFINITIONS The following definitions apply to rules found in this chapter:

(1) ~~"Gross income" means all income from sources within Montana recognized as gross income to the corporation in determining federal income tax liability, including interest income exempt from federal income tax.~~

(2) remains the same but is renumbered (1).

AUTH: 15-33-105, MCA

IMP: 15-33-103, MCA

REASONABLE NECESSITY: The department proposes to amend ARM 42.23.107 to delete the definition of "gross income," because this term is now defined in 15-31-113, MCA.

42.23.605 PENALTY AND INTEREST (1) through (3) remain the same.

(4) The department will adjust interest based on the corrected amount of tax

due, which results from an amended return, adjustment from an audit, or correction to the original return, unless the change in tax due arises from a net operating loss or a tax credit.

~~(4)~~(5) In the case of a net operating loss carry-back When there is a change to the tax liability which results from an amended return, adjustment from an audit, or correction to the original return, no change will be made to the underpayment interest penalty as calculated on the original return.

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

AUTH: 15-31-501, MCA

IMP: 15-1-216, 15-1-222, 15-31-502, 15-31-503, 15-31-510, MCA

REASONABLE NECESSITY: The department proposes changes to ARM 42.23.605 to better explain when it is not appropriate for the department to pay interest on a corrected tax liability. Existing Montana law prohibits the payment of interest with respect to a corrected tax liability that is derived from a net operating loss. The department currently applies the same policy to tax credits. Section (5) of the proposed rule regarding the underpayment penalty is necessary to support proper compliance by corporate taxpayers with estimated payment requirements of current Montana law. It is also even-handed and fair because events subsequent to the filing of a return will not increase or decrease the calculation of the penalty after the filing of the original return.

42.26.201 INTENT (1) and (2) remain the same.

(3) The only exceptions to these allocation and apportionment rules contained in these rules are set forth in ARM 42.26.261 through ~~42.26.263~~ 42.26.264 pursuant to the authority of 15-31-312, MCA. Special rules pertaining to certain industries are referenced in other subsections of this chapter.

(4) remains the same.

AUTH: 15-1-201, 15-31-313, 15-31-501, 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, 15-31-321, 15-31-322, 15-31-323, 15-31-324, 15-31-325, 15-31-326, MCA

REASONABLE NECESSITY: The department proposes to amend ARM 42.26.201 to cite the correct administrative rule.

42.26.202 DEFINITIONS The following definitions apply to this subchapter:

(1) through (10) remain the same.

(11) "Gross receipts" means the total receipts received by the taxpayer less any expenses attributable to the sale gross amounts realized (the sum of money and the fair market value of other property or services received) on the sale or exchange of property, the performance of services, or the use of property or capital (including rents, royalties, interest, and dividends) in a transaction which produces business income, in which the income, gain, or loss is recognized (or would be recognized if the transaction were in the United States) under the federal IRC.

(a) Intercompany revenues between members of the unitary group are eliminated from gross receipts. Examples of intercompany revenues include, but are not limited to:

- (i) sales;
- (ii) dividends;
- (iii) service fees;
- (iv) rents;
- (v) management fees;
- (vi) royalties;
- (vii) interest; and
- (viii) administrative fees.

(b) Gross receipts, even if business income, do not include, for example, such items as:

(i) repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument;

(ii) the principal amount received under a repurchase agreement or other transaction properly characterized as a loan;

(iii) proceeds from issuance of the taxpayer's own stock or from sale of treasury stock;

(iv) damages and other amounts received as the result of litigation;

(v) property acquired by an agent on behalf of another;

(vi) tax refunds and other tax benefits recoveries;

(vii) pension reversions;

(viii) contributions to capital (except for sales of securities by securities dealers);

(ix) income from forgiveness or discharge of indebtedness;

(x) amounts realized from the exchange of inventory, except those amounts actually received by the taxpayer and that exceeded any corresponding amounts paid to the other party, and which were to account for excess deliveries under the exchange agreement, as calculated on an annual basis. Thus, the net amount of payments received in excess of the net payments made during the year may be included in the sales factor; and

(xi) amounts received from hedging transactions involving intangible assets.

For purposes of this subsection, a "hedging transaction" means a transaction related to the taxpayer's trading function involving futures and options transactions for the purpose of hedging price risk of the products or commodities consumed, produced, or sold by the taxpayer.

(c) Exclusion of an item from the definition of "gross receipts" is not determinative of its character as business or nonbusiness income.

(12) through (23) remain the same.

(24) "To contribute materially" includes, without limitation, "to be used operationally in the taxpayer's trade or business." Whether property materially contributes is not determined by reference to the property's value or percentage of use. If an item of property materially contributes to the taxpayer's trade or business, the attributes, rights, or components of that property are also operationally used in that business.

(25) "Trade or business" means the unitary business of the taxpayer, part of

which is conducted in this state.

AUTH: 15-1-201, 15-31-313, 15-31-501, 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, 15-31-321, 15-31-322, 15-31-323, 15-31-324, 15-31-325, 15-31-326, MCA

REASONABLE NECESSITY: The department proposes amending ARM 42.26.202 to provide improved guidance for corporation taxpayers in reporting complex business transactions and circumstances. The existing brief definition of gross receipts does not adequately account for evolving situations occurring in today's complex global economy. The department seeks to provide reasonable consistency with other states by basing these definitions on recommendations from the Multistate Tax Commission (MTC) with additional detail added to assist taxpayers with facts not addressed by the MTC. ARM 42.26.202 adopts definitions for the following: "gross receipts," "trade or business," and "to contribute materially."

42.26.206 BUSINESS AND NONBUSINESS INCOME DEFINED

~~(1) Section 15-31-302~~ 15-31-301, MCA, defines "business income" as income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations requires that every item of income be classified either as business income or nonbusiness income. Income for purposes of classification as business or nonbusiness includes gains and losses. Business income is apportioned among jurisdictions by use of a formula. Nonbusiness income is specifically assigned or allocated to one or more specific jurisdictions pursuant to express rules. An item of income is classified as business income if it falls within the definition of business income. In essence, all income which arises from the conduct of trade or business operations of a taxpayer is business income. An item of income is nonbusiness income only if it does not meet the definitional requirements for being classified as business income. For purposes of administration, the income of the taxpayer is business income unless clearly classifiable as nonbusiness income.

~~(2) Non-business income means all income other than business income. Business income means income of any type or class, and from any activity, that meets the relationship described either in (3), the "transactional test," or (4), the "functional test." The classification of income by the labels occasionally used, such as manufacturing income, compensation for services, sales income, interest, dividends, rents, royalties, gains, operating income, nonoperating income, etc., is of no assistance in determining whether income is business or nonbusiness income.~~

~~(3) The classification of income by the labels occasionally used, such as manufacturing income, compensation for services, sales income, interest, dividends, rents, gains, operating income, non-operating income, etc., is of no aid in determining whether income is business or non-business income. Income of any type or class and from any source is business income if it arises from transactions and activity occurring in the regular course of a trade or business. Accordingly, the~~

critical element in determining whether income is "business income" or "nonbusiness income" is the identification of the transactions and activities which are the elements of a particular trade or business. In general, all transactions and activities of the taxpayer which are dependent upon or contribute to the operations of the taxpayer's economic enterprise as a whole constitute the taxpayer's trade or business and will be transactions and activities arising in the regular course of and will constitute integral parts of a trade or business. (See ARM 42.26.207 for more specific examples of the classification of income as business or nonbusiness income; see ARM 42.26.202 and 42.26.205 for further explanation of what constitutes a trade or business.)

(3) Under the transactional test, business income includes income arising from transactions and activity in the regular course of the taxpayer's trade or business.

(a) If the transaction or activity is in the regular course of the taxpayer's trade or business, part of which trade or business is conducted within this state, the resulting income of the transaction or activity is business income for this state. Income may be business income even though the actual transaction or activity that gives rise to the income does not occur in this state.

(b) For a transaction or activity to be in the regular course of the taxpayer's trade or business, the transaction or activity need not be one that frequently occurs in the trade or business. Most, but not all, frequently occurring transactions or activities will be in the regular course of that trade or business and will, therefore, satisfy the transactional test. It is sufficient to classify a transaction or activity as being in the regular course of a trade or business, if it is reasonable to conclude transactions of that type are customary in the kind of trade or business being conducted or are within the scope of what that kind of trade or business does. The transactional test includes, but is not limited to:

(i) income from sales of inventory;

(ii) property held for sale to customers; and

(iii) services which are commonly sold by the trade or business.

(c) The transactional test also includes, but is not limited to: income from the sale of property used in the production of business income of a kind that is sold and replaced with some regularity, even if replaced less frequently than once a year.

(4) Under the functional test, business income includes income from tangible and intangible property, if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

(a) Business income need not be derived from transactions or activities that are in the regular course of the taxpayer's own particular trade or business. It is sufficient, if the property from which the income is derived is or was an integral, functional, or operative component used in the taxpayer's trade or business operations, or otherwise materially contributed to the production of business income of the trade or business, part of which trade or business is or was conducted within this state. Property that has been converted to nonbusiness use through the passage of a sufficiently lengthy period of time, generally, five years is sufficient, has lost its character as a business asset and is not subject to the rule of the preceding sentence.

(b) Income that is derived from isolated sales, leases, assignments, licenses, and other infrequently occurring dispositions, transfers, or transactions involving property, including transactions made in liquidation, including complete or partial liquidations, or the winding-up of business, is business income, if the property is or was used in the taxpayer's trade or business operations.

(i) Property that has been converted to nonbusiness use has lost its character as a business asset and is not subject to (4)(b).

(ii) Income from the licensing of an intangible asset, such as a patent, copyright, trademark, service mark, know-how, trade secrets, or the like, that was developed or acquired for use by the taxpayer in its trade or business operations, constitutes business income whether or not the licensing itself constituted the operation of a trade or business, and whether or not the taxpayer remains in the same trade or business from or for which the intangible asset was developed or acquired.

(c) Under the functional test, income from intangible property is business income when the intangible property serves an operational function. The relevant inquiry focuses on whether the property is or was held in furtherance of the taxpayer's trade or business, that is, on the objective characteristics of the intangible property's use or acquisition and its relation to the taxpayer and the taxpayer's activities.

(d) If the property is or was held in furtherance of the taxpayer's trade or business then income from that property may be business income even though the actual transaction or activity involving the property that gives rise to the income does not occur in this state.

(e) If, with respect to an item of property, a taxpayer takes a deduction from business income that is apportioned to this state or includes the original cost in the property factor, it is presumed that the item or property is or was integral to the taxpayer's trade or business operations. No presumption arises from the absence of any of these actions.

(f) Application of the functional test is generally unaffected by the form of the property (e.g., tangible or intangible property, real or personal property). Income arising from an intangible interest, as, for example, corporate stock or other intangible interest in a business or a group of assets, is business income when the intangible itself or the property underlying or associated with the intangible is or was an integral, functional, or operative component to the taxpayer's trade or business operations.

(g) Property that has been converted to nonbusiness use has lost its character as a business asset and is not subject to (4)(f).

AUTH: 15-1-201, 15-31-313, 15-31-501, MCA

IMP: 15-1-601, 15-31-302 15-31-301, MCA

REASONABLE NECESSITY: The department proposes to amend ARM 42.26.206 to help achieve consistency, uniformity, and equity in Montana's corporation license tax and to adopt language recommended by the MTC in its model allocation and apportionment regulations and that are reflective of the department's current practices.

Additionally, the department's proposed amendments are intended to reflect the outcome of *Gannett Satellite Information Network, Inc. v. State of Montana, Department of Revenue*. In that case, the court agreed with the department that "business income," as it is defined in 15-31-302, MCA, contains two independent tests, a transactional test and a functional test. Now that the department's interpretation of 15-31-302, MCA, has been ratified, the department believes it is appropriate to amend ARM 42.26.206, to reflect its long-standing practice insofar as the application of those tests are concerned.

While the department's practice is consistent with the MTC regulations, the department has not adopted the MTC's language, in its entirety, because the department views certain departures from the MTC regulations to be necessary. For instance the MTC language, in general, is too ambiguous when stating that the functional test is not satisfied when the holding of property is limited to solely an investment function as is the case where the holding of the property is limited to mere financial betterment of the taxpayer. Importantly, the Montana State Tax Appeal Board has found, in more than one instance, that income from property serving an investment function is business income under Montana law. The MTC language omitted in these rules directly conflicts with these Montana decisions, which the department judges take precedence over MTC advisory recommendations. Please see *Gallagher, Inc. v. Department of Revenue and Decatur Development, Inc. v. Department of Revenue*. The proposed amendments also eliminate original department rule language that addresses the same topics as the inserted MTC language.

The proposed rules did not incorporate the due process clause language from the MTC language as the department already has a due process clause in 15-1-211, MCA. The rule improves guidance to the taxpayer by specifying that every type of income be classified as business or nonbusiness income.

The rule improves guidance to taxpayer's by specifying that:

- business income is apportioned to multiple jurisdictions, and nonbusiness income is allocated to the specific jurisdiction to which the income is earned;
- income is assigned as nonbusiness income only if it doesn't meet the qualifications of business income;
- the type of income or the description of the income does not affect whether the income is business or nonbusiness income; and
- explains the transactional test and the functional test as used in current practice by the department.

42.26.207 DETERMINATION OF BUSINESS AND NONBUSINESS

INCOME (1) Rental income from real and tangible property is characterized as business income if the property with respect to which the rental income was received is, or was, used in the taxpayer's trade or business or incidental thereto and therefore is includable in the property factor under ARM 42.26.231 and 42.26.237. Property that has been converted to nonbusiness use has lost its character as a business asset and is not subject to the rule of the preceding sentence.

(2) Gain or loss from the sale, exchange, or other dispositions of real

property or of tangible or intangible personal property constitutes business income if the property while owned by the taxpayer was used in, or was otherwise included in the property factor of, the taxpayer's trade or business. However, if such property was utilized for the production of nonbusiness income or otherwise was removed from the property factor before its sale, exchange, or other disposition, the gain or loss will constitute nonbusiness income. See ARM 42.26.232.

(3) Interest income is characterized as business income where the intangible with respect to which the interest was received arises out of or was created in the regular course of the taxpayer's trade or business operations or where the ~~purpose for acquiring and holding the intangible is related to or incidental to such trade or business operations~~ acquiring and holding the intangible is an integral, functional, or operative component of the taxpayer's trade or business operations, or otherwise materially contributes to the production of business income of the trade or business operations.

(4) Dividends are constitute business income where the stock with respect to which the dividends are received arises out of or was acquired in the regular course of the taxpayer's trade or business operations or where the ~~purpose for acquiring and holding the stock is related to or incidental to such trade or business operations~~ the acquiring and holding the stock is an integral, functional, or operative component of the taxpayer's trade or business operations, or otherwise materially contributes to the production of business income of the trade or business operations.

(5) Patent and copyright royalties are characterized as business income where the patent or copyright with respect to which the royalties were received arises out of or was created in the regular course of the taxpayer's trade or business operations or where the ~~purpose for acquiring and holding the patent or copyright is related to or incidental to such trade or business operations~~ acquiring and holding the patent or copyright is an integral, functional, or operative component of the taxpayer's trade or business operations, or otherwise materially contributes to the production of business income of the trade or business operations.

AUTH: 15-1-201, 15-31-313, 15-31-501, MCA

IMP: 15-1-601, 15-31-302, MCA

REASONABLE NECESSITY: The proposed amendment to ARM 42.26.207 arises from the biennial review requirements listed in 2-4-314, MCA. One of the goals of the biennial review is to address issues that the department encounters regularly from taxpayers and provide guidance on these issues. The proposed amendments to ARM 42.26.207 provide guidance on the treatment of the gain or loss from the sale of intangible assets as required by 15-31-302, MCA.

The rule states that property that has been converted into nonbusiness use is not business income when sold. The rule states that interest, dividends, or royalties are business income if they are derived from intangibles that are within the scope of the company's regular course of business.

The proposed language was recommended by the MTC in an effort to provide uniformity with other states.

42.26.208 PRORATION OF DEDUCTIONS ALLOCATION OF INCOME

AND DEDUCTIONS (1) through (3) remain the same.

(4) If two or more entities, whether or not organized or doing business in this state, are owned or controlled directly or indirectly by the same interest, the taxpayer may petition or the department may require adjustments that distribute, apportion, or allocate gross income or deductions between or among such entities, if it determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes, or to fairly represent the income of any such entities.

AUTH: 15-1-201, 15-31-313, 15-31-501, MCA

IMP: 15-1-601, and ~~Title 15, chapter 31, part 3~~ 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, 15-31-321, 15-31-322, 15-31-323, 15-31-324, 15-31-325, 15-31-326, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.26.208 to ensure equitable reporting among corporate taxpayers of income earned in Montana and to inform taxpayers of the actions the department or taxpayers may take to achieve proper income reporting. The department is amending the rule to also provide guidance to taxpayers on how to address situations when income and/or deductions, as filed on the Montana return, do not clearly reflect the Montana income of the entities included in the return. The department is also proposing to update the implementing citations.

42.26.234 NUMERATOR OF PROPERTY FACTOR (1) and (2) remain the same.

(3) The value of mobile or movable property such as construction equipment, trucks, or leased electronic equipment which ~~are~~ is located within and without this state during the tax period shall be determined for purposes of the numerator of the factor on the basis of total time within the state during the tax period. An automobile assigned to a traveling employee shall be included in the numerator of the factor of the state to which the employee's compensation is assigned under the payroll factor or in the numerator of the state in which the automobile is licensed.

AUTH: 15-1-201, 15-31-313, 5-31-501, MCA

IMP: 15-1-601, and ~~Title 15, chapter 31, part 3~~ 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, 15-31-321, 15-31-322, 15-31-323, 15-31-324, 15-31-325, 15-31-326, MCA

REASONABLE NECESSITY: The department proposes to amend ARM 42.26.234 to correct a grammatical error and to update the implementing citations.

