

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 17

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 The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted.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

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 10.16.3803 and 10.16.3818 ) PROPOSED AMENDMENT  
pertaining to special education )

TO: All Concerned Persons

1. On Thursday, October 6, 2011, at 11:30 a.m., the Superintendent of Public Instruction will hold a public hearing in the Superintendent's Conference Room at 1227 11th Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Superintendent of Public Instruction will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Office of Public Instruction no later than 5:00 p.m. on Monday, October 3, 2011, to advise us of the nature of the accommodation that you need. Please contact Beverly Marlow, OPI Legal Division, P.O. Box 202501, Helena, Montana, 59620-2501; telephone (406) 444-3712; fax (406) 444-2893; or e-mail bemarlow@mt.gov.

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

10.16.3803 DEFINITIONS The following definitions apply to rules affecting the funding of special education programs:

(1) through (10) remain the same.

(11) "Low incidence disability services" means services to students whose disability occurs in less than one percent of the school population, presents a need for very intensive special education services, and costs for the services exceed the average costs for other students with disabilities. Low incidence disabilities include autism, deafness or hearing impairments, vision impairments, and emotional disturbance when the emotional disturbance requires a more intense program such as day treatment most effectively provided in a multidistrict program.

(11) through (15) remain the same but are renumbered (12) through (16).

AUTH: 20-7-402, 20-7-431, 20-7-457, MCA

IMP: 20-7-414, 20-7-431, 20-7-457, 20-9-321, MCA

10.16.3818 SPECIAL EDUCATION TUITION RATES (1) through (3)(b)(i) remain the same.

(ii) the costs are for special education and related services unique to the student, including specialized one-on-one staff and specialized equipment and supplies and excluding:

(A) the costs for removal of architectural barriers;

(B) prorated costs of ordinary special education services such as teachers' salaries and benefits; and

(C) costs of equipment and supplies commonly used in special education programs.

(c) Option C: For specialized school district programs which provide concentrated services for significant numbers of students with low incidence disabilities, including nonresident students who enroll in the host district specifically to attend the program, the estimated total per-pupil cost of the program including administrative operating costs, less 80% of the maximum per ANB rate established in 20-9-306(1), MCA for the year of attendance and less the per ANB special education block grants received by the district, may be added to the rate in ARM 10.10.301, provided:

(i) such services provided in any multidistrict program must be determined by the student's IEP team and cannot be based solely on the student's identified low incidence disability;

(ii) the host district has submitted a written description of the program and the Office of Public Instruction has provided written approval for the host district to apply the Option C special education tuition add-on rate for nonresident students of the program;

(iii) the host district does not pass program costs for resident students on to parties paying nonresident student tuition;

(iv) the host district uses any remaining balance after operating the prior year's special education program for low incidence disabilities to defray the following year's program costs used to determine the tuition rate; and

(v) the total per-pupil cost of operating the program is determined based on the estimated average number of students expected to participate in the program for the following year.

(4) through (7) remain the same.

AUTH: 20-5-323, MCA

IMP: 20-5-320, 20-5-321, 20-5-323, 20-5-324, 20-9-306, MCA

REASON: The Superintendent of Public Instruction finds that it is reasonable and necessary to amend the above rules to provide another option for special education funding. School districts provide services regionally to certain groups of students with low incidence disabilities that cannot receive a free appropriate public education in their home districts. Due to the complexity of the services provided, any public school district that provides such services must be able to receive a reasonable amount of funds to staff and house the program as the host district. The current options available under ARM 10.16.3818 are not sufficient for the host district to receive adequate funding to operate the program. The proposed Option C will allow for host districts to provide appropriate services and receive the amount of funding necessary.

4. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Beverly Marlow, OPI Legal Division, P.O. Box 202501, Helena,

Montana, 59620-2501; telephone (406) 444-3712; fax (406) 444-2893; or e-mail [bemarlow@mt.gov](mailto:bemarlow@mt.gov) and must be received no later than 5:00 p.m., Thursday, October 6, 2011.