42.26.237 AVERAGING PROPERTY VALUES (1) through (3) remain the same.

AUTH: 15-1-201, 15-31-313, 15-31-501, MCA

IMP: 15-1-601, and ~~Title 15, chapter 31, part 3~~ 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, 15-31-321, 15-31-322, 15-31-323, 15-31-324, 15-31-326, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.26.237 to update the implementing citations.

42.26.241 PAYROLL FACTOR IN GENERAL (1) through (3) remain the same.

(4) ARM 42.26.202 provides the definitions applicable to this ~~rules~~ rule.

AUTH: 15-1-201, 15-31-313, 15-31-501, MCA

IMP: 15-1-601, 15-31-305, 15-31-308, 15-31-309, MCA

REASONABLE NECESSITY: The department proposes to amend ARM 42.26.241 to correct a grammatical error.

42.26.242 CONSISTENCY IN REPORTING WITH RESPECT TO PAYROLL (1) and (2) remain the same.

AUTH: 15-1-201, 15-31-313, 15-31-501, MCA

IMP: 15-1-601, and ~~Title 15, chapter 31, part 3~~ 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, 15-31-321, 15-31-322, 15-31-323, 15-31-324, 15-31-325, 15-31-326, MCA

REASONABLE NECESSITY: The department proposes to amend ARM 42.26.242 to update the implementing citations.

42.26.244 NUMERATOR OF PAYROLL FACTOR (1) and (2) remain the same.

(3) Payroll associated with the operation or transportation of mobile or movable property, as described in ARM 42.26.234, shall be assigned to this state on the proportion of mileage traveled within the state to mileage traveled everywhere during the tax period.

AUTH: 15-1-201, 15-31-313, 15-31-501, MCA

IMP: 15-1-601, 15-31-305, 15-31-308, 15-31-309, MCA

REASONABLE NECESSITY: The department proposes to amend ARM 42.26.244 to explain how to account for payroll associated with mobile and/or moveable property in the apportionment factor. The rule describes the current practice of the department.

42.26.253 DENOMINATOR OF SALES FACTOR (1) remains the same.

AUTH: 15-1-201, 15-31-313, 15-31-501, MCA

IMP: 15-1-601, and Title 15, chapter 31, part 3 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, 15-31-321, 15-31-322, 15-31-323, 15-31-324, 15-31-325, 15-31-326, MCA

REASONABLE NECESSITY: The department proposes to amend ARM 42.26.253 to update the implementing citations.

42.26.254 NUMERATOR OF SALES FACTOR (1) remains the same.

(2) Intercompany revenues between members of the unitary group that are attributable to this state shall be excluded from the numerator of the sales factor.

AUTH: 15-1-201, 15-31-313, 15-31-501, MCA

IMP: 15-1-601, and Title 15, chapter 31, part 3 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, 15-31-321, 15-31-322, 15-31-323, 15-31-324, 15-31-325, 15-31-326, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.26.254 to inform corporate taxpayers of current department practice concerning the exclusion of intercompany receipts from gross receipts that were included in the sales factor. The department has determined that intercompany sales is the shifting of inventory between affiliates, not sales, as described in 15-31-311, MCA. Taxpayers need to be aware of this determination to properly prepare their returns in Montana. The department is also proposing to update the implementing citations.

42.26.255 SALES OF TANGIBLE PERSONAL PROPERTY (1) through (6) remain the same.

(7) If a taxpayer whose salesman operates from an office located in this state makes a sale to a purchaser in another state in which the taxpayer is not taxable and the property is shipped directly by a third party to the purchaser, the following rules apply:

(a) If the taxpayer is taxable in the state from which ~~this~~ the third party ships the property, then the sale is in such state.

(b) If the taxpayer is not taxable in the state from which the property is shipped, then the sale is in this state.

AUTH: 15-1-201, 15-31-313, 15-31-501, MCA

IMP: 15-1-601, 15-31-305, 15-31-310, 15-31-311, MCA

REASONABLE NECESSITY: The department proposes to amend ARM 42.26.255 to correct a grammatical error.

42.26.256 SALES OF TANGIBLE PERSONAL PROPERTY TO FEDERAL GOVERNMENT (1) and (2) remain the same.

AUTH: 15-1-201, 15-31-313, 15-31-501, MCA

IMP: 15-1-601, and Title 15, chapter 31, part 3 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, 15-31-321, 15-31-322, 15-31-323, 15-31-324, 15-31-325, 15-31-326, MCA

REASONABLE NECESSITY: The department proposes to amend ARM 42.26.256 to update the implementing citations.

42.26.261 SPECIAL APPORTIONMENT AND ALLOCATION

COMPUTATIONS (1) ~~Section 15-31-312, MCA, permits a departure from the allocation and apportionment provisions of 15-31-302 through 15-31-311, MCA, only in limited and specific cases. Section 15-31-312, MCA, may be invoked only in specific cases where unusual fact situations (which ordinarily will be unique and nonrecurring) produce incongruous results under the apportionment and allocation provisions contained in 15-31-302 through 15-31-311, MCA.~~

(2) remains the same but is renumbered (1).

AUTH: 15-1-201, 15-31-313, 15-31-501, MCA

IMP: 15-1-601, 15-31-305, 15-31-312, MCA

REASONABLE NECESSITY: This proposed rule amendment is a continuation of the department's effort to provide tax administration transparency. Because the standard found in 15-31-312, MCA is clear, the department believes that ARM 42.26.261(1) creates confusion rather than providing additional clarity or guidance with regard to the administration of Montana's corporation license tax. Thus, the department is proposing to delete the text in (1).

42.26.262 SPECIAL COMPUTATIONS RELATED TO PROPERTY FACTOR

(1) The following special rules are established in respect to the property factor of the apportionment formula:

(a) If the sub-rents taken into account in determining the net annual rental rate under ARM 42.26.236 produce a negative or clearly inaccurate value for any item of property, another method which will properly reflect the value of rented property may be required by the department or requested by the taxpayer.

(b) In no case, however, shall such value be less than an amount which bears the same ratio to the annual rental rate paid by the taxpayer for such property as the fair market value of that portion of the property used by the taxpayer bears to the total fair market value of the rented property.

(2) remains the same.

AUTH: 15-1-201, 15-31-313, 15-31-501, MCA

IMP: 15-1-601, and Title 15, chapter 31, part 3 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, 15-31-321, 15-31-322, 15-31-323, 15-31-324, 15-31-325, 15-31-326, MCA

REASONABLE NECESSITY: The department proposes to amend ARM

42.26.262 to correct a grammatical error and to update the implementing citations.

42.26.263 SPECIAL COMPUTATIONS RELATED TO SALES FACTOR

(1) The following special criteria are established in respect to the sales factor of the apportionment formula:

(a) Insubstantial amounts of gross receipts arising from incidental or occasional transactions or activities may be excluded from the sales factor unless such exclusion would materially affect the amount of income apportioned to this state. ~~For example, the taxpayer ordinarily may include or exclude from the sales factor gross receipts from such transactions as the sale of office furniture, business automobiles, etc.~~

(b) Where the income-producing activity in respect to business income from intangible personal property can be readily identified, such income is included in the denominator of the sales factor and, if the income-producing activity occurs in this state, in the numerator of the sales factor as well. For example, usually the income-producing activity can be readily identified in respect to interest income received on deferred payments on sales of tangible property (ARM 42.26.251) and income from sale, licensing, or other use of intangible personal property (ARM 42.26.257).

(2) and (3) remain the same.

AUTH: 15-1-201, 15-31-313, 15-31-501, MCA

IMP: 15-1-601, 15-31-305, 15-31-310, 15-31-311, 15-31-312, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.26.263 to remove the example in (1)(a), which does not follow the provisions set forth in ARM 42.26.259.

42.26.264 SPECIAL COMPUTATIONS RELATED TO FREIGHT AND PASSENGER CARRIERS (1) and (2) remain the same.

AUTH: 15-1-201, 15-31-313, 15-31-501, MCA

IMP: 15-1-601, and Title 15, chapter 31, part 3 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, 15-31-321, 15-31-322, 15-31-323, 15-31-324, 15-31-325, 15-31-326, MCA

REASONABLE NECESSITY: The department proposes to amend ARM 42.26.264 to update the implementing citations.

42.26.302 PROCEDURE (1) To perfect a water's-edge election a taxpayer must ~~file a written election~~ complete Form WE – ELECT and file the form with the department within the first 90 days of the tax year for which the election is to become effective. If the first tax period for which the election is to become effective is less than 90 days, the taxpayer will have until the end of the tax period to file the election. The election must disclose the taxpayer's identity and a complete listing of all affiliates owned in excess of 50% percent. ~~No specific forms are required when making the written election.~~

(2) The provisions of (1) provide the only way to perfect a water's-edge election. Filing returns and paying tax under the water's-edge method without perfecting the election as provided for in (1) will not be accepted as a valid election.

~~(2)(3)~~ With the exception of ARM 42.26.303(2), each Each election is binding for a three-year renewable period and may only be revoked upon express written permission of the department.

~~(3)(4)~~ As stated in ~~(2)(3)~~ above, the water's-edge election is binding for a three-year renewable period. If a taxpayer wishes to continue to file on a water's-edge basis, a ~~written election~~ Form WE – ELECT must again be filed with the department within the first 90 days of the tax year for which the election is to become effective.

AUTH: 15-31-501, MCA

IMP: 15-31-324, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.26.302 to reduce future taxpayer error in complying with the water's-edge election. The rule accomplishes this purpose by establishing that filing returns on a water's-edge basis, without going through the written election process, does not perfect a water's-edge election and will not be accepted by the department as a substitute for filing Form WE – ELECT. The rule provides assistance to the taxpayers in making an election by requiring the department to provide a specific form for that purpose.

42.26.303 REVOCATION OR NONRENEWAL OF WATER'S-EDGE ELECTIONS (1) remains the same.

~~(2) A taxpayer, with a unitary subsidiary that is incorporated in a tax haven, as shown in 15-31-322, MCA, who has a water's-edge election that is in effect for tax periods beginning both before and after December 31, 2003, may rescind the election for any tax period beginning after December 31, 2003. A letter requesting the revocation of the election must be received by the department within the first 90 days of the first taxable period affected by this change in statute.~~

AUTH: 15-31-501, MCA

IMP: 15-31-324, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.26.303 because the rule was originally adopted in response to the change in 15-31-322, MCA, which required the inclusion in the water's-edge group of entities incorporated in tax havens, and a portion of the rules is no longer applicable. Because there was a change in the composition of the water's-edge group, the department gave consent to those taxpayers with water's-edge elections applying to tax periods both before and after 2003 to opt out of the election. This section does not apply to elections made for three-year periods after 2003. This is addressed in 15-31-324, MCA.

42.26.310 DISREGARDING OR MODIFYING A WATER'S-EDGE

ELECTION (1) The department shall review for completeness the domestic disclosure spreadsheets that are filed as required by ARM ~~42.26.217~~ 42.26.304. Completeness means that entries are provided for each item requested. A spreadsheet which is not properly completed shall be treated as if not filed, except that the taxpayer will be given 60 days to correct any deficiencies which it has been informed of in writing by the department. A taxpayer who fails to file a domestic disclosure spreadsheet or fails to file a complete spreadsheet after having been given an opportunity to correct any deficiencies shall have its water's-edge election revoked by the department.

(2) remains the same.

(3) The calculation of water's-edge combined income may be modified to reflect adjustments to transfer prices, royalty rates, allocation of common expenses, and similar adjustments necessary to reflect a proper apportionment of income. ~~In the instance of a carry-forward of a net operating loss deduction from a period in which no water's-edge combination was filed, such loss must be computed on a basis consistent with the year to which the loss is carried.~~

(4) remains the same.

(5) Limitations of net operating loss deductions of a water's-edge group are addressed in [NEW RULE I].

AUTH: 15-31-501, MCA

IMP: 15-31-301, 15-31-322, 15-31-326, 15-31-505, MCA

REASONABLE NECESSITY: The department proposes to amend ARM 42.26.310 to correct the reference to ARM 42.26.217 because that rule was repealed and replaced by ARM 42.26.304 in 2001. The department is also proposing to move all provisions dealing with net operating loss issues to chapter 23, subchapter 8 and adding the reference to NEW RULE I, which now addresses net operating losses.

42.26.311 CERTAIN CORPORATIONS INCLUDABLE IN A WATER'S-EDGE COMBINED RETURN (1) Domestic international sales corporations (DISCs), as defined in sections 991 through 994 of the IRC, export trade corporations, as described in sections 970 and 971 of the IRC, and foreign sales corporations, as defined in sections 921 through 927 of the IRC, are included in a water's-edge return. DISCs are specifically taxable ~~notwithstanding~~ notwithstanding the general exempt language of 15-31-102, MCA.

(2) ~~Foreign corporations~~ A corporation incorporated outside the United States, if over 50% percent of the voting stock is owned directly or indirectly by a member of the includable group and if more than 20% percent of the average of its payroll and property is assignable to a location inside the United States, ~~are~~ is included in a water's-edge return. For purposes of computing this average, the payroll factor provided for by 15-31-308, MCA, and the property factor as provided for by 15-31-306, MCA, shall be added together and divided by two, or by one if the denominator of either the property ~~of~~ or payroll factor is zero.

(3) A corporation incorporated in the United States, if the denominator of both the property and payroll factor is zero, is included in a water's-edge return.

(4) A corporation incorporated outside the United States, if "engaged in business" or "doing business" pursuant to 15-31-101, MCA, in this state, is included in a water's-edge return.

~~(3)~~(5) A corporation that is in a unitary relationship with the taxpayer and that is incorporated in a tax haven is included in a water's-edge return.

AUTH: 15-31-501, MCA

IMP: 15-31-322, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.26.311 to inform taxpayers of the department's current practice regarding the inclusion of corporations in the water's-edge group, and to correct grammatical errors.

42.26.312 TREATMENT OF DIVIDENDS FOR PURPOSES OF A WATER'S-EDGE COMBINED RETURN

(1) Eighty percent of the dividends apportionable under this rule are to be excluded from income subject to apportionment where:

(a) dividends received from foreign corporations, taxable for federal purposes, are considered to be income subject to apportionment;

(b) amounts included in income under sections 951 through 962 and 964 of the IRC are considered taxable foreign dividends;

(c) the after-tax net income of United States corporations excluded from eligibility as affiliated corporations under ARM 42.26.311 and possession corporations defined in sections 931 through 934 and 936 of the IRC, is considered to be a dividend for purposes of this rule;

(i) In calculating the after tax net income, where the corporation is included in a federal consolidated income tax return, the consolidated tax liability shall be apportioned among the members of the group in accord with the ratio which that portion of the consolidated taxable income attributable to each member of the group having positive taxable income, bears to the total consolidated taxable income of all companies in the consolidated group having positive taxable income. For purposes of this calculation, the consolidated tax liability shall be the tax liability calculated on the federal consolidated income tax return after application of federal tax credits.

(ii) Where such corporations have no net income for the taxable year in question, the amount to be included as dividends received from corporations outside the United States shall equal zero.

(d) dividends between members in the water's-edge combinable group are eliminated from the calculation of apportionable income;

(e) deemed dividend distributions pursuant to section 78 of the IRC are excluded from the calculation of apportionable income; and

(f) the limited inclusion of dividend income specified in this rule is in lieu of attempts to allocate expenses attributable to the generation of such dividend income. For apportionment factor purposes only the dividend income considered to be business income shall be included in the receipts factor numerator or denominator as appropriate.

AUTH: 15-31-501, MCA

IMP: 15-31-325, MCA

REASONABLE NECESSITY: The department is proposing to amend ARM 42.26.312 to inform taxpayers of the department's current practice regarding the treatment of dividends for purposes of water's-edge combined returns. In the calculation of the water's-edge deemed dividend, when using the amount for the federal consolidated tax liability, it shall be the tax liability after application of federal tax credits.

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

42.23.414 FILINGS IN CONNECTION WITH NET OPERATING LOSSES

(1) remains the same.

(2) Corporations that are members of a unitary group filing a single return must use intrastate apportionment to calculate the net operating loss and net operating loss deduction for each member of the unitary group that is engaged in business in the state. A net operating loss for one member of a unitary group cannot be carried back or carried over to offset the income of another member included in the unitary group.

(a) Each member of a unitary group engaged in business in this state must calculate its individual share of the unitary group's net operating loss by applying its individual apportionment factor to the net operating loss of the unitary group.

(b) For purposes of calculating the net operating loss deduction, each member of a unitary group engaged in business in this state must calculate its individual share of the unitary group's net income by applying its individual apportionment factor to the net income of the unitary group, then applying its individual net operating loss available as calculated in (2)(a).

(2) and (3) remain the same, but are renumbered (3) and (4).

AUTH: 15-31-501, MCA

IMP: 15-31-119, 15-31-509, MCA

REASONABLE NECESSITY: The department proposes to amend ARM 42.23.414 to inform taxpayers of the department's current practice with regard to net operating losses. Members of a unitary group must use intrastate apportionment to calculate and apply net operating losses. Even though unitary income is apportioned on the basis of a combined report, each taxpayer member of a combined group is subject to its own tax liability. The minimum tax, net operating loss deduction, and tax credits are applied on an individual entity basis. Since unitary business income is combined and apportioned on a group basis, it is necessary to further apportion the Montana income among the taxpayer members of the group – those that are engaged in business in the state.

The department also proposes to transfer ARM 42.23.414, as amended, to new subchapter 8 – Net Operating Losses.

6. The rules proposed to be transferred provide as follows:

42.23.412 NET OPERATING LOSSES (1) and (2) remain the same.

AUTH: 15-31-501, MCA

IMP: 15-31-114, MCA

REASONABLE NECESSITY: The department proposes to transfer ARM 42.23.412 to new subchapter 8 – Net Operating Losses.

42.23.413 CARRYOVERS OF NET OPERATING LOSSES (1) through (4) remain the same.

AUTH: 15-31-501, MCA

IMP: 15-31-119, MCA

REASONABLE NECESSITY: The department proposes to transfer ARM 42.23.413 to new subchapter 8 – Net Operating Losses.