5. Ann Gilkey, OPI Chief Legal Counsel, has been designated to preside over and conduct this hearing.

6. The Superintendent of Public Instruction 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 agency.

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

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

/s/ Ann Gilkey  
Ann Gilkey  
Rule Reviewer

/s/ Dennis Parman for Denise Juneau  
Denise Juneau  
Superintendent of Public Instruction

Certified to the Secretary of State August 29, 2011.

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY  
OF THE STATE OF MONTANA

In the matter of the amendment of ARM )	NOTICE OF PUBLIC HEARING ON
17.56.101, 17.56.605, and 17.56.607 )	PROPOSED AMENDMENT
pertaining to definitions, cleanup plan, )	
and release categorization )	(UNDERGROUND STORAGE
)	TANKS)

TO: All Concerned Persons

1. On September 28, 2011, at 10:00 a.m., the Department of Environmental Quality will hold a public hearing in Room 122, 1100 North Last Chance Gulch, Helena, Montana, to consider the proposed amendment 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, contact Elois Johnson, Paralegal, no later than 5:00 p.m., September 19, 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:

17.56.101 DEFINITIONS For the purposes of this chapter and unless otherwise provided, the following terms have the meanings given to them in this rule and must be used in conjunction with those definitions in 75-11-203, 75-11-302, and 75-11-503, MCA.

(1) through (48)(c) remain the same.

(49) "Petroleum mixing zone" has the meaning given in 75-11-503, MCA.

(49) through (77) remain the same, but are renumbered (50) through (78).

AUTH: 75-11-204, 75-11-319, 75-11-505, MCA

IMP: 75-11-203, 75-11-302, 75-11-319, 75-11-505, MCA

REASON: It is necessary to amend ARM 17.56.101 in order to incorporate and cross reference the statutory definition of petroleum mixing zone codified at 75-11-503, MCA.

17.56.605 CLEANUP PLAN (1) and (2) remain the same.

(3) The owners and operators must screen and select cleanup alternatives to develop a matrix evaluation of cleanup alternatives which considers cost, performance, reliability, implementation, safety, and effects on public health, and the environment. Information on all cleanup alternatives, with an explanation of why any

alternative was selected, must be included in the cleanup plan. Cleanup alternatives may include, but are not limited to, the following types of action:

(a) through (h) remain the same.

(i) drinking water supply replacement; ~~and~~

(j) relocation of affected residences and/or businesses; ~~and~~

(k) establishment of a petroleum mixing zone in accordance with ARM 17.56.607.

(4) through (8)(b) remain the same.

AUTH: ~~75-10-405~~, 75-11-319, 75-11-505, MCA

IMP: ~~75-10-405~~, ~~75-11-309~~, 75-11-319, 75-11-505, MCA

REASON: The proposed amendment to ARM 17.56.605 is necessary to implement amendments to the Petroleum Storage Tank Cleanup Act, 75-11-301, MCA, et seq., and to the Montana Underground Storage Tank Act, 75-11-501, MCA, et seq., by Chapter 189, Laws of 2011, which was entitled Senate Bill 9 (Senate Bill 9). Senate Bill 9 provides that a corrective action plan may include the establishment of a petroleum mixing zone. The proposed amendment adds ARM 17.56.605(3)(k) to include the establishment of a petroleum mixing zone as a cleanup alternative evaluated against other cleanup alternatives in the development of a cleanup plan designed to remediate a petroleum release from a petroleum storage tank. Senate Bill 9 provides that a corrective action plan may include a petroleum mixing zone in conjunction with the final remediation and resolution of a petroleum release. The final remedial action chosen to address a petroleum release may be the establishment of a petroleum mixing zone if the criteria in Senate Bill 9, Section 5(2) are satisfied. The proposed amendment to ARM 17.56.605 will assist tank owners and operators in proposing remediation of a release with a petroleum mixing zone and will assist the department in evaluating whether all criteria for establishment of a petroleum mixing zone are achieved.

17.56.607 RELEASE CATEGORIZATION (1) The department shall categorize all releases from USTs and PSTs regulated under this chapter as active, transferred, resolved, ~~or~~ ground water management, or resolved with a petroleum mixing zone releases.

(2) Releases that do not meet the criteria set forth in (3), (4), ~~or~~ (7), or (10) must be categorized as active.

(3) through (4)(e) remain the same.

(5) The department may recategorize a resolved or a resolved with a petroleum mixing zone release as active if the department receives information with which it determines that further corrective action is necessary. Such information may include, but is not limited to, changes in land use or site conditions, including removal, alteration, or failure to maintain department-approved institutional controls, engineering controls, or physical conditions, that may increase the potential for adverse impacts to human health, safety, or to the environment from residual contamination. The department shall notify the owner or operator of the department's determination to recategorize a resolved release as active.

(6) If a release is categorized as resolved, the department shall send a letter to the owner or operator that:

(a) through (c) remain the same.

(d) describes any institutional controls, engineering controls, or physical conditions that must be maintained to protect human health, safety, or the environment from residual contamination;

(d) and (e) remain the same, but are renumbered (e) and (f).

(7) The department may categorize a release as ground water management if:

(a) through (d)(iii) remain the same.

(e) ground water performance monitoring and natural attenuation data collected in accordance with U.S. Environmental Protection Agency Office of Solid Waste and Emergency Response Directive 9200.4-17P indicate that the extent, magnitude, and concentration of the dissolved contaminant plume have been stable or decreasing under fluctuating hydrogeologic conditions for a period of monitoring, ~~not less than five years, which~~ that is determined by the department to be sufficient to detect unacceptable risks to human health, safety, or to the environment;

(f) through (9)(g) remain the same.

(10) The department may categorize a release as resolved with a petroleum mixing zone and send a letter to the owner or operator in accordance with (11), if the department has determined that conditions at the site ensure present and long-term protection of human health, safety, and the environment and that residual petroleum in soil and ground water will continue to be remediated through natural attenuation processes without additional intervention, active cleanup, or monitoring. The following requirements must also be met before a release may be categorized as resolved with a petroleum mixing zone:

(a) the petroleum mixing zone is included in a corrective action plan and all the conditions set forth in [Chapter 189, Laws of 2011] are met;

(b) documented investigations, conducted in accordance with ARM 17.56.604, identify the extent or absence of contamination in the soil, ground water, surface water, or other environmental media;

(c) all free product has been removed to the maximum extent practicable;

(d) risk evaluations conducted in accordance with (4)(b) demonstrate that there are no unacceptable risks to human health, safety, ecological receptors, surface water, or aquatic sediments from exposure or likely exposure to contamination;

(e) all appropriate corrective actions associated with the release have been completed and no further corrective actions are reasonably required by the department;

(f) all applicable environmental laws listed in (4)(e) associated with the release have been met, except that ground water quality exceeds a water quality standard for petroleum or petroleum constituents. In addition, ground water quality may exceed a nondegradation requirement or a standard established as a drinking water maximum contaminant level published in 40 CFR Part 141 for petroleum or petroleum constituents;

(g) ground water performance monitoring indicates that the extent, magnitude, and concentration of the dissolved contaminant plume have been stable



or decreasing under fluctuating hydrogeologic conditions for a period of monitoring that is determined by the department to be sufficient to detect unacceptable risks to human health and safety;

(h) the source area contamination has been removed to the maximum extent practicable, and any remaining source area contamination does not pose an unacceptable present or future risk to human health, safety, or the environment;

(i) at the downgradient boundary of a petroleum mixing zone, the concentration of any petroleum constituent does not exceed a water quality standard adopted by the Board of Environmental Review pursuant to 75-5-301, MCA.