42.23.415 TREATMENT OF MERGERS AND CONSOLIDATIONS (1) and (2) remain the same.

AUTH: 15-31-501, MCA

IMP: 15-31-114, MCA

REASONABLE NECESSITY: The department proposes to transfer ARM 42.23.415 to new subchapter 8 – Net Operating Losses.

7. The department proposes to repeal the following rules:

42.23.105 DISCLOSURE OF INFORMATION which can be found on page 42-2306 of the Administrative Rules of Montana.

AUTH: 15-31-501, MCA

IMP: 15-31-507, MCA

REASONABLE NECESSITY: The department proposes to repeal ARM 42.23.105 because the implementing statute 15-31-507, MCA, was repealed by the 1993 Legislature and the disclosure of confidential corporation license tax returns is now covered in statute, 15-31-511, MCA.

42.26.305 TAX RATES which can be found on page 42-2660 of the Administrative Rules of Montana.

AUTH: 15-31-501, MCA

IMP: 15-31-121, MCA

REASONABLE NECESSITY: The department proposes to repeal ARM

42.26.305, because it provides the same language as 15-31-121, MCA.

8. 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: Cleo Anderson, Department of Revenue, Director's Office, P.O. Box 7701, Helena, Montana 59604-7701; telephone (406) 444-5828; fax (406) 444-4375; or e-mail canderson@mt.gov and must be received no later than July 29, 2011.

9. Cleo Anderson, Department of Revenue, Director's Office, has been designated to preside over and conduct the hearing.

10. 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.

11. The Department of Revenue maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and e-mail or mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding particular subject matter or matters. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the person in 8 above, or faxed to the office at (406) 444-4375, or may be made by completing a request form at any rules hearing held by the Department of Revenue.

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

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

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

Certified to Secretary of State June 13, 2011

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

In the matter of the amendment of) NOTICE OF AMENDMENT AND
ARM 6.6.3401, 6.6.3402, 6.6.3403,) ADOPTION
and 6.6.3404, and adoption of New)
Rule I (ARM 6.6.3405) pertaining to)
Standards for Companies Considered)
to be in Hazardous Financial)
Condition)

TO: All Concerned Persons

1. On April 28, 2011, the State Auditor and Commissioner of Insurance published MAR Notice No. 6-191 regarding the public hearing on the proposed amendment and adoption of the above-stated rules at page 616 of the 2011 Montana Administrative Register, issue number 8.

2. On May 24, 2011, the State Auditor and Commissioner of Insurance held a public hearing to consider the proposed amendment and adoption of the above-stated rules.

3. No comments were received from the public either by mail, or at the hearing.

4. The commissioner has amended ARM 6.6.3401, 6.6.3402, 6.6.3403, and 6.6.3404 exactly as proposed.

5. The commissioner has adopted New Rule I (ARM 6.6.3405) exactly as proposed.

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

/s/ Jesse Laslovich
Jesse Laslovich
Chief Legal Counsel

Certified to the Secretary of State June 13, 2011.

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

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 6.6.3504 pertaining to Annual)
Audited Reports and Establishing)
Accounting Practices and Procedures)
to Be Used in Annual Statements)

TO: All Concerned Persons

1. On May 12, 2011, the State Auditor and Commissioner of Insurance published MAR Notice No. 6-194 pertaining to the proposed amendment of the above-stated rule at page 705 of the Montana Administrative Register, issue number 9.
2. No comments or testimony were received.
3. The department has amended the above-stated rule as proposed.

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

/s/ Jesse Laslovich
Jesse Laslovich
Chief Legal Counsel

Certified to the Secretary of State June 13, 2011.

BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 8.94.3727 pertaining to the)
administration of the 2011-2012)
Federal Community Development)
Block Grant (CDBG) Program)

TO: All Concerned Persons

1. On May 12, 2011, the Department of Commerce published MAR Notice No. 8-94-91 pertaining to the proposed amendment of the above-stated rule at page 710 of the 2011 Montana Administrative Register, Issue Number 9.
2. The department has amended the above-stated rule as proposed.
3. No comments or testimony were received.

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

/s/ DORE SCHWINDEN
DORE SCHWINDEN
Director
Department of Commerce

Certified to the Secretary of State June 13, 2011.

BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 8.99.504, 8.99.505, 8.99.507,)
and 8.99.511 pertaining to)
microbusiness loans)

TO: All Concerned Persons

1. On May 12, 2011, the Department of Commerce published MAR Notice No. 8-99-90 pertaining to the proposed amendment of the above-stated rules at page 713 of the 2011 Montana Administrative Register, Issue Number 9.

2. The department has amended the above-stated rules 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 June 13, 2011.

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

In the matter of the adoption of NEW)
RULE I regarding aquatic invasive) NOTICE OF ADOPTION
species inspection stations)

TO: All Concerned Persons

1. On April 28, 2011, the Department of Fish, Wildlife and Parks (department) published MAR Notice No. 12-366 regarding a notice of public hearing on the proposed adoption of the above-stated rule at page 626, 2011 Montana Administrative Register, issue number 8.

2. The department has adopted NEW RULE I [ARM 12.11.341] as proposed, but with the following changes, stricken matter interlined, new matter underlined:

NEW RULE I [ARM 12.11.341] AQUATIC INVASIVE SPECIES INSPECTION STATIONS (1) ~~Vessels that are intended to be launched on any water in Montana~~ approaching a department-operated inspection station must stop ~~as directed at designated inspection stations operated by the department and be subject to inspection for aquatic invasive species.~~

(2) Vessels intended for launching on any water in Montana are subject to inspection for aquatic invasive species.

(2) remains as proposed but is renumbered (3).

~~(3)~~ (4) Any vessel at an inspection station found with an invasive species ~~must~~ will be decontaminated as arranged by the department and must pass a second inspection prior to ~~being allowed to launching~~ launching in Montana waters.

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

Comment 1: The department received six comments in favor of adopting the rule as proposed.

Response 1: The department appreciates the interest in this rulemaking process.

Comment 2: One person questioned whether a boater needs to seek out an inspection station before launching a boat.

Response 2: The department amended the rule language to clarify that a vessel approaching an inspection station is required to stop as directed. A boater does not need to intentionally seek out an inspection station before launching.

Comment 3: One person questioned who will be responsible for conducting the decontamination.

Response 3: The department amended the rule language to clarify that the department will either conduct the decontamination or will make arrangements for the decontamination to be completed appropriately.

Comment 4: Walleyes Unlimited is in favor of the rule, the aquatic invasive species (AIS) inspections and decontaminations, and the Inspect, Clean, and Dry program. Walleyes Unlimited also recognizes the department for their work on AIS and for expanding the AIS inspection program. Walleyes Unlimited does not believe it will be a bad process or an inconvenience.

Response 4: The department appreciates the interest in this rulemaking process and the support of Walleyes Unlimited.

Comment 5: One person stated the boat inspections were unnecessary, questioned where the inspection stations would be located and funded, and stated that only out of state boats should be inspected.

Response 5: The mandatory inspection stations are necessary to prevent the introduction and further spread of aquatic invasive species. Previously, department authority extended only to anglers and hunters, the new rule would make it mandatory for all watercraft to stop at designated inspection stations. The inspection stations will be located at key border crossings, on highways, and also at some water bodies. The selection of locations is based on the highest risk areas and most likely routes of infested boats into the state. The inspection program will be funded with a combination of general fund money, license dollars, and federal funds. Out-of-state boats are definitely the highest risk boats however, Montana residents also travel frequently out-of-state, additionally we are concerned about invasive species that may be moved around by watercraft within state borders, and therefore, all watercraft will be required to stop at designated inspection stations.

Comment 6: One person stated the department should coordinate with the Montana Department of Transportation (MDT) to increase boat inspection capacity at weigh stations.

Response 6: The department has been coordinating with MDT. Inspection stations located at MDT weigh stations is being considered.

Comment 7: One person requested an exception to mandatory inspections for boats being brought in from winter dry storage.

Response 7: For the department for determine the risk a vessel poses, it has to be inspected. Vessels coming from winter dry storage will pose a minimal risk but would still be required to stop at inspection stations as directed.

Comment 8: One person stated the process needs to be easy on the boater so it is not a negative experience and wants it to be a friendly process.

Response 8: The department agrees that the process should be easy on the boater and not a negative experience. It is the intention to conduct the inspections as efficiently as possible. It is anticipated that the average inspection time will be less than five minutes per vessel. The department will be taking several measures to decrease the inconvenience to those recreating.

/s/ Joe Maurier

Joe Maurier

Director

Department of Fish, Wildlife and Parks

/s/ Robert N. Lane

Robert N. Lane

Rule Reviewer

Department of Fish, Wildlife and Parks

Certified to the Secretary of State June 13, 2011

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the adoption of New Rules I) NOTICE OF ADOPTION
through VII pertaining to electronic filing of)
documents)

TO: All Concerned Persons

1. On April 28, 2011, the Department of Environmental Quality published MAR Notice No. 17-320 regarding a notice of public hearing on the proposed adoption of the above-stated rules at page 628, 2011 Montana Administrative Register, issue number 8.

2. The department has adopted New Rules I (17.4.801), II (17.4.802), III (17.4.803), V (17.4.805), VI (17.4.806), and VII (17.4.807) exactly as proposed, and has adopted New Rule IV (17.4.804) as proposed, but with the following changes, new matter underlined, deleted matter interlined:

NEW RULE IV ELECTRONIC SUBSCRIBER AGREEMENT (1) remains as proposed.

(2) The agreement form may be obtained from the department or downloaded and printed from the department's web site and must include the following agreements by each person who will submit electronic records:

(a) remains as proposed.

(b) to contact the department staff member designated in the rule, permit, or license as soon as possible, but no later than ~~24 hours~~ one business day, after suspecting or determining that the person's account security information or any required electronic signature device has become lost, stolen, or otherwise compromised;

(c) through (3) remain as proposed.

3. No comments or testimony were received, but the department is making one amendment to New Rule IV(2)(b), as shown above, to make the language consistent with New Rule V(3).

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, June 13, 2011.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 24.17.127, related to prevailing)
wage rates for public works projects -)
nonconstruction services)

TO: All Concerned Persons

1. On May 12, 2011, the Department of Labor and Industry (Department) published MAR Notice No. 24-17-255 regarding the public hearing on the amendment of the above-stated rule on page 725 of the 2011 Montana Administrative Register, issue no. 9.

2. On June 3, 2011, the department held a public hearing on the proposed amendment, at which a member of the public attended, but did not offer any comments. No comments concerning the proposed amendment were made during the comment period.

3. The department has amended ARM 24.17.127 as proposed.

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

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

Certified to the Secretary of State June 13, 2011

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

In the matter of the adoption of NEW	)	NOTICE OF ADOPTION AND
RULES I through V, and the	)	AMENDMENT
amendment of ARM 24.29.1401A,)	
24.29.1402, 24.29.1406, 24.29.1407,)	
24.29.1501, 24.29.1517, 24.29.1519,)	
24.29.1526, 24.29.1574, 24.29.1575,)	
24.29.1585, 24.29.1586, 24.29.2002,)	
and 24.29.2003, regarding the)	
implementation of utilization and)	
treatment guidelines and medical)	
services rules for workers')	
compensation matters)	

TO: All Concerned Persons

1. On May 12, 2011, the Department of Labor and Industry (department) published MAR Notice No. 24-29-256 regarding the public hearing on the adoption and amendment of the above-stated rules on page 728 of the 2011 Montana Administrative Register, Issue Number 9.

2. On June 6, 2011, a public hearing was held at which time members of the public made oral comments. Additional written comments were received during the comment period.

3. 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 noted that the thoracic region of the spine is not covered by a specific guideline. The commenter suggested that the cervical spine injury guideline be applied to T6 or T7 and above, and the low back guideline be applied to T7 and below. The commenter also expressed concern that if there is no guideline for this region, then all treatment has to obtain prior authorization under New Rule II.

Response 1: There is no specific guideline for the thoracic region. There are references to the thoracic region in the cervical spine injury and low back guidelines. The thoracic region is to be treated as a body part without a guideline under the utilization and treatment rules, unless there is a specific reference to it in the cervical spine injury or low back guidelines. That means that providers are to follow the general guideline principles, as required by New Rule I(3)(d) (24.29.1591), for injuries to the thoracic region, and are to request prior authorization when it would normally be required under ARM 24.29.1517. Providers do not have to obtain prior authorization for all treatment, but rather, would obtain prior authorization as they do now.

Comment 2: One commenter asked if treatment performed between July 1st and July 14th would be compensable if prior authorization was not obtained before the rules go into effect on July 1. The commenter was concerned that providers could be blind-sided if they provide treatment during that time period, but didn't obtain prior authorization ahead of time.

Response 2: The rules cannot govern any issue that occurs before the effective date of the rules. If a provider wishes to provide treatment between July 1st and July 14th that would require prior authorization under the currently existing rules, the provider should obtain that prior authorization before the new rules go into effect. If the treatment would require prior authorization under the new rules, the provider may wish to delay treatment during that time period in order to obtain prior authorization.

The department believes it is important to note that there are cases that will be in the middle of treatment when the new rules go into effect. An insurer must use its discretion carefully in any case in which it has been approving treatment as reasonable that would not be allowed without prior authorization under the new rules. Insurers have the ability to allow a course of treatment to continue that was begun before the rules went into place.

Comment 3: One commenter noted there is an incorrect reference in the notice that states "ODG" stands for "Occupational Disability Guidelines," when in fact, "ODG" stands for "Official Disability Guidelines."

Response 3: The department acknowledges that the comment is correct and that the department misidentified the correct name of the ODG in the general statement of reasonable necessity. The department notes that its inadvertent misnomer does not affect the department's reasoning or rationale for its decision to not adopt ODG as part of the Montana Guidelines.

Comment 4: One commenter noted that the ODG guidelines scored higher on technical criteria than the other guidelines considered by the department, including the Colorado guidelines chosen by the department.

Response 4: The department developed an evaluation plan that requested a Montana medical provider group (MPG) to review several national guidelines and rate the guidelines for technical quality and clinical validity of the content. The MPG rated ODG slightly higher than the Colorado guidelines for technical quality but rated ODG slightly lower than the Colorado guidelines for clinical validity of the content. The Colorado guidelines scored higher in six of seven clinical scenarios reviewed by the MPG group. The MPG voted unanimously to recommend the Colorado guidelines as the primary guidelines to be established by the department. In addition to the MPG recommendation, the department also considered the availability, costs, and acceptability of a guideline to the Montana stakeholders and

determined that the Colorado guidelines supplemented by the ACOEM guidelines was the most appropriate guidelines used to establish the Montana Guidelines.

Comment 5: One commenter requested that employers and insurers be allowed to cite to other guidelines in order to rebut the Montana guidelines, similar to the way injured workers, or someone on their behalf, may rebut the guidelines under New Rule II (24.29.1593), Prior Authorization.

Response 5: If a self-insured employer or insurer wishes to rebut the guidelines in order to allow an injured worker to obtain prior authorization for treatment outside the guidelines, they may do so under the rules as written. However, in contrast, if an insurer could rebut the guidelines in order to deny a treatment for which prior authorization is not needed, such a rule would defeat the point of choosing and establishing the Montana Guidelines as the standard for compensable treatment.

Under HB 334, the department is required to undertake an annual review of the guidelines with the assistance of providers. The department believes this is the proper mechanism and forum in which to consider changing or removing treatments from the guidelines as "recommended" and thereby narrowing the possible treatments that are presumed compensable.

To the extent that the commenter suggests that employers should have the independent right to rebut the guidelines, the department notes that in Montana employers (other than self-insured employers) do not have a direct role in claims handling decisions. Indeed, Montana law requires an insurer to exercise independent judgment when making claims handling decisions. With that said, however, the department recognizes that an employer and insurer should, and often do, have a common interest with an injured worker in seeing that there is a prompt return to work following an injury. Recent legislation emphasizes the need for appropriate communications among and between employers, workers, insurers, and medical providers regarding stay-at-work and return-to-work. The department concludes that under Montana law, an employer cannot be directly allowed to enter into disputes regarding the appropriateness of medical treatment provided to an injured worker.

Comment 6: Two commenters requested that the department add to the rules by providing a mechanism for giving injured workers advance notice so that they could choose to pay for treatment themselves if the treatment would not be covered under the utilization and treatment guidelines.

Response 6: A new rule like the one suggested is not possible to adopt in this notice because it would require notice to the public under another rule notice. In addition, nothing in these rules prevents an injured worker for paying for treatment themselves if they wish. Finally, such a rule would need to coordinate with the statutory provision that prevents an injured worker from having to pay for any provider charged amounts above those allowed by the fee schedule rules. The

department will consider the suggestion when contemplating future changes to these rules.

Comment 7: A few commenters requested that New Rule II (24.29.1593), Prior Authorization, no longer set out procedures for verbal requests or verbal authorizations.

Response 7: The department agrees and has deleted the provisions regarding verbal requests for prior authorization and verbal authorizations. The department does not wish to discourage verbal communications with providers. Such communications can continue. Both under the originally proposed rule and the rule as adopted below, someone has to document a verbal request and a verbal authorization. If a provider does not document a verbal request, it is assumed not to have been made. If an insurer does not document a verbal authorization, the request is presumed to have been approved because it was never denied in writing during the time period provided for in the rule. The department has amended the rule as provided below.

Comment 8: One commenter, representing a specialty practice area, requested that the department adopt Colorado's rule that the independent medical review be conducted by a provider in "the same or similar specialty as would typically manage the medical condition" under review. Two commenters, also representing two specialty practice areas, requested that under the independent medical review process in New Rule III (24.29.1595), the language be changed from "may" to "should" so that the medical director would be required to consult with another chiropractor if a chiropractor was the designated treating physician in a case, or other applicable specialty practitioner.

Response 8: HB 334 requires the department to hire a medical director. If the medical director recuses himself or herself, does not feel qualified to review a case, or is otherwise unavailable, the department has the ability to designate a different person on a given case. The language reads: "the medical director is the specific individual designated by the department to serve as the medical director with respect to a given set of disputed treatments or procedures." Because the Legislature specifically directed the department to hire a medical director for this process, the department believes the structure of this rule allows sufficient flexibility to address cases as needed.

In addition, the department does not believe it is necessary or proper at this time for the medical director to consult a specialist in every case. One of the main purposes of the independent medical review process is to determine if the treatment that was requested and denied falls within the general guideline principles. It is not always necessary to consult a specialist for this determination. The department also believes that in light of the short timelines for providing a response to a request for the independent medical review process, and the department's desire to provide as prompt a review as is feasible, New Rule III (24.29.1595) should continue to allow the medical director the discretion of whether or not to consult with a chiropractor or

other specialist. The department also notes that the suggested change from "may" to "should" would not impose a requirement for the medical director to make such a consultation, in that "should" is merely a term of advice, rather than a term of mandate like "shall." The department concludes that its medical director will have the discretion to exercise appropriate judgment in deciding which cases it is appropriate to consult with a consulting specialist, rather than requiring that such a consultation be made in every situation.

Comment 9: One commenter notes that the guidelines are designed such that certain requirements need to be met prior to initiating additional treatment. The commenter requested the department clarify that a provider may not automatically use any treatment that is designated as recommended in the guidelines. The commenter wants to make clear that when less complex or less expensive alternatives that are also recommended in the guidelines have not been used, a provider must follow those alternatives first. The commenter wanted the language to indicate that the guidelines are to be followed in a step by step manner. The commenter requested that New Rule I (24.29.1591) be changed by adding in (3)(a), "and treatment is provided in accordance with the guidelines," adding a new (b)(i) which would read "not in accordance with the guidelines;" and in New Rule II(1) (24.29.1593), adding a new (a) that would read, "are not in accordance with the guidelines;".

Response 9: The department agrees that the guidelines are to be administered in a progressive manner and that the guidelines are designed such that certain requirements need to be met prior to initiating additional treatment. Less invasive, simpler, and less costly treatments are to be followed before more complex and expensive alternatives. The guidelines are all written in this progressive step-by-step manner. Further, the general guideline principles also indicate that this is the very nature of the guidelines. A provider is not to proceed to more complex treatments unless the clinical indications are present. And nothing in the guidelines requires that all treatments recommended be provided.

The department agrees with some of the suggested language and disagrees with some. The department has amended the rule as provided below.

Comment 10: One commenter stated that it interprets the language of 39-71-704(3)(c), MCA, to require the independent medical review process to be used, prior to mediation, once New Rule III (24.29.1595) is in place.

Response 10: The department agrees with this interpretation to the extent the independent medical review process is requested prior to mediation. However, to the extent that the commenter suggests that the independent medical review process is a prerequisite to requesting mediation concerning a medical treatment dispute, the department disagrees that the statute imposes such a requirement. The department has amended the rule to clarify its interaction with mediation.

Comment 11: One commenter requested that the last sentence of New Rule III(3) (24.29.1595) be deleted. The commenter believes there could be unintended access issues to medical providers if a provider with whom the medical director consults is not allowed to testify in later litigation.

Response 11: The department believes it would not be proper for a consulting physician in a mediation type process to be required to testify in a later court proceeding. The department believes the proper mechanism to prevent access issues is for the medical director to use care in selecting individuals for consultation, such that there continues to be access to qualified providers if a case proceeds to litigation. The department is concerned that making an independent consultant subject to being compelled to give testimony would limit the willingness of providers to consult with the department's medical director. The department notes that nothing in the rule prevents the provider from later providing services to the injured worker, and that the rule would not prevent the provider from giving testimony related to that care. The department concludes that it should not delete the last sentence of New Rule III(3) (24.29.1595).

Comment 12: One commenter felt there was a conflict in the definition of medical director that could be construed to mean the medical director could only review issues of prior authorization regarding treatments not recommended in the guidelines and could not review, for example, issues regarding body parts not covered by a guideline.

Response 12: The department agrees with the suggested language and has amended the rule as provided below.

Comment 13: The Montana Optometric Association requested that optometrists be added in the eye guideline chapter to ophthalmologists, as professionals that general practitioners can refer patients to for treatment. The association points out optometrists are readily accessible to injured workers in Montana and it is well within the education and practice of scope of optometrists to diagnose, treat, and manage eye injuries.

Response 13: The department agrees that optometrists should be allowed to provide treatment for an injury to the eye that needs more care than can be provided by the primary care physician (provided that the care falls within the allowed scope of practice of the optometrist). The department has added optometrists as a professional that general practitioners can refer patients to for eye issues related to a workers' compensation matter. These changes are in the final guidelines that are available on June 23 and applicable to treatment provided on or after July 1, 2011. In addition, the department has amended the text of the eye chapter of the guidelines, section C.1, General Approach and Basic Principles of Eye Injury by adding the following text: "Whenever this chapter suggests referral to an ophthalmologists, the primary care physician may refer the patient to an optometrist for care, if in the clinical judgment of the primary care physician, the injury can be treated by an optometrist. A primary care physician may also refer the patient to an

optometrist to determine whether appropriate treatment can be rendered by an optometrist."

Comment 14: One commenter asked the following question: If a CPT code search in the U & T guideline's web tool does not return a result, does that mean pre-authorization is required for that treatment?

Response 14: Pre-authorization is not necessarily required when a CPT numeric code search in the web tool does not return a result. The department included some numeric CPT codes and ICD-9 codes as a customer courtesy in the web tool; however, the web tool does not include every possible CPT code or ICD-9 code that may be recommended in the content of the guidelines. If a search by CPT or ICD-9 code reveals no results, the department strongly suggests that users search by the text description to determine if the procedure: (a) is recommended or not recommended; or (b) prior authorization is required because the procedure is either not addressed in the guidelines or the guidelines require prior authorization for the specific procedure.

Comment 15: One commenter suggested that the language in proposed New Rule V(4) (24.29.1596), which refers to the meaning of the term injuries as including occupational diseases for "this rule", should be amended to clarify that the meaning applies to all of ARM Title 24, chapter 29, subchapters 14 and 15.

Response 15: The department agrees with the comment and has amended the rule as suggested and as set out below.

Comment 16: One commenter suggested that the department consider including a recommendation for referral of low back pain patients (and patients with other types of injury) found to have a history of depression, anxiety, and/or other psychiatric disturbance at the time of the initial history and physical examination for psychological screening and/or examination as a part of the initial evaluation process, as is currently recommended in the low back pain guidelines in the presence of three or more Waddell signs, rather than waiting for 6 to 12 weeks to initiate an interdisciplinary approach to evaluation and treatment.

Response 16: One purpose of waiting on an immediate psychological evaluation, unless there are certain indications, is to allow time to determine if there are any psychological conditions impeding the healing progress of the injury or occupational disease. Immediate referral in all cases described in the comment would imply that the workers' compensation insurer must be responsible for treatment of all psychopathology in injured workers. The department does not believe the suggested change is necessary at this time. The department believes it is more appropriate to consider this request as part of the annual review process after the rules have been in place.

Comment 17: Numerous commenters indicated their support for the utilization and treatment guidelines.

Response 17: The department acknowledges these comments.

Comment 18: One commenter suggested that the language of New Rule II(6) (24.29.1593) be changed to be consistent with the language of 24.29.1593(4) regarding the information used to rebut the Montana Guidelines. The commenter suggested an insurer be required to explain why a justification from a provider is not sufficient, rather than explain the reason for a denial.

Response 18: The department agrees with making the language internally consistent and has amended the rule as indicated below.

Comment 19: One commenter requested that New Rule II(4)(f) (24.29.1593) be deleted in its entirety. The commenter believes that allowing other guidelines to be used to rebut the Montana Guidelines will defeat the purpose of the guidelines, will be a justification to treat outside the guidelines, and defeats what the Medical Provider Group recommended and the declared basis for the recommendation – standardized best practices evidence-based medical treatment of injured workers. The commenter believes the preceding subsections (a)-(e) in the rule provide sufficient basis for deviation in those instances where other treatment options should be considered.

Response 19: The department disagrees that the use of other guidelines defeats the purpose of standardizing best practices evidence-based medical treatment of injured workers. The proposed rule only allows use of other guidelines if the Montana Guidelines don't recommend the treatment, the treatment is not addressed, or the guidelines require prior authorization. If a medical provider or an injured worker wishes to obtain prior authorization for a treatment not recommended by, required by, or outside the guidelines, the use of other guidelines as documentation to support authorization is reasonable. The use of additional guidelines alone will not be sufficient to rebut the guidelines. The foundation of evidence-based guidelines is to look to the evidence supporting a treatment. To the extent that someone submits another guideline to rebut the Montana Guideline, that rebuttal will only be as effective as the soundness of the evidence gained for that guideline through the scientific method, as indicated by the definition of "evidence-based " in ARM 24.29.1401A.

Comment 20: One commenter requested that the department adopt a process for reviewing and updating the Montana Guidelines that includes input and involvement from Montana physicians. The commenter requested that the process be open, transparent, and provide for input specifically from physicians in appropriate specialties.

Response 20: The department agrees. Under HB334, the department is required to undertake an annual review of the guidelines with the assistance of providers. The department believes this is the process the department will use to update and renew the Montana Guidelines. If the department determines changes are needed to the

guidelines as a result of this process, the department will undertake a formal rules promulgation process with public comment as required by the Montana Administrative Procedure Act.

Comment 21: One commenter noted that the list of information allowed to rebut the guidelines in New Rule II(4) (24.29.1593) doesn't expressly allow a treating physician to present information regarding their personal clinical experience with other similar patients who have benefited from the proposed treatment or procedure. The commenter believes information of this nature should be accepted and given equal consideration with the remaining information categories. This commenter also stated that the definition of "evidence-based" in ARM 24.29.1401A is inconsistent with what the Medical Provider Group members expressed regarding their desire to consider their own practice experience in developing treatment plans for Montana's injured workers. The commenter recommended different language be used to define "evidence-based".

Response 21: The department believes that to the extent a provider wants to present information on their personal clinical experience, that information must be submitted in the context of the categories listed in the rule. Because the guidelines are intended to be evidence-based as that term is defined by rule, the department believes that allowing the treating physician to present only their personal clinical experience would defeat the purpose of the guidelines. Rather, the approach of evidence-based guidelines is the integration of individual clinical expertise with the best available external clinical evidence from systematic research. However, there is nothing in the rule that prevents a provider from indicating that their personal clinical experience supports the information being submitted to rebut the guidelines. While the Medical Provider Group discussed providers submitting personal clinical experience, the group clearly supported the goal of adopting evidence-based utilization and treatment guidelines.

4. The department has adopted the following rule as proposed: New Rule IV (ARM 24.29.1599).

5. The department has amended the following rules as proposed: ARM 24.29.1402, 24.29.1406, 24.29.1407, 24.29.1501, 24.29.1517, 24.29.1519, 24.29.1526, 24.29.1574, 24.29.1575, 24.29.1585, 24.29.1586, 24.29.2002, and 24.29.2003.

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

NEW RULE I (24.29.1591) UTILIZATION AND TREATMENT GUIDELINES

(1) and (2) remain as proposed.

(3) When providing treatment for primary and secondary medical services to an injured worker, all health care providers shall use the Montana Guidelines adopted by reference in (1).

(a) In cases where treatment(s) or procedure(s) are recommended by the Montana Guidelines, and treatment is provided in accordance with the guidelines, prior authorization is unnecessary unless the Montana Guidelines specify otherwise.

(b) through (5) remain as proposed.

AUTH: 39-71-203, 39-71-704, MCA

IMP: 39-71-704, MCA

NEW RULE II (24.29.1593) PRIOR AUTHORIZATION (1) through (4) remain as proposed.

(5) All prior authorization requests, whether in written, ~~telephone,~~ e-mail, or facsimile (fax) form, must be made at least 14 days prior to the date the service is scheduled to be performed. ~~If the prior authorization request was made by telephone, the burden of proof for showing that the request was made rests with the interested party who made the request.~~

(a) Authorization is presumed to be given by the insurer if there is no written denial sent by the insurer to the interested party within 14 days of ~~either the date the verbal prior authorization request was made or the date the written prior authorization request was mailed~~ made.

(b) An insurer may notify the interested party of authorization by written confirmation, ~~telephone,~~ e-mail, or facsimile (fax). ~~If an insurer provides authorization by telephone, the burden of proof for showing that authorization was granted rests with the interested party. The interested party shall promptly send the insurer written confirmation of any verbal authorization made by the insurer. Such written confirmation shall refer to the name of the claimant, the claim number, the treatment(s) or procedure(s) authorized, and the name of the person giving the authorization and the date the authorization was given.~~

(c) Nothing in this rule precludes verbal communication. However, all deadlines in this rule must be satisfied in written form.

(6) If the insurer denies the prior authorization request, the denial must be in writing and must contain an explanation of ~~the reason(s) for the denial~~ why the justification is not sufficient.

(a) through (8) remain as proposed.

AUTH: 39-71-203, 39-71-704, MCA

IMP: 39-71-704, MCA

NEW RULE III (24.29.1595) INDEPENDENT MEDICAL REVIEW PROCESS

(1) An interested party who has requested and been denied authorization by the insurer for treatment, or an insurer, may request an independent medical review by the medical director designated by the department prior to mediation under 39-71-2401, MCA. ~~A request for medical review is not mandatory in order to proceed to mediation.~~ If the independent medical review process is requested prior to mediation, the mediation process shall not proceed until completion of the independent medical review process.

(2) through (8) remain as proposed.

AUTH: 39-71-203, 39-71-704, MCA
IMP: 39-71-224, 39-71-704, 39-71-2401, MCA

NEW RULE V (24.29.1596) APPLICABILITY OF UTILIZATION AND TREATMENT RULES (1) through (3) remain as proposed.

(4) As used in ~~this rule~~ ARM Title 24, chapter 29, subchapters 14 and 15, the term "injuries" includes occupational diseases which were diagnosed as an occupational disease, or should have been diagnosed as an occupational disease, during the time period specified.

AUTH: 39-71-203, 29-71-704, MCA
IMP: 39-71-704, MCA

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

24.29.1401A DEFINITIONS As used in subchapters 14 and 15, the following definitions apply:

(1) through (21) remain as proposed.

(22) "Medical director" means a person who is an employee of, or contractor to, the department, and who is responsible for the independent medical review of requests for treatment(s) or procedure(s) ~~that are not specifically addressed or recommended by the Montana Guidelines~~, when those requests are denied, and whose responsibility will also include other areas to be determined by the department. A person serving as a medical director must be a physician licensed by the state of Montana under Title 37, chapter 3, MCA.

(23) through (41) remain as proposed.

AUTH: 39-71-203, MCA
IMP: 39-71-116, 39-71-704, MCA

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

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

Certified to the Secretary of State June 13, 2011

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

In the matter of the amendment of	)	NOTICE OF AMENDMENT AND
ARM 24.174.303 definitions,	)	REPEAL
24.174.501 examination for licensure,)	
24.174.503 administration of)	
vaccines, 24.174.510 prescription)	
requirements, 24.174.602 internship)	
requirements, 24.174.604 preceptor)	
requirements, 24.174.2104 and)	
24.174.2106 registered pharmacist)	
continuing education, and the repeal)	
of ARM 24.174.1010 disciplinary)	
action)	

TO: All Concerned Persons

1. On March 10, 2011, the Board of Pharmacy (board) published MAR notice no. 24-174-61 regarding the public hearing on the proposed amendment and repeal of the above-stated rules, at page 277 of the 2011 Montana Administrative Register, issue no. 5.

2. On April 4, 2011, a public hearing was held on the proposed amendment and repeal of the above-stated rules in Helena. Several comments were received by the April 12, 2011, deadline.

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

COMMENT 1: One commenter suggested changing the reference in ARM 24.174.503(1) from "chief medical officer" to "state medical officer" to reflect the correct position title.

RESPONSE 1: The board agrees with the comment and is amending the rule accordingly.

Comments 2 through 6 address ARM 24.174.510 Prescription Requirements:

COMMENT 2: Three commenters expressed concern that the proposed added language in ARM 24.174.510(1)(e)(i) will mandate that pharmacists dispense a 60-day quantity. The commenters objected to this, arguing that a 60-day supply does not promote patient care and may exceed the quantity for which third-party payors will pay. Two commenters opined that this requirement may conflict with pending federal regulations that may require a seven-day fill in long-term care facilities.

RESPONSE 2: The board considered the special cases of institutional pharmacies and agrees that the proposed language may be unclear. The board is therefore deleting (1)(e)(i) from this rule.

COMMENT 3: One commenter suggested improving ARM 24.174.510(1)(h)(ii)(C), regarding tampering protections for controlled substances in Schedule II, by requiring that the prescription contain the statement, "valid for six months from the date of issue," to align with federal law and common practice.

RESPONSE 3: The board notes that federal law currently provides that prescriptions expire in one year and believes that pharmacists should be allowed to exercise their professional judgment on this issue. The board is amending this subsection exactly as proposed.

COMMENT 4: One commenter suggested that the board could improve ARM 24.174.510(1)(i), pertaining to the number of refills authorized, by amending it to "number of refills authorized, if applicable."

RESPONSE 4: The board considered this comment, but is amending this subsection exactly as proposed.

COMMENT 5: One commenter suggested the board improve ARM 24.174.510(1)(k), regarding the "prescriber's employee or agent" by requiring the disclosure of the name of the prescriber's agent, if applicable.

RESPONSE 5: After considering this comment and other implications of the proposed amendment, the board is deleting proposed (1)(k) from this rule.

COMMENT 6: One commenter said that not a single U.S. board of pharmacy has addressed the special circumstances of long-term care pharmacies. The commenter's employer has tried to operate under the retail pharmacy rules, but those prescription requirements are not always compatible and can result in apparent deficiencies during audits and payors' refusal to pay for prescriptions. The commenter submitted the National Association of Boards of Pharmacy/American Society of Consultant Pharmacists Joint Report: Model Rules for Long-Term Care Pharmacy Practice, and suggested the board consider these model rules to clarify issues particular to long-term care pharmacies and institutional pharmacies.

RESPONSE 6: The board notes that this comment is outside the scope of this rulemaking notice, but that it brings to the board's attention a perceived gap in rules related to long-term care pharmacies. The board will discuss this matter at a future board meeting.