The downgradient boundary of a petroleum mixing zone must be determined by documented investigations conducted in accordance with ARM 17.56.604. A petroleum mixing zone must remain within the facility property boundary unless a recorded easement approved by the department allows the mixing zone to extend off the facility property. A petroleum mixing zone may extend no further than 500 feet from the origin of the release. For purposes of this rule, the term "facility property" means a single parcel or contiguous parcels on which one or more petroleum storage tanks are or were located, provided that contiguous parcels must be under single ownership at the time the petroleum mixing zone is established;

(j) a petroleum mixing zone may not extend to within 500 feet of an existing drinking water well or surface water;

(k) department-approved institutional controls, engineering controls, or physical conditions are in place to ensure that identified risks to human health and safety are reduced to acceptable levels. For the purposes of this rule, institutional controls, engineering controls, or physical conditions may consist of:

(i) easements, deed restrictions, or restrictive covenants that run with the land and that have been approved by the department and duly recorded;

(ii) a designated controlled ground water area as provided for in 85-2-506, MCA;

(iii) environmental control easements created and approved in accordance with 76-7-101 through 76-7-213, MCA; and

(iv) an engineering control, physical condition, or other method or condition approved by the department and designed to ensure that risk to human health has been reduced to acceptable levels; and

(l) a notice is placed on the deed of all parcels of real property on which the facility that is the source of the resolved with a petroleum mixing zone release is located. This deed notice must describe the nature and location of the residual contamination remaining in the soil and ground water at the facility and must describe all institutional controls, engineering controls, physical conditions, or other controls or conditions required to maintain the petroleum mixing zone.

(11) If the department categorizes a release as resolved with a petroleum mixing zone, the department shall send a no-further-action letter to the owner or operator. The letter must describe the following conditions required to maintain the petroleum mixing zone:

(a) no further corrective action will be required to address the release provided that all institutional controls, engineering controls, physical conditions, or other department-approved controls or conditions are maintained;

(b) residual contamination from the release will be addressed by natural attenuation processes designed to reduce residual concentrations of contaminants to levels that meet all applicable environmental laws, listed in (4)(e), at a point in the future;

(c) all monitoring wells, piezometers, and other ground water sampling points either be abandoned or maintained by the owner or operator in accordance with applicable rules and requirements and as directed by the department. Monitoring well maintenance requirements include reasonable well maintenance necessary to avoid waste or contamination of ground water in accordance with Title 37, chapter 43, MCA. Maintenance does not include monitoring of ground water level, flow, or quality, unless there is a unique, overriding, site-specific, impact-related reason to require monitoring;

(d) the nature, extent, concentration, and location of any residual contamination is defined and will not expand or increase;

(e) the release does not pose an unacceptable present or future risk to human health, safety, or ecological receptors;

(f) there be a schedule for review of any institutional controls;

(g) a statement that the department may require further documentation of site conditions to determine whether the requirements in (4) are met if the owner, operator, or department proposes to recategorize the release as resolved; and

(h) a statement that the department reserves the right to conduct or to require further investigation or corrective action if a new release occurs or if the department receives new or different information related to the release.

(12) Institutional controls, engineering controls, physical conditions, and notices placed on deeds, required to categorize a release as resolved with a petroleum mixing zone under (10), may be removed when the department determines that residual petroleum contamination in ground water exceeding a parameter listed in (10)(f) is no longer present or when the release is categorized as resolved in accordance with (4).

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

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

REASON: It is necessary to amend ARM 17.56.607(1) and (2) to include "resolved with a petroleum mixing zone" as a category of release from underground storage tanks (USTs) and petroleum storage tanks (PSTs) so that Senate Bill 9, allowing the establishment of a petroleum mixing zone as the final remedial action addressing a petroleum release from a UST or PST, is implemented by the department.

It is necessary to amend ARM 17.56.607(5) to allow the department to recategorize a "resolved with a petroleum mixing zone" release as active if the department receives information with which it determines further corrective action is necessary to address the release. Information that may cause the department to recategorize a "resolved with a petroleum mixing zone" release as active includes the removal, alteration, or failure to maintain department-approved institutional controls, engineering controls, or physical conditions designed to protect human health, safety, and the environment. The proposed amendment to ARM

17.56.607(5) is necessary to implement Section 5(6) of Senate Bill 9, which requires a petroleum mixing zone to be "established and maintained" in order for the release to be considered "resolved." Establishment and maintenance of department-approved institutional controls, engineering controls, or physical conditions, as defined in proposed ARM 17.56.607(10)(k) through (l), are necessary to categorize a release as "resolved with a petroleum mixing zone" and to ensure present and long-term protection of human health, safety, and the environment.