COMMENT 7: One commenter questioned the proposed new ARM 24.174.604(6), which reads, "no more than one intern at a time." Rather than allowing a preceptor to serve more than one intern at a time, the new language prohibits this. The commenter suggested deleting the "no" to conform with the board's intended goal.

RESPONSE 7: The board agrees that using "no" was a clerical error that should be deleted to further the board's intent. The board is amending the rule accordingly.

4. The board has amended ARM 24.174.303, 24.174.501, 24.174.602, 24.174.2104, and 24.174.2106 exactly as proposed.

5. The board has amended ARM 24.174.503, 24.174.510, and 24.174.604 with the following changes, stricken matter interlined, new matter underlined:

24.174.503 ADMINISTRATION OF VACCINES BY PHARMACISTS (1) In order to administer or prescribe vaccinations, a pharmacist must have a collaborative practice agreement with a practitioner authorized to prescribe drugs, or in the case of a public health emergency, a directive from the ~~chief~~ state medical officer of the Montana Department of Public Health and Human Services.

(2) through (10) remain as proposed.

24.174.510 PRESCRIPTION REQUIREMENTS (1) through (1)(e) remain as proposed.

~~(i) the quantity for residents of long-term care facilities must be for 60 days, unless otherwise limited by the prescriber.~~

(f) through (j)(iii) remain as proposed.

~~(k) prescriber's employee or agent;~~

~~(l) (2) prescription~~ Prescription or refill authorization issued by a prescriber may be communicated to a pharmacist or a pharmacist intern by an employee or agent of the prescriber.

(2) remains as proposed but is renumbered (3).

24.174.604 PRECEPTOR REQUIREMENTS (1) through (5) remain as proposed.

(6) A preceptor may ~~serve as a preceptor~~ precept for ~~no~~ more than one intern at a time.

6. The board has repealed ARM 24.174.1010 exactly as proposed.

BOARD OF PHARMACY
LEE ANN BRADLEY, RPH, 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 June 13, 2011

BEFORE THE BOARD OF VETERINARY MEDICINE
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT
ARM 24.225.401 fees, 24.225.503)
examination application)
requirements, 24.225.504)
examination for licensure, 24.225.907)
board-approved training program)
criteria, 24.225.910 certified)
euthanasia technician test criteria,)
and 24.225.921 certified euthanasia)
agency inspection criteria)

TO: All Concerned Persons

1. On March 24, 2011, the Board of Veterinary Medicine (board) published MAR notice no. 24-225-35 regarding the public hearing on the proposed amendment of the above-stated rules, at page 371 of the 2011 Montana Administrative Register, issue no. 6.

2. On April 18, 2011, a public hearing was held on the proposed amendment of the above-stated rules in Helena. Several comments were received by the April 26, 2011, deadline.

3. The board has thoroughly considered the comments received. A summary of the comments received and the board's response is as follows:

COMMENT 1: Four individuals commented regarding ARM 24.225.401, amending the fee schedule. All four opined that the proposed near doubling of the license renewal fees is significant and burdensome to veterinarians in the current economic climate. Regarding the board's stated reasons for the fee increases, three commenters stated that the computer upgrade needed to be better explained and suggested that lower-cost alternatives had not been explored. One commenter suggested that the increased fees might cause older veterinarians to drop their licenses and lose corresponding revenue, and that younger veterinarians may increase their debt load. One commenter proposed an incremental fee increase over the coming years.

Response 1: The board appreciates all comments made during the rulemaking process. However, the board does not agree that the increases are unreasonable at this time and notes that the board must be fiscally self-sufficient and set fees commensurate with the program costs.

The board licenses veterinarians, embryo transfer technicians, euthanasia agencies, and euthanasia technicians; tests applicants; adjudicates complaints; administers continuing education requirements; and updates statutes and rules that

regulate its licensees. The board must pay for legal counsel, computer support, compliance and administrative staff support, division administrative personnel, etc. By law, the board can retain in cash no more than two times its budget authority. Any revenue in excess of that amount would be rebated to licensees if these fee increases created an unexpected excess reserve. Expenses have exceeded the board's revenue for several years, thus the increase in fees can be delayed no longer. The board is projected to have a negative cash balance in FY12 without the proposed fee increases.

The scanning and electronic storage of all records and the new division computer licensing database are decisions made by the Business Standards Division of the Department of Labor and Industry and affects all boards. The decision to purchase a new computer database that includes all 34 boards and licensing programs has been exhaustively researched and in process for several years. The current licensing database is obsolete and no longer technically supported.

4. The board has amended ARM 24.225.401, 24.225.503, 24.225.504, 24.225.907, 24.225.910, and 24.225.921 exactly as proposed.

BOARD OF VETERINARY MEDICINE
ROBERT SAGER, DVM, 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 June 13, 2011

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

In the matter of the amendment of) NOTICE OF DECISION ON
ARM 37.104.101 and 37.104.212) PROPOSED RULE ACTION
pertaining to emergency medical)
services (EMS))

TO: All Concerned Persons

1. On December 23, 2010, the Department of Public Health and Human Services published MAR Notice No. 37-530, pertaining to the public hearing on the proposed amendment of the above-stated rules at page 2915 of the 2010 Montana Administrative Register, Issue Number 24.

2. A public hearing on the notice of proposed amendment of the above-stated rules was held on January 12, 2011.

3. Comments to the public hearing were received from nine individuals and a private ambulance operator's group. While most comments and concerns would not significantly change the content of the proposed rules, it was evident that there was noteworthy confusion on the department's intent of these rules and further education is needed before implementing these changes. The department plans to contact each of these commenters in order to assure that concerns are resolved and to provide another series of education materials and a WebEx session to all EMS services about the proposed rules. Pursuant to these activities, the department will again publish proposed rules for public hearing.

/s/ Shannon McDonald
Rule Reviewer

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

Certified to the Secretary of State June 13, 2011

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

In the matter of the adoption of New) NOTICE OF ADOPTION,
Rule I, amendment of 37.87.903,) AMENDMENT, AND REPEAL
37.87.1201, 37.87.1202, 37.87.1206,)
37.87.1217, 37.87.1222, and)
37.87.1223, and repeal of 37.88.910)
pertaining to psychiatric residential)
treatment facility reimbursement)

TO: All Concerned Persons

1. On March 10, 2011, the Department of Public Health and Human Services published MAR Notice No. 37-533 pertaining to the public hearing on the proposed adoption, amendment, and repeal of the above-stated rules at page 293 of the 2011 Montana Administrative Register, Issue Number 5.

2. The department has adopted New Rule I (37.87.1210) as proposed.

3. The department has amended ARM 37.87.903, 37.87.1201, 37.87.1202, 37.87.1206, 37.87.1217, 37.87.1222, and 37.87.1223, and repealed 37.88.910 as proposed.

4. 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 commenter proposed adjusting retrospectively the psychiatric residential treatment facility (PRTF) statewide bundled per diem interim rate as well as the PRTF ancillary rate in ARM 37.87.1222(5). Commenter proposed adjusting the PRTF interim per diem rate because the department's rules requiring "...active treatment designed to achieve the youth's discharge to a less restrictive level of care at the earliest possible time" has significantly reduced the PRTF average length of stay. The highest level of treatment intensity is in the first couple of months following a youth's admission to a PRTF. Under previous regulations, longer average lengths of stay allowed the PRTF the opportunity to recapture some of the costs incurred within the first months of treatment. Therefore, a cost settlement reimbursement system that includes the PRTF rate along with the ancillary rate would more fairly reimburse a PRTF for the costs incurred to treat a youth while in their facility.

RESPONSE #1: The department believes the commenter is confusing the terms and using the interim rate definition in ARM 37.87.1222(1) with the psychiatric service rate in ARM 37.87.1222(1)(a) because they proposed to add "psychiatric residential treatment facility" costs in ARM 37.87.1222(5)(a) and (b). The interim rate in ARM 37.87.1222(1) is composed of the psychiatric service rate in (1)(a), an

applicable direct care wage add-on in (1)(b) and a facility specific ancillary add-on rate in (1)(c).

The department disagrees with the proposal to cost settle all PRTF costs or the psychiatric service rate costs in ARM 37.87.1222(1)(a) and notes it did not propose changes to ARM 37.87.1222(5), other than to renumber the rule. Only the PRTF ancillary expenses in ARM 37.87.1222(1)(c) are cost settled, not the psychiatric service rate. The proposed change to ARM 37.87.1222(5) is outside the scope of the proposed rule change.

COMMENT #2: One commenter proposed limiting reimbursement for ancillary services in ARM 37.87.1222(7), provided by an enrolled Medicaid provider to the department's published Medicaid fee schedule rate instead of reimbursing the provider's usual and customary charges. Without requiring outside providers to accept the Medicaid rate, the cost of ancillary services will increase for the department. The current language allows outside providers to demand their ancillary services to be reimbursed at their usual and customary charge, when they would be reimbursed the Medicaid rate for the same service if the youth were not in a PRTF.

The current language encourages outside providers to self-regulate and accept the Medicaid rate, but this could become an opportunity for the outside providers to maximize their reimbursement while providing services to Medicaid patients in a PRTF.

The commenter believes the changes are necessary to improve the ancillary service reimbursement process for PRTFs and to avoid a negative impact to the Medicaid mental health program budget by increasing ancillary service costs.

RESPONSE #2: The department appreciates the commenter's recommendation, but disagrees. Limiting reimbursement for ancillary services provided outside the PRTF by Medicaid providers to the current Medicaid fee schedule rate may limit ancillary services for youth in a PRTF. It is not the department's intent to limit ancillary services to youth in a PRTF. The department does not have the staff or resources to manually price ancillary service claims, and assumes the same applies for the ancillary service providers and PRTFs. In addition, the department cannot require ancillary service providers who are not enrolled in the Montana Medicaid program to enroll in the program and accept the Medicaid reimbursement rate.

COMMENT #3: One commenter recommended Medicaid and third party liability (TPL) requirements apply to PRTF and ancillary services reimbursed by the Medicaid program in ARM 37.87.1222(8). The proposed changes would address a number of issues and assist both the department and PRTFs in processing and reimbursing ancillary services provided to youth in a PRTF.

The commenter recommended all ancillary services provided to youth in a PRTF be billed to Medicaid, including services provided in and by or outside the PRTF, for

both in- and out-of-state PRTFs. Commenter believes this would assist the department in estimating the cost of ancillary services prior to receiving the cost reports. Commenter recommended ancillary service providers bill the PRTFs using either a CMS 1500 or UB claim form. Copies of the explanation of benefits, denials, etc., are needed by the PRTF to determine whether or not the service would be covered by Medicaid and if any insurance payments were made. Use of these claim forms would also provide the department with the information they need for the cost report.

Commenter believes timely filing language is also needed in the rule for billing the PRTF for ancillary services. PRTFs have received reimbursement requests for ancillary services after the Medicaid timely filing requirements have lapsed. If this occurs, the department may not consider the claim in the cost settlement process. The ancillary service provider should also be required to collect the client's copayment for the service.

RESPONSE #3: The department disagrees with the commenter's recommendations for ARM 37.87.1222(7).

The department will not require in-state ancillary service providers, outside the PRTF, to bill Medicaid for ancillary services provided to a youth in a PRTF before billing the PRTF. The department is not party to the arrangement between the PRTF and the ancillary service provider and cannot stipulate in the PRTF rules what the billing relationships will be. If the PRTF has a question about whether or not the service is a covered ancillary service, they may consult with the department. Montana Medicaid does not require a copayment for individuals under 21 years of age.

COMMENT #4: One commenter asked if the ancillary services in ARM 37.87.1222(8) including ancillary services provided outside the PRTF by outside providers, are exempt from prior authorization requirements when provided to youth in a PRTF.

RESPONSE #4: Yes, ancillary service in ARM 37.87.1222(8) means ancillary services provided in and by the PRTF as well as those provided outside the PRTF by outside providers. Medicaid prior authorization requirements do not apply to ancillary services when provided to youth in a PRTF.

COMMENT #5: One commenter proposed the effective date of the proposed PRTF reimbursement changes in ARM 37.87.1223(1) be July 1, 2011 instead of September 1, 2010. The proposed retroactive date of September 1, 2010, if implemented, would increase costs for both the department and the PRTFs. The splitting of the department's fiscal reporting period requires PRTFs to file separate cost reports for each regulation period set within the department's fiscal period. The time and energy put into the preparation by the PRTFs and the review by the department outweigh any benefit. PRTFs have been required to operate under the existing rules for at least nine months following the proposed retroactive date.

RESPONSE #5: The department disagrees with the commenter's proposed change to the PRTF reimbursement effective date. The department received approval from the Centers for Medicare and Medicaid to use federal financial participation instead of state general funds to reimburse ancillary services effective September 1, 2010. The estimated annual impact of the retroactive effective date to September 1, is approximately \$881,189 in saved state general funds.

COMMENT #6: One commenter proposed changing the out-of-state PRTF reimbursement rate in ARM 37.87.1223(4) from 50% of their usual and customary charges to the in-state PRTF reimbursement rate, whichever is less, their usual and customary charges or the department's fee schedule rate. Commenter also proposed out-of-state PRTFs receive a facility-specific ancillary rate, and that the ancillary costs are retrospectively cost settled like they are for in-state PRTFs. These changes are proposed to provide consistency in reimbursement for PRTF services whether or not they are provided by an in-state or out-of-state provider. The practice of reimbursing out-of-state providers at the same rate as in-state providers is commonly practiced by other state Medicaid programs.

RESPONSE #6: The department disagrees and will not be changing the language in ARM 37.87.1223(4). The three in-state PRTFs have the first opportunity to treat youth needing PRTF services. In-state PRTF denials are required prior to a youth being admitted to an out-of-state PRTF. Some of the most difficult-to-serve youth are served in out-of-state PRTFs. Out-of-state PRTF placements for treatment are used as a last resort when in-state PRTFs have determined that they cannot meet the youth's treatment needs. The department does not have the staff or resources to complete out-of-state PRTF cost reports.

/s/ John Koch
Rule Reviewer

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

Certified to the Secretary of State June 13, 2011

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

In the matter of the adoption of New) NOTICE OF ADOPTION AND
Rules I and II, and the repeal of ARM) REPEAL
37.34.206, 37.34.215, 37.34.216, and)
37.34.221 pertaining to)
developmental disabilities eligibility)
rules for Medicaid only)

TO: All Concerned Persons

1. On March 10, 2011, the Department of Public Health and Human Services published MAR Notice No. 37-534 pertaining to the public hearing on the proposed adoption and repeal of the above-stated rules at page 312 of the 2011 Montana Administrative Register, Issue Number 5.

2. The department has repealed ARM 37.34.206, 37.34.215, 37.34.216, and 37.34.221 as proposed.

3. The department has adopted 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.

NEW RULE I (37.34.225) DEVELOPMENTAL DISABILITIES COMMUNITY SERVICES ELIGIBILITY: TERMINATION OF ELIGIBILITY FOR A PROGRAM ~~(4)~~
~~Funding for all individuals receiving developmental disability community services as of February 28, 2011 funded by state general funds will terminate on July 1, 2011.~~

~~(a) Individuals who apply for and are determined eligible for the Medicaid program will convert to Medicaid funded services.~~

~~(2)~~ (1) The department may terminate a person's eligibility for a particular program of developmental disabilities services if the person, in accordance with this subchapter and the rules pertinent to eligibility for that program, does not meet the eligibility requirements for that program. The particular programs of developmental disability services are:

~~(a) 37.34.207 Eligibility: Federally Funded Part H Family Education and Support Services~~ the 0208 waiver program of Medicaid funded home and community services;

~~(b) 37.34.208 Eligibility: Federally Funded Intensive Family Education and Support Services~~ the 0371 community supports waiver program of Medicaid funded home and community services;

~~(c) 37.34.211 Eligibility: Children's Community Home Services;~~ the 0667 autism services program of Medicaid funded home and community services; and

~~(d) 37.34.212 Eligibility: Children's Summer Day Services;~~ the federally funded Part C early intervention services.

~~(e) 37.34.217 Eligibility: Federally Funded Intensive Adult Services; and~~

- ~~(f) 37.34.222 Eligibility: Federally Funded Senior Services.~~
~~(3) (2) The department may terminate a person's eligibility for a particular program of services for which the person no longer meets eligibility criteria if:~~
 ~~(a) through (e) remain as proposed.~~
 ~~(f) the person's failure to receive or participate in the program services poses imminent risk to the health and safety of the individual or another person a person poses imminent risk to the health and safety of the person or another person by not participating in the program services available to that person;~~
 ~~(g) through (i) remain as proposed.~~

AUTH: 53-6-402, 53-20-204, MCA

IMP: 53-6-402, 53-20-203, 53-20-205, 53-20-209, MCA

NEW RULE II (37.34.224) DEVELOPMENTAL DISABILITIES COMMUNITY SERVICES ADULT FINANCIAL ELIGIBILITY (1) On July 1, 2011, funding will terminate for all persons 19 years of age or older who were receiving developmental disability community services as of February 28, 2011 and funded by a combination of the state general fund and the federal Title XX Social Services Block Grant.

(a) Persons subject to this loss of state general fund and federal Title XX Social Services Block Grant funding may continue to receive developmental disabilities services if they apply for and are determined by the department to meet the following:

- (i) the financial and categorical eligibility for the Medicaid program; and
- (ii) the eligibility criteria for one of the Medicaid funded programs of home and community developmental disabilities services and are accepted into that program.

(b) For persons who have as of July 1, 2011 applied for Medicaid eligibility, but for whom Medicaid eligibility has yet to be determined, their services may be continued with Title XX Social Services Block Grant funding during the pendency of this eligibility application.