When a release is categorized as resolved, the owner or operator must be informed of any institutional controls, engineering controls, or physical conditions that must be maintained to protect human health, safety, and the environment from residual contamination. It is necessary to amend ARM 17.56.607(6)(d) to add a description of all institutional controls, engineering controls, or physical conditions that must be maintained to protect human health, safety, or the environment from residual contamination to the contents of the letter sent to the owner or operator of the facility upon categorization of a release as resolved.

It is necessary to amend ARM 17.56.607(7)(e) to eliminate the minimum five-year ground water monitoring period prior to determining that a dissolved contaminant plume is stable or decreasing, and whether the release may be categorized as ground water management. It has been the department's experience that less than five years of ground water monitoring and natural attenuation data is sufficient in many cases to support a conclusion that a ground water contaminant plume is stable or decreasing. The department has determined that the minimum five-year period of monitoring data is unnecessary. Instead, the department will examine available monitoring and natural attenuation data, determine whether this information is sufficient to detect unacceptable risks to human health, safety, or to the environment from residual ground water contamination, and determine whether the release should be placed in the ground water management category.

Section 4 of Senate Bill 9 requires the department to adopt rules governing the inclusion of a petroleum mixing zone in a corrective action plan and provides that the department may incorporate by reference rules adopted by the Board of Environmental Review pursuant to 75-5-301 and 75-5-303, MCA, related to mixing zones for ground water. The proposed amendments do not incorporate by reference all restrictions and requirements in rules adopted by the board related to mixing zones for ground water as permitted by Senate Bill 9, but the proposed amendments at ARM 17.56.607(10)(i) and (j) are based on the board's standard mixing zone rules for ground water at ARM 17.30.517. For example, at proposed ARM 17.56.607(10)(i) the downgradient boundary of the petroleum mixing zone may extend no further than 500 feet from the origin of the release, and at proposed ARM 17.56.607(10)(j) a petroleum mixing zone may not extend to within 500 feet of an existing drinking water well or surface water. These limitations are based on rules pertaining to standard mixing zones for ground water at ARM 17.30.517(1)(d)(viii)(D) and (1)(d)(ix).

The proposed amendments to ARM 17.56.607(10) are necessary to meet the requirement in Senate Bill 9 to adopt rules governing the inclusion of petroleum mixing zones in corrective action plans and to implement provisions of Senate Bill 9 that provide for the establishment of a petroleum mixing zone in a corrective action plan. The proposed amendments to ARM 17.56.607(10) provide that the

department may categorize a release as "resolved with a petroleum mixing zone" if the conditions at the site ensure present and long-term protection of human health, safety, and the environment and the department determines that residual petroleum in soil and ground water will continue to be remediated through natural attenuation processes without additional intervention, active cleanup, or monitoring. Section 5 of Senate Bill 9 provides that a corrective action plan may include the use of a petroleum mixing zone in conjunction with the final remediation and resolution of a petroleum release. It is necessary to set forth the conditions under which a petroleum mixing zone may be established consistent with Senate Bill 9, Section 5, which provides that a petroleum mixing zone may be established only when: all source material has been removed to the maximum extent practicable; the extent of petroleum contamination has been defined; natural breakdown or attenuation is occurring within the plume; and no further corrective action is reasonably required at the site. Further, the boundary of a petroleum mixing zone must be contained within the boundary of the property on which the petroleum release originated, unless a recorded easement on an adjoining property allows the petroleum mixing zone to extend onto the adjoining property, and the petroleum mixing zone must be contained within an unconfined aquifer. The proposed amendments to ARM 17.56.607(10)(a) through (l) set forth the conditions and requirements, consistent with Senate Bill 9, for a release to be categorized as resolved with a petroleum mixing zone and maintained in that category.

The proposed amendments to ARM 17.56.607(11) describe the no-further-action letter that will be sent to the owner or operator of a facility where a release is categorized as "resolved with a petroleum mixing zone." These amendments are necessary to implement Section 5(6)(c) of Senate Bill 9, which requires the department to issue a no-further-action letter to the owner or operator that states a petroleum mixing zone has been established for the release and describes any conditions necessary to maintain the petroleum mixing zone. The proposed amendments to ARM 17.56.607(11)(a) through (h) describe the contents of the no-further-action letter.