~~(4) (2) For individuals persons, 19 years of age or older, who as of February 28, 2011 receive were in receipt of developmental disability community services funded by a combination of the state general fund and the federal Title XX Social Services Block Grant and who are not Medicaid eligible ineligible for Medicaid funded services or who are ineligible for or not accepted into a Medicaid funded developmental disabilities home and community services program, the department may, in its discretion, on or after July 1, 2011, convert funding for such services from state general funding to proceed to fund developmental disabilities community services for the person with federal Title XX Social Services Block Grant funding if such funding is available.~~

~~(2) (3) The department may apply available federal Title XX Social Services Block Grant funding under this rule to maintain establish the eligibility of an individual and to prevent the termination of a person for developmental disabilities community services by using the method set forth in the documents dated and effective June 9, 2011 entitled "Application for Federal Title XX Social Services Block Grant Funding" and "Directions for Federal Title XX Social Services Block Grant Funding-". The department hereby adopts and incorporates those documents by reference. The~~

documents are available from the Developmental Disabilities Program, Department of Public Health and Human Services, P.O. Box 4210, Helena MT 59604, and at www.dphhs.mt.gov/dsd/ddp/forms.shtml.

~~(3)~~ (4) Individuals Persons, 19 years of age or older, for whom neither Medicaid funding nor federal Title XX Social Services Block Grant funding is available will ~~be terminated~~ no longer be eligible to receive services from the developmental disability services program.

AUTH: 56-6-402, 53-20-204, MCA

IMP: 53-2-206, 53-6-402, 53-20-203, 53-20-205, 53-20-209, MCA

4. 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: A comment was made that the meaning of New Rule I(3)(f) (37.34.225) is not clear and the subsection should be redrafted to specify that it applies when department programs fail to provide services.

RESPONSE #1: The department has modified New Rule I(3)(f) (37.34.225) to clarify its intended meaning that when otherwise Medicaid eligible persons pose imminent risk to the health and safety of themselves or others by not participating in program services offered to them, their eligibility for those programs may be terminated.

COMMENT #2: A comment was made requesting that the department use more simplified and transparent language to describe how the changes set forth in this rulemaking will affect consumers, and what they can do about it.

RESPONSE #2: The department believes the rulemaking clearly states the effect of New Rules I (37.35.225) and II (37.34.224) in light of the reduction of state general funds, and the actions consumers may pursue, either in applying for Medicaid or, if they are ineligible for Medicaid, in applying for federal Title XX Social Services Block Grant (hereafter "Title XX") funding. Notices sent to current participants, and to persons applying for Medicaid, have and will inform them of their legal rights to appeal through the department's fair hearing process.

COMMENT #3: A comment was received that, until now, even without the department being able to force family members to provide support, the cost to the department of meeting the needs of developmentally disabled adults has been discounted because: (1) some of those adults with resources and income have been able to live with, and with the support of, family members, and (2) because some family members or guardians have helped them obtain health care coverage. Under the new rules, the commenter states, clients who spend down to qualify for Medicaid will not have sufficient resources to reside independently or with family, and that the demand for residential services and health care costs under this rule will result in long-term increases in both state and federal Medicare and Medicaid costs.

RESPONSE #3: While the cost of residential services may increase, as the commenter suggests, the department believes these rules will be effective in reducing the department's state general fund liability while limiting as much as possible any reduction of services, either by Medicaid for those persons eligible, or through Title XX funding to the extent those funds are available.

COMMENT #4: A comment was received stating that under the proposed rule change, the value of support that developmentally disabled persons currently receive from their families will disqualify them from meeting Medicaid eligibility limits and lose the current state support for their daytime developmental disabilities services. This value of support includes financial support and letting them reside with their families, which allows them to remain integrated in the community. When families are no longer able to support their family members, developmentally disabled persons will be placed into the service system in community homes and other more costly and restrictive residential service settings, thereby violating the federal integration mandate of the Americans with Disabilities Act as the U.S. Supreme Court interpreted in the Olmstead case.

RESPONSE #4: Beginning with the 2012-2013 biennium, funding for developmental disabilities services is limited to Medicaid monies consisting of a match of state monies for available federal Medicaid monies. Using state general fund monies under this approach will generate a significant increase in federal Medicaid matching monies dedicated to developmental disabilities services.

There will not be sufficient general fund monies to sustain the existing population of service recipients funded by a combination of the state general fund and the federal Title XX Social Services Block Grant. There may be some limited non-Medicaid federal Title XX monies and state monies available for discrete one-time or time-limited services and for limited long-term services. Based upon past experience and current knowledge, the department believes most current non-Medicaid eligible consumers can establish Medicaid eligibility and thereby maintain their status as consumers of the state sponsored developmental disabilities services.

Two federally approved Medicaid funded home and community services programs currently serve approximately 2,350 consumers in the disabilities program. These are consumers whose primary diagnosis is one of developmental disability and for whom the state provides approximately 32% of the Medicaid funding for services the Developmental Disabilities Program (DDP) delivers to them. As of the first day of fiscal year 2011, there were approximately 373 persons whose service costs were paid by the state using state general fund monies. Since it became apparent during this fiscal year that the state would have to convert funding of more persons from state general fund only to Medicaid funding, 158 consumers have already moved to Medicaid eligibility.

In light of the change in appropriated funding and changing eligibility criteria, the department will assist current consumers at risk of losing day habilitation services in

establishing eligibility for Medicaid so they can continue to benefit from the state's service system. The DDP's support staff and case managers will continue to receive training and written materials for working with and assisting consumers and their families in establishing and maintaining Medicaid eligibility. The eligibility staff of the Public Assistance Bureau will also provide guidance.

The department encourages consumers and their families to contact a DD Program regional office if their case managers are not adequately assisting in eligibility matters.

COMMENT #5: A comment was made that the statutes at chapter 20 of Title 53, MCA provide for a developmental disabilities services program that is not based upon the recipients of services being Medicaid eligible. Comment was also made that the statutes the department cites as implementation authority for the proposed rules are not proper because they do not provide that the receipt of developmental disabilities services can be based upon general Medicaid eligibility, and that the department must cite statutory authority supporting its limitation of services eligibility to Medicaid eligible persons.

RESPONSE #5: The department inadvertently only cited Title 53, chapter 20, part 2, MCA as the statutory basis for the implementation of this change to Medicaid funding only for the receipt of the state developmental disabilities services. The correct statutory implementation authority has been inserted in the final notice to correct the mistake. The correct authority is explained below.

The general authority statutes at Title 53, chapter 20, part 2, MCA relate to general development of the program of developmental disabilities services that allow the department discretion to determine the nature and scope of a service system. Other statutory authorities specifically govern the proposed rule adoption exercise. The statutory authority of 53-6-402, MCA expressly governs the implementation of developmental disability home and community services programs funded with Medicaid monies, the largest of which is the federally designated 0208 waiver program initially implemented in 1981. In 1983 the Legislature enacted 53-6-401 and 53-6-402, MCA to govern Medicaid expenditures for home and community programs, and in 2007 amended 53-6-402, MCA to provide more detailed and explicit authority for the administration of home and community services.

COMMENT #6: Comment was made that state general fund monies are used to fund developmental disabilities services not only in whole but also in part, and that proposed New Rule I (37.34.225) appears to read that consumers of any state-sponsored services funded in any portion by state general fund monies will lose their eligibility for services, thereby terminating eligibility for all current consumers.

RESPONSE #6: The comment is well taken. The proposed language is mistaken and has been modified to reflect the intent that this provision concerns only state-sponsored developmental disabilities services funded by a combination of the state

general fund and the federal Title XX Social Services Block Grant. State funds will continue to be used in the Medicaid program to match federal funds.

COMMENT #7: A comment was made that if by this rulemaking, the department intends to create a separate class of developmentally disabled adults receiving services funded only by state general funds on February 28, 2011, it should state a rational basis for doing so, and set forth how it will administer its waiting list for this class.

RESPONSE #7: The department does not intend to create a separate class of developmentally disabled adults identified as receiving services funded only by state general funds through this notice, and the rule does not establish such a definitive class funded by Title XX monies. Instead, some developmental disabilities services may be provided to non-Medicaid eligible persons through currently available federal Title XX monies limited on the basis of either time or type of services provided.

COMMENT #8: A comment was made objecting to the provision in New Rule I(3)(c) (37.34.225) allowing termination of eligibility of persons who fail to cooperate in the eligibility determination process, and stating concern that the department is failing its duty of care if those persons lack adequate mental capacity to cooperate in the eligibility process.

RESPONSE #8: The department cannot pay for services for persons with developmental disabilities unless they have been determined to be eligible and remain eligible. Eligibility determinations for persons with developmental disabilities consist of establishing general eligibility to receive Medicaid and, specific eligibility for Medicaid funded home and community services program. The burden of proving eligibility rests with the applicant and others who may be involved in the applicant's life, including family, who must act affirmatively to pursue and establish these types of eligibility. Department personnel are available to assist and guide consumers and their families in these efforts, however, if there is a lack of cooperation that leaves the department without the information necessary to establish initial or continuing eligibility, the department is without recourse and must determine ineligibility. The department has limited authority by which to intervene in such circumstances to undertake the effort for the applicant.

COMMENT #9: A comment was made that New Rule II (37.34.224) appears to implement a federal Title XX program of developmental disabilities services without express authority cited for that purpose, and that the department was not adopting criteria to govern the receipt of the funding by persons.

RESPONSE #9: As noted in a prior response, there is a limited amount of federal Title XX monies available to fund discrete one-time or time-limited services and for some limited long-term services. Title XX monies are available through the appropriation authority of the U.S. Congress, first, and second through the appropriation authority of the Montana Legislature.

The amount of these funds is limited and could be significantly reduced in the future due to actions of Congress or the Legislature. The department therefore does not intend to establish a program of Title XX services. The availability and expenditure of these monies is a measure to attempt to apply the monies in a way that improves, in limited manner, some of the impacts for consumers who cannot establish Medicaid eligibility for the payment of developmental disabilities services.

The department appreciates the concern that the application of this limited resource of monies be undertaken with consideration given to a guiding set of criteria. The department will review the applicable documents to determine if further guidance is warranted.

COMMENT #10: A comment was made that under this rulemaking, existing consumers who have resources that disqualify them from Medicaid eligibility may nevertheless be eligible for Title XX funded services, which are not available to consumers who spend down their resources to become Medicaid eligible.

RESPONSE #10: The department determined that because Title XX monies are extremely limited, those persons who could potentially achieve and maintain Medicaid eligibility through an income incurment will not be able to access the funding. Persons found ineligible for Medicaid due to excess resources will not be eligible for Title XX funding.

COMMENT #11: A comment was made that the proposed changes would act to limit choice in the service system since consumers who seek to establish incomes will find it harder to do so if receiving services funded with Medicaid monies and therefore being subject to the financial features of eligibility that penalize their efforts to build financial independence.

RESPONSE #11: The department shares the commenter's concern. Though the department cannot act outside the fiscal course that the Legislature has established for the state, it directs the commenter and others to the recently implemented Montana Medicaid for Workers with Disabilities Program which through higher income and resource limits allows for continued Medicaid eligibility for persons with disabilities as they further their financial independence through employment.

COMMENT #12: A comment was made that New Rule I (37.34.225) should be clarified to reflect not only the need for current participants to establish general categorical and financial eligibility for Medicaid coverage, but also the need for them to establish their eligibility to receive services under one of the Medicaid funded programs of home and community developmental disabilities services and to be accepted into that program.

RESPONSE #12: The department agrees and has modified New Rule I (37.34.225) to reflect this comment.

COMMENT #13: A comment was made that because the substantive text of (2) of New Rule I (37.34.225) concerns termination of participants in the regular course from programs administered by the DD Program (i.e., the 0208 or "principal waiver"; the 0371 "community supports" waiver; and the 0667 "autism waiver" as programs), that section should reflect circumstances in which persons are terminated from "programs" administered by the DD Program, rather than termination from "programs of services".

RESPONSE #13: The department agrees and has modified New Rule I (37.34.225) to reflect this comment.

COMMENT #14: A comment was made that the two rules should be restructured with proposed New Rule I (37.34.225) containing only the material pertinent to termination from one of the waiver programs in the normal course and with proposed New Rule II (37.34.224) containing the material pertinent to the current changes in eligibility related to the changes in the funding sources for the developmental disabilities program.

RESPONSE #14: The department agrees with the commenter and has restructured the two rules accordingly.

/s/ Cary B. Lund
Rule Reviewer

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

Certified to the Secretary of State June 13, 2011

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

In the matter of the adoption of	)	NOTICE OF ADOPTION OF
temporary emergency rules, New	)	TEMPORARY EMERGENCY RULES
Rules I through VII, and repeal of	)	AND REPEAL
37.107.101, 37.107.103, 37.107.104,)	
37.107.107, and 37.107.109)	
pertaining to the Montana medical)	
marijuana registry)	

TO: All Concerned Persons

1. The Department of Public Health and Human Services (department) is adopting the following emergency rules because Senate Bill 423 (SB423) revises the Montana Medical Marijuana Act (Act). SB423 changes the requirements for individuals to register as cardholders, in addition to changing requirements for caregivers who are now referred to as "providers" or "marijuana-infused products provider (MIPP)". SB423 also reflects changes in the debilitating conditions for which individuals can register under and includes changes to physician certifications for severe and chronic pain diagnosis.

SB423 gives the department emergency rule writing authority to allow for the issuance of registry identification cards in accordance with Sections 1 through 23 of SB423. In order to meet the requirements of Section 33 of SB423 and 2-4-306, MCA, the department must file these rules with the Secretary of State to be effective June 1, 2011. In addition to the authority granted to the department under Section 33 of SB423, the emergency rules are being written to guard the health, safety, and overall welfare of the individuals who participate in this program. If these rules were not implemented under the emergency rule guideline to be effective immediately, there is the possibility that current and future patients with debilitating medical conditions would be without the legal protections currently afforded to them. This situation constitutes an imminent peril to public health, safety, and welfare. Through the standard rulemaking procedure, the department will promulgate permanent rules to fully implement the Act.

The department has prepared a rule package under the authority of Section 33 of SB423 pertaining to the processes for issuance of registry identification cards. The rules address the process for the initial application for registered cardholders and for providers or MIPP. Further, the rules establish application and renewal fees; these fees generate revenue sufficient to offset all expenses of implementing and administering the requirements under the Act.

Last, this emergency rule package repeals the rules promulgated under the Montana Medical Marijuana Act found at Title 50, Chapter 46 in accordance to Section 34 of SB423.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on June 20, 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. SB423 directs the department to begin issuing cards under the new requirements on June 1, 2011. Therefore, the effective date of these emergency rules is June 1, 2011, when these rules are filed with the Secretary of State.

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

NEW RULE I DEFINITIONS For purposes of the Montana medical marijuana registry:

(1) "Cultivate" means to grow and prepare medical marijuana for use by registered cardholders.

(2) "Manufacture" means the act or process of producing medical marijuana.

(3) "Fee" means the mandatory fees necessary to process a medical marijuana registry card.

AUTH: Ch. 419, Section 33, L. 2011

IMP: Ch. 419, Section 33, L. 2011

NEW RULE II REGISTERED CARDHOLDER APPLICATION PROCESS

(1) An adult applicant, or a parent or guardian of a minor applicant, must have a Montana mailing address and submit an application form provided by the department for consideration to be placed in the state's confidential medical marijuana registry. An application form is available by contacting the Department of Public Health and Human Services, Licensure Bureau, 2401 Colonial Drive, P.O. Box 202953, Helena, Montana, 59620-2953. Application forms are also available on the department's web site at www.dphhs.mt.gov/medicalmarijuana.

(2) Registered cardholder application materials that must be provided include:

(a) State of Montana Medical Marijuana Registered Cardholder Application Form. The information on this form includes but is not limited to:

(i) the applicant's name, address, date of birth, and social security number;

(ii) proof of residency/State of Montana Identification Number—as verified by a copy of either a State of Montana Drivers License or other State of Montana issued identification card;

(iii) a statement that the applicant will be:

(A) cultivating and manufacturing marijuana for the applicant's own use; or

(B) obtaining marijuana from a provider or MIPP.

(iv) a statement that the applicant agrees to not divert to any other person the marijuana that the person cultivates, manufactures, or obtains for the applicant's debilitating medical condition; and

(v) verification that the applicant is not in the custody of or under the supervision of the Department of Corrections or youth court.

(b) a signed, applicable Physician Statement, as defined in Section 2 of SB 423, attesting to the applicant's diagnosis of a debilitating medical condition, diagnosis of chronic pain, or certification for use by a minor. The Physician Statement includes but is not limited to:

(i) physician's name, address, and telephone number; and

(ii) physician's Montana medical license number.

(c) applicable fees as outlined in [New Rule VI].

(3) The department will verify with the Montana Board of Medical Examiners that the attending physician and/or the referral physician are licensed to practice medicine in Montana and the license is in good standing.

(4) The department will either approve or deny a registered cardholder application within 30 days of receiving the application. If approved, the department shall issue a registry identification card within five days of approving the application.

(5) Applicants who designate a provider or a MIPP on the application form will be issued a registry identification card listing no provider or MIPP, unless the named provider or MIPP is already registered with the department and has not reached the limit of registered cardholders they can serve. Named providers or MIPPs who are not already registered with the department will be sent application materials by the department. Upon approval by the department, the registered cardholder will be issued a new identification card, with the name of the registered provider or MIPP. The registered cardholder will be notified if the provider or MIPP applicant is denied, or if the provider or MIPP has reached the limit of registered cardholders they can serve.

(6) The registry identification card expires one year from the date of issuance unless:

(a) a physician has provided a written certification for a shorter period of time; or

(b) a registered cardholder changes provider or MIPP. When a change request form is received by the department, the registered cardholder's current card becomes void. After the change request is processed, the new registry identification card will not be valid until it is received by the registered cardholder.

(7) If the registered cardholder application is denied, the department will send the applicant notice of the denial and inform the applicant of the reasons for denial. Rejection of the application is considered a final department action, subject to judicial review.

AUTH: Ch. 419, Section 33, L. 2011

IMP: Ch. 419, Section 33, L. 2011

NEW RULE III PHYSICIAN STATEMENT (1) Registered cardholder applications must include one of the following three physician-written statements certifying the registered cardholder applicant's debilitating condition:

- (a) Physician Statement for Debilitating Condition;
- (b) Physician Statement for Chronic Pain Diagnosis; or
- (c) Physician Statement for Minors.

AUTH: Ch. 419, Section 33, L. 2011

IMP: Ch. 419, Section 33, L. 2011

NEW RULE IV APPLICATION REQUIREMENTS FOR MINORS (1) In addition to the requirements outlined in Section 4(2) and (3) of SB423 the minor's custodial parent or legal guardian with responsibility for health care decisions must submit to the department a Minor Registry Application Packet. A Minor Registry Application Packet must be requested from the department by contacting the Department of Public Health and Human Services, Licensure Bureau, 2401 Colonial Drive, P.O. Box 202953, Helena, MT 59620-2953. The Minor Registry Application Packet will include:

- (a) materials outlined in [NEW RULE II];
- (b) MIPP provider application;
- (c) legal documentation that the person completing the application is the legal guardian of the minor with responsibility for health care decisions; and
- (d) physician statement for a minor.

AUTH: Ch. 419, Section 33, L. 2011

IMP: Ch. 419, Section 33, L. 2011

NEW RULE V REQUIREMENTS FOR PROVIDERS (1) In order to apply to the department to be a provider or MIPP, a provider or MIPP applicant must first be named by a registered cardholder on a registered cardholder's application, or on a registered cardholder's change request form.

(2) Upon being named on a registered cardholder's application, or a registered cardholder's change request form, a provider or MIPP applicant will be sent a provider application by the department. The packet will include:

- (a) a provider application form; and
 - (b) applicable fee information.
- (3) Providers must reapply annually. Providers do not need to reapply every time they are named by a registered cardholder, unless it has been one year since their last application.

AUTH: Ch. 419, Section 33, L. 2011

IMP: Ch. 419, Section 33, L. 2011

NEW RULE VI FEES (1) The department shall assess the following fees:

- (a) registered cardholder application fee of \$25;
 - (b) provider, MIPP, or both, application fee of \$50; and
 - (c) annual registered cardholder renewal fee of \$10.
- (2) All fees shall be submitted with the application and must be paid by check or money order payable to the Department of Public Health and Human Services.
- (3) Fees are nonrefundable regardless of final application status.

AUTH: Ch. 419, Section 33, L. 2011

IMP: Ch. 419, Section 33, L. 2011

NEW RULE VII REPLACING LOST OR STOLEN REGISTRY IDENTIFICATION CARDS (1) If a registry identification card has been lost or stolen, the department must receive written notification from the registered cardholder, the provider, or the MIPP prior to replacing the registry identification card.

(2) If the registry identification card has been lost or stolen, the department will advise the registered cardholder, the provider, or the MIPP to notify local law enforcement.

(3) Upon notification from the registered cardholder that the card has been lost or stolen, the department will reissue a duplicate to the registered cardholder.

AUTH: Ch. 419, Section 33, L. 2011

IMP: Ch. 419, Section 33, L. 2011

5. The department proposes to repeal the following rules:

37.107.101 DEFINITIONS, is found on page 37-26707 of the Administrative Rules of Montana.

AUTH: 50-46-210, MCA

IMP: 50-46-103, 50-46-210, MCA

37.107.103 REGISTRATION AND APPLICATION PROCESS, is found on page 37-26709 of the Administrative Rules of Montana.

AUTH: 50-46-210, MCA

IMP: 50-46-103, 50-46-210, MCA

37.107.104 INVALIDATION OR REVOCATION OF REGISTRY IDENTIFICATION CARD, is found on page 37-26711 of the Administrative Rules of Montana.

AUTH: 50-46-210, MCA

IMP: 50-46-103, 50-46-210, MCA

37.107.107 FEES, is found on page 37-26713 of the Administrative Rules of Montana.

AUTH: 50-46-210, MCA

IMP: 50-46-103, 50-46-210, MCA

37.107.109 REPLACING LOST OR STOLEN REGISTRY IDENTIFICATION CARDS, is found on page 37-26715 of the Administrative Rules of Montana.

AUTH: 50-46-210, MCA
IMP: 50-46-103, 50-46-210, MCA

It is necessary to repeal the existing rules to prohibit potential conflict between the existing rules and the emergency rules. Upon passage of SB423, 50-46-103, MCA was repealed; thereby eliminating the department's authority to issue registry cards. The department considered not repealing the rules in conjunction with the new emergency rules but determined not taking action on existing rules would be detrimental to public health, safety, or welfare of current medical marijuana cardholders and caregivers.

6. The rationale for the temporary emergency rules is set forth in paragraph 1.
7. A standard rulemaking procedure will be undertaken prior to the expiration of these temporary emergency rules.
8. Concerned persons are encouraged to submit their comments during the upcoming standard rulemaking process. If concerned persons wish to be personally notified of that rulemaking process, they should submit their names and addresses to Kenneth Mordan at the address in 2 above.
9. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 2 above or may be made by completing a request form at any rules hearing held by the department.
10. The bill sponsor notice requirements of 2-4-302, MCA, apply and have been fulfilled.

/s/ Kurt Moser
Rule Reviewer

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

Certified to the Secretary of State June 1, 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 March 31, 2011. This table includes those rules adopted during the period April 1, 2011, through June 30, 2011, and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not include the contents of this issue of the Montana Administrative Register (MAR or Register).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through March 31, 2011, this table, and the table of contents of this issue of the MAR.

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

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BOARD APPOINTEES AND VACANCIES

Section 2-15-108, MCA, passed by the 1991 Legislature, directed that all appointing authorities of all appointive boards, commissions, committees, and councils of state government take positive action to attain gender balance and proportional representation of minority residents to the greatest extent possible.

One directive of 2-15-108, MCA, is that the Secretary of State publish monthly in the ***Montana Administrative Register*** a list of appointees and upcoming or current vacancies on those boards and councils.

In this issue, appointments effective in May 2011 appear. Vacancies scheduled to appear from July 1, 2011, through September 30, 2011, are listed, as are current vacancies due to resignations or other reasons. Individuals interested in serving on a board should refer to the bill that created the board for details about the number of members to be appointed and necessary qualifications.

Each month, the previous month's appointees are printed, and current and upcoming vacancies for the next three months are published.

IMPORTANT

Membership on boards and commissions changes constantly. The following lists are current as of June 1, 2011.

For the most up-to-date information of the status of membership, or for more detailed information on the qualifications and requirements to serve on a board, contact the appointing authority.

BOARD AND COUNCIL APPOINTEES FROM MAY 2011

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Board of Athletic Trainers (Labor and Industry)			
Mr. Robert Fletcher Bozeman Qualifications (if required): public representative	Governor	Harper	5/19/2011 10/1/2013
Dr. Derrick Johnson Butte Qualifications (if required): physician	Governor	McCue	5/19/2011 10/1/2011
Board of Plumbers (Labor and Industry)			
Mr. Steve Carey Frenchtown Qualifications (if required): journeyman plumber	Governor	reappointed	5/4/2011 5/4/2015
Mr. Denver Fraser Clancy Qualifications (if required): Department of Environmental Quality representative	Governor	Golz	5/4/2011 5/4/2015
Ms. Debi Friede Havre Qualifications (if required): public representative	Governor	reappointed	5/4/2011 5/4/2015
Mr. Scott Lemert Livingston Qualifications (if required): master plumber	Governor	reappointed	5/4/2011 5/4/2015

BOARD AND COUNCIL APPOINTEES FROM MAY 2011

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Board of Plumbers (Labor and Industry) cont.			
Mr. David Lindeen Helena	Governor	reappointed	5/4/2011 5/4/2015
Qualifications (if required): public representative			
Board of Real Estate Appraisers (Labor and Industry)			
Ms. Anzarina Moore Great Falls	Governor	Fontana	5/1/2011 5/1/2014
Qualifications (if required): real estate appraiser			
Mr. Todd Schmidt Kalispell	Governor	Kosena	5/1/2011 5/1/2014
Qualifications (if required): real estate appraiser			
Board of Realty Regulation (Labor and Industry)			
Mr. C.E. Abe Abramson Missoula	Governor	not listed	5/9/2011 5/9/2015
Qualifications (if required): real estate salesperson and identifies himself as a Democrat			
Ms. Shirley McDermott Laurel	Governor	not listed	5/9/2011 5/9/2015
Qualifications (if required): public representative			
Mr. Larry Milless Stevensville	Governor	reappointed	5/9/2011 5/9/2015
Qualifications (if required): real estate sales person and identifies himself as a Republican			

BOARD AND COUNCIL APPOINTEES FROM MAY 2011

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Board of Realty Regulation (Labor and Industry) cont.			
Ms. Connie Wardell Billings	Governor	not listed	5/9/2011 5/9/2015
Qualifications (if required): real estate sales person and identifies himself as a Democrat			
Commissioner of Political Practices (Secretary of State)			
Commissioner Dave Gallik Helena	Governor	Hensley	5/23/2011 1/1/2017
Qualifications (if required): none specified			
Library Commission (Higher Education)			
Ms. Lee Phillips Butte	Governor	reappointed	5/22/2011 5/22/2014
Qualifications (if required): public representative			
Mr. Richard Quillin Whitefish	Governor	reappointed	5/22/2011 5/22/2014
Qualifications (if required): public representative			
Mental Disabilities Board of Visitors (Governor)			
Ms. Betty N. Cooper Heart Butte	Governor	reappointed	5/31/2011 7/1/2013
Qualifications (if required): public representative			
Ms. Patricia Harant Helena	Governor	reappointed	5/31/2011 7/1/2013
Qualifications (if required): consumer of mental health services			

BOARD AND COUNCIL APPOINTEES FROM MAY 2011

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Mental Disabilities Board of Visitors (Governor) cont.			
Ms. Lin Olson Helena	Governor	reappointed	5/31/2011 7/1/2013
Qualifications (if required): consumer of developmental disability services			
Mental Health Ombudsman (Governor)			
Ms. Jennifer L. Hensley Butte	Governor	Pichette	5/23/2011 8/2/2011
Qualifications (if required): none specified			
Milk Control Board (Livestock)			
Mr. Hubert Abrams Wibaux	Governor	Prinkki	5/16/2011 1/1/2013
Qualifications (if required): public representative			
Mr. Wade Weber Stevensville	Governor	Prinkki	5/16/2011 1/1/2013
Qualifications (if required): public representative			
Mint Committee (Agriculture)			
Mr. Clyde Fisher Columbia Falls	Governor	reappointed	5/20/2011 7/1/2012
Qualifications (if required): representative of the mint industry research council			
Mr. Kirk Passmore Kalispell	Governor	reappointed	5/20/2011 7/1/2012
Qualifications (if required): mint grower			

BOARD AND COUNCIL APPOINTEES FROM MAY 2011

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Mint Committee (Agriculture) cont.			
Mr. Kenneth W. Smith Kalispell Qualifications (if required): mint grower	Governor	reappointed	5/20/2011 7/1/2013
Director Ron de Yong Helena Qualifications (if required): Director of the Department of Agriculture	Governor	reappointed	5/20/2011 0/0/0
Montana Noxious Weed Seed Free Forage Advisory Council (Agriculture)			
Mr. James Bouma Choteau Qualifications (if required): forage producer	Director	Miller	5/24/2011 9/17/2013
Mr. Mark Siderius Kalispell Qualifications (if required): forage producer	Director	Maki	5/24/2011 9/17/2013
Mr. Kehoe Wayman Ronan Qualifications (if required): representative of the outfitters and guides	Director	Hutton	5/24/2011 9/17/2013
Private Alternative Adolescent Residential or Outdoor Programs Board (Governor)			
Rep. Tim Callahan Great Falls Qualifications (if required): public member	Governor	reappointed	5/31/2011 4/19/2014

BOARD AND COUNCIL APPOINTEES FROM MAY 2011

<u>Appointee</u>	<u>Appointed by</u>	<u>Succeeds</u>	<u>Appointment/End Date</u>
Private Alternative Adolescent Residential or Outdoor Programs Board (Governor) cont.			
Mr. Michael Chism Thompson Falls	Governor	Alexine	5/31/2011 4/19/2014
Qualifications (if required): representative of a residential adolescent program (small size)			
Ms. Penny James Trout Creek	Governor	reappointed	5/31/2011 4/19/2014
Qualifications (if required): representative of a residential adolescent program (medium size)			
Ms. Darcie Kelly Helena	Governor	reappointed	5/31/2011 4/19/2014
Qualifications (if required): public member			
Mr. John Santa Marion	Governor	reappointed	5/31/2011 4/19/2014
Qualifications (if required): representative of a residential adolescent program (large size)			
Reserved Water Rights Compact Commission (Attorney General)			
Mr. Chris D. Tweeten Helena	Attorney General	reappointed	5/31/2011 5/31/2015
Qualifications (if required): none specified			

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2011 THROUGH SEPTEMBER 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Ageing Advisory Council (Public Health and Human Services) Rep. Beverly Barnhart, Bozeman Qualifications (if required): public representative	Governor	7/18/2011
Mrs. Jessie James-Hawley, Harlem Qualifications (if required): public representative	Governor	7/18/2011
Ms. Lauren Lynch, Butte Qualifications (if required): public representative	Governor	7/18/2011
Ms. Toni Hagener, Havre Qualifications (if required): public representative	Governor	7/18/2011
Mr. Marvin Carter, Laurel Qualifications (if required): public representative	Governor	7/18/2011
Mr. Alex Ward, Helena Qualifications (if required): public representative	Governor	7/18/2011
Agriculture Development Council (Agriculture) Mr. Bill Koenig, Kalispell Qualifications (if required): agriculture producer	Governor	7/1/2011
Ms. Patricia Quisno, Harlem Qualifications (if required): agriculture producer	Governor	7/1/2011
Mr. David Tyler, Belgrade Qualifications (if required): agriculture producer	Governor	7/1/2011

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2011 THROUGH SEPTEMBER 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Alternative Health Care Board (Labor and Industry) Dr. Kathleen Stevens, Billings Qualifications (if required): medical doctor	Governor	9/1/2011
Dr. Nancy Aagenes, Helena Qualifications (if required): naturopathic physician	Governor	9/1/2011
Board of Banking (Administration) Dr. Maureen J. Fleming, Missoula Qualifications (if required): public representative	Governor	7/1/2011
Mr. John King, Kalispell Qualifications (if required): state bank officer of a small size bank	Governor	7/1/2011
Board of Hearing Aid Dispensers (Labor and Industry) Ms. Lee Frantz Oines, Missoula Qualifications (if required): dispenser with master's degree and national certification	Governor	7/1/2011
Mr. Jim Lieberg, Helena Qualifications (if required): public representative with a hearing aid	Governor	7/1/2011
Board of Medical Examiners (Labor and Industry) Rep. Mary Anne Guggenheim, Helena Qualifications (if required): doctor of medicine	Governor	9/1/2011
Dr. James D. Upchurch, Crow Agency Qualifications (if required): doctor of medicine	Governor	9/1/2011

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2011 THROUGH SEPTEMBER 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Board of Nursing (Labor and Industry) Ms. Sharon L. Dschaak, Wolf Point Qualifications (if required): licensed practical nurse	Governor	7/1/2011
Ms. Laura Weiss, Great Falls Qualifications (if required): registered nurse	Governor	7/1/2011
Board of Pharmacy (Labor and Industry) Mr. William D. Burton, Helena Qualifications (if required): licensed pharmacist	Governor	7/1/2011
Board of Physical Therapy Examiners (Labor and Industry) Mr. Richard Smith, Missoula Qualifications (if required): physical therapist	Governor	7/1/2011
Board of Private Security (Labor and Industry) Mr. Raymond Murray, Missoula Qualifications (if required): representative of the Public Safety Officer Standards and Training Council	Governor	8/1/2011
Ms. Holly Dershem-Bruce, Glendive Qualifications (if required): public representative	Governor	8/1/2011
Board of Professional Engineers and Land Surveyors (Labor and Industry) Ms. Ingrid Clare Lovitt-Abramson, Missoula Qualifications (if required): public representative	Governor	7/1/2011

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2011 THROUGH SEPTEMBER 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<p>Board of Psychologists (Labor and Industry) Dr. Marla Lemons, Butte Qualifications (if required): public health psychologist</p>	Governor	9/1/2011
<p>Board of Radiologic Technologists (Labor and Industry) Ms. Anna L. Hazen, Fort Benton Qualifications (if required): permit holder</p>	Governor	7/1/2011
<p>Mr. Charles L. McCubbins, Shelby Qualifications (if required): radiologic technician</p>	Governor	7/1/2011
<p>Board of Sanitarians (Labor and Industry) Ms. Kathleen Driscoll, Hamilton Qualifications (if required): public representative</p>	Governor	7/1/2011
<p>Mayor Gene Townsend, Three Forks Qualifications (if required): public representative</p>	Governor	7/1/2011
<p>Mr. Gerald Cormier, Billings Qualifications (if required): sanitarian</p>	Governor	7/1/2011
<p>Ms. Susan K. Brueggeman, Polson Qualifications (if required): sanitarian</p>	Governor	7/1/2011
<p>Board of Veterans' Affairs (Military Affairs) Rep. Robert "Bob" Pavlovich, Butte Qualifications (if required): individual with experience with veterans' issues</p>	Governor	8/1/2011

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2011 THROUGH SEPTEMBER 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Board of Veterans' Affairs (Military Affairs) cont. Mr. James E. Heffernan, Helena Qualifications (if required): individual with experience with veterans' issues	Governor	8/1/2011
Mr. Lloyd Jackson, Pablo Qualifications (if required): representative of tribal councils	Governor	8/1/2011
Mr. Harvey Rattey, Glendive Qualifications (if required): veteran and tribal member	Governor	8/1/2011
Mr. C.E. Crookshanks, Missoula Qualifications (if required): individual with experience with veterans' issues	Governor	8/1/2011
Board of Veterinary Medicine (Labor and Industry) Dr. Bob Sager, Wilsall Qualifications (if required): veterinarian	Governor	7/31/2011
Board of Water Well Contractors (Natural Resources and Conservation) Mr. Herrick Jeffrey, Helena Qualifications (if required): none specified	Deputy Director	9/4/2011
Burial Preservation Board (Administration) Mr. Robert P. Four Star, Poplar Qualifications (if required): representative of the Fort Peck Tribes	Governor	8/22/2011
Mr. Steve Platt, Helena Qualifications (if required): representative of the State Historic Preservation Office	Governor	8/22/2011