The proposed amendments to ARM 17.56.607(12) are necessary to describe the process for removing institutional controls, engineering controls, physical conditions, and notices placed on deeds when residual contamination in ground water, exceeding a parameter in ARM 17.56.607(10)(f), is no longer present, or when the release is categorized as resolved in accordance with ARM 17.56.607(4). Once a release that has been categorized as "resolved with a petroleum mixing zone" has attenuated to levels that do not exceed water quality parameters, the conditions designed to ensure that risks to human health and safety are reduced to acceptable levels are no longer necessary and this proposed rule amendment is necessary to provide a mechanism to remove these restrictions once the threat from residual contamination is no longer present.

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

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

5. Kirsten Bowers, attorney, has been designated to preside over and conduct the hearing.

6. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name 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](mailto:ejohnson@mt.gov); or may be made by completing a request form at any rules hearing held by the department.

7. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted by letter dated June 7, 2011.

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, August 29, 2011.

BEFORE THE DEPARTMENT OF JUSTICE  
OF THE STATE OF MONTANA

In the matter of the amendment of	)	NOTICE OF PROPOSED
ARM 23.6.105, 23.6.108, and	)	AMENDMENT
23.6.109 pertaining to removal of a	)	
member of the Tow Truck Complaint	)	
Resolution Committee, removing	)	NO PUBLIC HEARING
references to the Public Service	)	CONTEMPLATED
Commission and satellite operations,	)	
clarifying requirements regarding	)	
insurance, requirements for safety	)	
certification of tow trucks and	)	
extending the time period for safety	)	
certification of tow trucks	)	

TO: All Concerned Persons

1. On October 10, 2011, the Department of Justice proposes to amend the above-stated rules.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on September 20, 2011, to advise us of the nature of the accommodation that you need. Please contact Kathy Stelling, Department of Justice, 215 North Sanders, P.O. Box 201401, Helena, MT 59620-1401; telephone (406) 444-2026; Montana Relay Service 711; fax (406) 444-3549; or e-mail [kstelling@mt.gov](mailto:kstelling@mt.gov).

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

23.6.105 TOW TRUCK COMPLAINT RESOLUTION COMMITTEE - ESTABLISHMENT (1) through (5) remain the same.

(6) The Attorney General may remove any member of the committee for any reason prior to the completion of their term. In such instance, the Attorney General shall appoint the successor to any committee member. The successor member shall complete the term of the member whom they replaced and may apply to be appointed to subsequent terms.

(6) remains the same but is renumbered (7).

AUTH: 61-8-911, MCA  
IMP: 61-8-908, 61-8-912, MCA

REASON: While the current rule addresses appointment to the committee, it does not address situations in which a committee member may need to be removed. The

department recognized this need when recently a committee member pleaded guilty to a federal crime, though he resigned from the committee before the Attorney General pursued removal. This proposed rule change allows the Attorney General discretion to remove members from the committee for any reason.

23.6.108 VEHICLE TOW AND STORAGE REQUIREMENTS – INSURANCE

(1) remains the same.

(2) A representative of the Montana Highway Patrol or of a local law enforcement agency may request that a qualified operator in the state rotation system improve its storage facility so as to comply with 61-8-906, MCA. If the operator wishes to contest the request, he or she may file a written complaint with the committee.

(3) Pursuant to 69-12-102, MCA, each and every commercial tow truck operator shall cause proof of insurance coverage to be filed with the ~~Montana Public Service Commission~~ Montana Highway Patrol in accordance with ARM 38.3.712, notwithstanding the fact that any individual operator may be a subsidiary of another operator and may be covered by the parent operator's insurance.