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2011 THROUGH SEPTEMBER 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<p>Burial Preservation Board (Administration) cont. Mr. John Murray, Browning Qualifications (if required): representative of the Blackfeet Tribe</p>	Governor	8/22/2011
<p>Ms. Marilyn Silva, Miles City Qualifications (if required): public representative</p>	Governor	8/22/2011
<p>Community Health Center Advisory Group (Governor) Mr. David Herrera, Missoula Qualifications (if required): public representative</p>	Governor	7/1/2011
<p>Ms. Laurie Francis, Livingston Qualifications (if required): executive employee of a community health center</p>	Governor	7/1/2011
<p>Ms. Jill Baker, Great Falls Qualifications (if required): public representative</p>	Governor	7/1/2011
<p>Ms. Marge Levine, Helena Qualifications (if required): representative of the Montana Primary Care Association</p>	Governor	7/1/2011
<p>Ms. Devri Rockwood, Libby Qualifications (if required): chief financial officer of a community health center</p>	Governor	7/1/2011
<p>Community Service Commission (Labor and Industry) Mr. Robert E. Harris, Great Falls Qualifications (if required): public representative</p>	Governor	7/1/2011

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2011 THROUGH SEPTEMBER 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Community Service Commission (Labor and Industry) cont. Mr. James B. Corson, Billings Qualifications (if required): public representative	Governor	7/1/2011
Mr. James Steele, Pablo Qualifications (if required): representative of Tribal government	Governor	7/1/2011
Mr. Jack Chambers, Missoula Qualifications (if required): representative of the disabilities community	Governor	7/1/2011
Economic Development Advisory Council (Commerce) Ms. Sheila Hogan, Butte Qualifications (if required): public representative	Governor	7/23/2011
Mr. Curt Starr, Billings Qualifications (if required): public representative	Governor	7/23/2011
Ms. Kathie Bailey, Lewistown Qualifications (if required): public representative	Governor	7/23/2011
Ms. Linda Twitchell, Wolf Point Qualifications (if required): public representative	Governor	7/23/2011

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2011 THROUGH SEPTEMBER 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<p>Economic Development Advisory Council (Commerce) cont. Ms. Estelle Tafoya, Red Lodge Qualifications (if required): public representative</p>	Governor	7/23/2011
<p>Electrical Board (Labor and Industry) Ms. Dawn Achten, Billings Qualifications (if required): public representative</p>	Governor	7/1/2011
<p>Family Education Savings Oversight Committee (Higher Education) Mr. John Driscoll, Helena Qualifications (if required): public representative</p>	Governor	7/1/2011
<p>Judicial Standards Commission (Justice) Ms. Sue Schleif, Valier Qualifications (if required): public representative</p>	Governor	7/1/2011
<p>Mental Disabilities Board of Visitors (Governor) Mr. Patrick Wayne, Missoula Qualifications (if required): consumer of mental health services</p>	Governor	7/1/2011
<p>Ms. Lin Olson, Helena Qualifications (if required): consumer of developmental disability services</p>	Governor	7/1/2011
<p>Ms. Betty N. Cooper, Heart Butte Qualifications (if required): public representative</p>	Governor	7/1/2011
<p>Ms. Patricia Harant, Helena Qualifications (if required): consumer of mental health services</p>	Governor	7/1/2011

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2011 THROUGH SEPTEMBER 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<p>Mental Health Ombudsman (Governor) Ms. Alicia Pichette, Helena Qualifications (if required): none specified</p>	Governor	8/2/2011
<p>Rep. Eve Franklin, Helena Qualifications (if required): none specified</p>	Governor	8/2/2011
<p>Montana Historical Society Board of Trustees (Historical Society) Secretary Bob Brown, Whitefish Qualifications (if required): public member</p>	Governor	7/1/2011
<p>Mr. George Horse Capture, Great Falls Qualifications (if required): public representative</p>	Governor	7/1/2011
<p>Mr. Thomas Nygard, Bozeman Qualifications (if required): public representative</p>	Governor	7/1/2011
<p>Ms. Crystal Wong Shors, Helena Qualifications (if required): public representative</p>	Governor	7/1/2011
<p>Montana Noxious Weed Seed Free Forage Advisory Council (Agriculture) Mr. Don Walker, Glendive Qualifications (if required): forage producer representative</p>	Director	9/17/2011
<p>Ms. Michelle Miller, Billings Qualifications (if required): feed pellets/cube products representative</p>	Director	9/17/2011

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2011 THROUGH SEPTEMBER 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<p>Montana Noxious Weed Seed Free Forage Advisory Council (Agriculture) cont. Ms. Jennifer Cramer, Hysham Qualifications (if required): eastern county weed district representative</p>	Director	9/17/2011
<p>Mr. Tom Benson, Pablo Qualifications (if required): western county weed district representative</p>	Director	9/17/2011
<p>Montana Organic Commodity Advisory Committee (Agriculture) Mr. Tennyson Doney, Harlem Qualifications (if required): none specified</p>	Director	8/18/2011
<p>Sen. Gene Thayer, Great Falls Qualifications (if required): none specified</p>	Director	8/18/2011
<p>Ms. Sharon Lindquist, Bloomfield Qualifications (if required): none specified</p>	Director	8/18/2011
<p>Montana Wheat and Barley Committee (Agriculture) Mr. Leonard Schock, Vida Qualifications (if required): wheat and barley grower and resident of District 7</p>	aGovernor	8/20/2011
<p>Mr. Frank Schoonover, Dutton Qualifications (if required): wheat or barley grower and resident of District 4</p>	Governor	8/20/2011
<p>Montana's Poet Laureate (Labor and Industry) Mr. Henry Real Bird, Garryowen Qualifications (if required): Montana poet</p>	Governor	9/23/2011

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2011 THROUGH SEPTEMBER 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Motorcycle Safety Advisory Commission (Commissioner of Higher Education)		
Mr. Dal Smilie, Helena Qualifications (if required): cycle group member	Governor	7/1/2011
Captain Clancy King, Kalispell Qualifications (if required): peace officer	Governor	7/1/2011
Mr. Randy Baldwin, Glendive Qualifications (if required): cycle group member	Governor	7/1/2011
Private Lands/Public Wildlife (Fish, Wildlife and Parks)		
Mr. Brenden Nichols, Bozeman Qualifications (if required): sportsperson	Governor	7/30/2011
Mr. Mike Penfold, Billings Qualifications (if required): sportsperson	Governor	7/30/2011
Rep. Bob Ream, Helena Qualifications (if required): Fish, Wildlife and Parks Commissioner	Governor	7/30/2011
Mr. Jack Billingsley, Glasgow Qualifications (if required): outfitter	Governor	7/30/2011
Mr. Rick Miller, Colstrip Qualifications (if required): sportsperson	Governor	7/30/2011
Commissioner Chris King, Winnett Qualifications (if required): landowner	Governor	7/30/2011

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2011 THROUGH SEPTEMBER 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Private Lands/Public Wildlife (Fish. Wildlife and Parks) cont.		
Ms. Kathy Hadley, Deer Lodge Qualifications (if required): landowner	Governor	7/30/2011
Sen. Steve Gallus, Butte Qualifications (if required): legislator	Governor	7/30/2011
Mr. Mike Penfold, Billings Qualifications (if required): sportsperson	Governor	7/30/2011
Mr. Jack Rich, Seeley Lake Qualifications (if required): outfitter	Governor	7/30/2011
Mr. Land Tawney, Missoula Qualifications (if required): sportsperson	Governor	7/30/2011
Mr. Richard Iverson, Culbertson Qualifications (if required): landowner	Governor	7/30/2011
Ms. Lindsay A. Giem-Seidensticker, Twin Bridges Qualifications (if required): landowner	Governor	7/30/2011
Mr. Brett Todd, Big Timber Qualifications (if required): outfitter	Governor	7/30/2011
Rep. Jeff Welborn, Dillon Qualifications (if required): legislator	Governor	7/30/2011

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2011 THROUGH SEPTEMBER 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Private Lands/Public Wildlife (Fish, Wildlife and Parks) cont. Mr. Joe Cohenour, East Helena Qualifications (if required): sportsperson	Governor	7/30/2011
Mr. Wagner Harmon, Bainville Qualifications (if required): outfitter	Governor	7/30/2011
Professional Engineers and Land Surveyors (Labor and Industry) Mr. James Hahn, Billings Qualifications (if required): licensed land surveyor	Governor	7/1/2011
Mr. Casey E. Johnston, Butte Qualifications (if required): licensed electrical engineer	Governor	7/1/2011
Mr. Mohammad Ruhul Amin, Bozeman Qualifications (if required): licensed mechanical engineer and an instructor	Governor	7/1/2011
Public Defender Commission (Administration) Ms. Caroline Fleming, Miles City Qualifications (if required): public representative nominated by the Speaker of the House	Governor	7/1/2011
Ms. Jennifer L. Hensley, Butte Qualifications (if required): member of organization advocating on behalf of people with mental illness	Governor	7/1/2011
Mr. James Park Taylor, Pablo Qualifications (if required): attorney nominated by the State Bar	Governor	7/1/2011

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2011 THROUGH SEPTEMBER 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
<p>Public Defender Commission (Administration) cont. Mr. Kenneth R. Olson, Great Falls Qualifications (if required): attorney nominated by the Montana Supreme Court</p>	Governor	7/1/2011
<p>Research and Commercialization Technology Board (Commerce) Mr. Jim Davison, Anaconda Qualifications (if required): public representative</p>	Governor	7/1/2011
<p>State Workforce Investment Board (Labor and Industry) Mr. Michael Grove, White Sulphur Springs Qualifications (if required): private sector representative</p>	Governor	7/1/2011
<p>Director Keith Kelly, Helena Qualifications (if required): public sector representative (Department of Labor and Industry Director)</p>	Governor	7/1/2011
<p>Commissioner Connie Eissinger, Brockway Qualifications (if required): private sector representative</p>	Governor	7/1/2011
<p>Mr. Evan Barrett, Butte Qualifications (if required): governor's representative</p>	Governor	7/1/2011
<p>Mr. Michael McGinley, Dillon Qualifications (if required): county commissioner</p>	Governor	7/1/2011
<p>Ms. Linda Woods, Darby Qualifications (if required): public sector representative (job corps)</p>	Governor	7/1/2011

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2011 THROUGH SEPTEMBER 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
State Workforce Investment Board (Labor and Industry) cont.		
Director Anthony Preite, Helena Qualifications (if required): public sector representative (Department of Commerce Director)	Governor	7/1/2011
Mr. Jeff Rupp, Bozeman Qualifications (if required): public sector representative (nonprofit organization)	Governor	7/1/2011
Mr. Dave Crum, Great Falls Qualifications (if required): private sector representative	Governor	7/1/2011
Ms. Martina Copps, Broadus Qualifications (if required): private sector representative	Governor	7/1/2011
Mr. Thomas Curry, Billings Qualifications (if required): labor representative	Governor	7/1/2011
Mr. Michael DesRosier, Browning Qualifications (if required): county commissioner	Governor	7/1/2011
Mr. Kirk Hammerquist, Kalispell Qualifications (if required): private sector representative	Governor	7/1/2011
Ms. Jacquie Helt, Missoula Qualifications (if required): labor representative	Governor	7/1/2011
Ms. Maureen Kenneally, Butte Qualifications (if required): private sector representative	Governor	7/1/2011

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2011 THROUGH SEPTEMBER 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
State Workforce Investment Board (Labor and Industry) cont.		
Mr. Robbe Lindsay, Missoula Qualifications (if required): private sector representative	Governor	7/1/2011
Mr. Rodney Miller, Wolf Point Qualifications (if required): Section 166 representative	Governor	7/1/2011
Mr. Alan Skari, Chester Qualifications (if required): private sector representative	Governor	7/1/2011
Mrs. Sandi Miller, Helena Qualifications (if required): private sector representative	Governor	7/1/2011
Ms. Georgia Gibbs-Atkinson, Poplar Qualifications (if required): private sector representative	Governor	7/1/2011
Mr. Thomas McKenna, Lewistown Qualifications (if required): private sector representative	Governor	7/1/2011
Ms. Anna Whiting-Sorrell, Helena Qualifications (if required): public sector representative (Public Health and Human Services Director)	Governor	7/1/2011
Mr. Major Robinson, Billings Qualifications (if required): private sector representative	Governor	7/1/2011
Mr. George Kipp, Browning Qualifications (if required): Section 166 representative	Governor	7/1/2011

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2011 THROUGH SEPTEMBER 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
State Workforce Investment Board (Labor and Industry) cont.		
Mr. Brian Sheridan, Missoula Qualifications (if required): private sector representative	Governor	7/1/2011
Superintendent Denise Juneau, Helena Qualifications (if required): public sector representative (Superintendent of Public Instruction)	Governor	7/1/2011
Mr. Brad Eldridge, Helena Qualifications (if required): public sector representative (Higher Education)	Governor	7/1/2011
Ms. Vicki Judd, Missoula Qualifications (if required): private sector representative	Governor	7/1/2011
Mr. Henry Dykema, Red Lodge Qualifications (if required): private sector representative	Governor	7/1/2011
Mr. Jim Paquette, Billings Qualifications (if required): private sector representative	Governor	7/1/2011
Mr. John DeMichiei, Roundup Qualifications (if required): private sector representative	Governor	7/1/2011
Ms. Mary Moe, Helena Qualifications (if required): public sector representative (Higher Education)	Governor	7/1/2011
Teachers' Retirement Board (Administration)		
Ms. Mona Bilden, Miles City Qualifications (if required): teacher	Governor	7/1/2011

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2011 THROUGH SEPTEMBER 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Teachers' Retirement Board (Administration) cont.		
Mr. Darrell Layman, Glendive Qualifications (if required): retired teacher	Governor	7/1/2011
Mr. Jeff Greenfield, Shepherd Qualifications (if required): teacher	Governor	7/1/2011
Telecommunications Access Services for Persons with Disabilities (Public Health and Human Services)		
Mr. Drew Arnot, Missoula Qualifications (if required): independent local exchange company representative	Governor	7/1/2011
Ms. Susan Kalarchik, Butte Qualifications (if required): audiologist	Governor	7/1/2011
Telecommunications Advisory Council Services for Persons with Disabilities (Public Health and Human Services)		
Ms. Char Harasymczuk, Billings Qualifications (if required): having a hearing disability	Governor	7/1/2011
Ms. Colette Custer, Plentywood Qualifications (if required): independent local exchange company representative	Governor	7/1/2011
Ms. Kristen Bruner-Kober, Billings Qualifications (if required): audiologist	Governor	7/1/2011
Mr. Charles Charette, Lame Deer Qualifications (if required): having a hearing disability	Governor	7/1/2011

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2011 THROUGH SEPTEMBER 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Tourism Advisory Council (Commerce)		
Mr. Paul Tuss, Havre Qualifications (if required): resident of Russell Country	Governor	7/1/2011
Ms. Ramona Holt, Lolo Qualifications (if required): resident of Glacier Country	Governor	7/1/2011
Mr. Ed DesRosier, East Glacier Park Qualifications (if required): resident of Glacier Country	Governor	7/1/2011
Commissioner Dolores Plumage, Chinook Qualifications (if required): resident of Russell Country	Governor	7/1/2011
Ms. Gail Richardson, Bozeman Qualifications (if required): resident of Yellowstone Country	Governor	7/1/2011
Ms. Sandra Cahill, Livingston Qualifications (if required): resident of Yellowstone Country	Governor	7/1/2011
Ms. Amber Woods-Jensen, Butte Qualifications (if required): resident of Goldwest Country	Governor	7/1/2011
Ms. Meg O'Leary, Big Sky Qualifications (if required): resident of Yellowstone County	Governor	7/1/2011
Upper Clark Fork River Basin Remediation and Restoration Advisory Council (Justice)		
Mr. Jim Kambich, Butte Qualifications (if required): resident of the Upper Clark Fork River Basin	Governor	7/31/2011

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2011 THROUGH SEPTEMBER 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Upper Clark Fork River Basin Remediation and Restoration Advisory Council (Justice) cont.		
Mr. Jon A. Krutar, Helena Qualifications (if required): resident of the Upper Clark Fork River Basin	Governor	7/31/2011
Director Mary Sexton, Helena Qualifications (if required): Director of the Department of Natural Resources and Conservation	Governor	7/31/2011
Director Richard Opper, Helena Qualifications (if required): Director of the Department of Environmental Quality	Governor	7/31/2011
Mr. William Rossbach, Missoula Qualifications (if required): resident of the Upper Clark Fork River Basin	Governor	7/31/2011
Mr. Joe Maurier, Helena Qualifications (if required): Director of the Department of Fish Wildlife and Parks	Governor	7/31/2011
Mr. Roy O'Connor, Missoula Qualifications (if required): resident of the Upper Clark Fork River Basin	Governor	7/31/2011
Mr. Elton Ringsak, Butte Qualifications (if required): resident of the Upper Clark Fork River Basin	Governor	7/31/2011
Ms. Katherine Eccleston, Anaconda Qualifications (if required): resident of the Upper Clark Fork River Basin	Governor	7/31/2011
Mr. Michael McLean, Anaconda Qualifications (if required): resident of the Upper Clark Fork River Basin	Governor	7/31/2011

VACANCIES ON BOARDS AND COUNCILS -- JULY 1, 2011 THROUGH SEPTEMBER 30, 2011

<u>Board/current position holder</u>	<u>Appointed by</u>	<u>Term end</u>
Upper Clark Fork River Basin Remediation and Restoration Advisory Council (Justice) cont. Ms. Maureen Connor, Philipsburg Qualifications (if required): resident of the Upper Clark Fork River Basin	Governor	7/31/2011
Workers' Compensation Court Judge (not listed) Mr. James Shea, Missoula Qualifications (if required): none specified	Governor	9/6/2011