~~(4) For each satellite operation, the tow truck operator must be able to provide proof of current insurance for that location to an inspector upon request.~~

(54) A tow operator must comply with applicable insurance laws at all times, including 61-8-906 and 61-6-302, MCA. If the Montana Highway Patrol is advised at any time by the Public Service Commission that an operator's insurance is expired or cancelled, the operator will be given 48 hours to correct the problem, then he or she will be removed from the rotation list the operator must immediately cease towing and must take all trucks out of service. The operator must not resume commercial towing until the operator provides proof of valid insurance to the Montana Highway Patrol. If the operator holds a current letter of appointment, the operator will also be reinstated to the rotation list. Such placement on the rotation list is not retroactive.

~~(6) If the operator provides proof of insurance at a later date and is currently certified, the operator will be placed back on the rotation list; such placement is not retroactive.~~

~~(7) At the time of the annual safety inspection the operator must provide proof of current insurance to the inspector. Such proof must be carried in the tow truck at all times.~~

(5) Proof of insurance, through the submission of the MV-5 form to the Montana Highway Patrol, must be filed prior to the annual safety inspection.

(6) The inspector must confirm proof of vehicle insurance during the annual safety inspection, evidenced by an insurance card as required by 61-6-302, MCA. An operator need not furnish a copy of the MV-5 form to the inspector.

AUTH: 61-8-911, MCA

IMP: 61-8-906, MCA

REASON: The Public Service Commission no longer receives insurance information. Such information is gathered and kept on file through the Montana Highway Patrol. Also, due to changes to the Montana Professional Tow Truck Act in

the 2011 legislative session, all references to satellite operations have been removed. Finally, any tow truck operator without valid, current insurance may not tow any vehicle, as provided by 61-8-906, MCA. Giving tow operators a 48-hour window to address the problem exposes the state to liability if the operator continues to tow after receiving notice from the Montana Highway Patrol.

23.6.109 SAFETY INSPECTION PROCESS (1) All operators of commercial tow truck equipment in the state of Montana must have an annual safety inspection as set forth in (2), (3), and (4).

(2) through (4) remain the same.

(5) As part of the annual inspection process, each tow truck operator shall provide the Montana Highway Patrol with an active driver roster including proof of each driver's towing certification or towing experience and proof of valid driver's license for each driver for the class of vehicle operated. A list of nationally recognized certification programs for tow truck operators that are acceptable to meet the requirements for a qualified tow truck operator under 61-8-903(b)(i) and (ii), MCA, is maintained by the Montana Tow Truck Association.

(56) All safety inspectors must have a CVSA level 1 inspector's certification before being qualified to inspect tow trucks.

(67) A Montana Highway Patrol-approved inspection form will be completed by the inspector an assigned trooper. If minimum standards are met, a Montana Highway Patrol-approved decal will be affixed to the lower right hand corner of the windshield indicating passage of the inspection. The decal will indicate the date of the inspection, the expiration date of the tow truck's insurance, and the class and license plate number of the tow truck.

(78) The safety certification is effective for one year, beginning October September 1 of each year. There will be a 60-day grace period extending to December 31 at the expiration of the certification to allow for the scheduling of an inspection of the tow truck. It is the responsibility of the tow truck operator to complete the entire inspection process by December 31. The tow truck must be taken out of service for both commercial and rotation system towing if the inspection process is incomplete by December 31.

(89) It is the responsibility of the tow truck operator to contact the Montana Highway Patrol and Montana Department of Transportation Motor Carrier Services District Captain to request the inspection. The inspection site must be relatively flat and of a hard surface to allow for movement of the inspector under the tow truck.

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

(4011) Any additional tow truck placed into service by an operator must be qualified and classified prior to answering any commercial towing calls or calls from the law enforcement rotation system.

(11) remains the same but is renumbered (12).

(13) Failure to provide true and accurate information, or failure to supply updated information, required by these rules to the Montana Highway Patrol will result in immediate suspension from commercial towing for a minimum of 30 days. A tow truck operator may not commence commercial towing until complete, accurate, and updated information is provided. Following suspension, a tow truck



operator must resubmit all information required by the annual safety inspection and reapply for a letter of appointment to participate in the state rotation system.

(4214) This rule is subject to the following qualifications:

(a) remains the same.

(b) if the inspection identifies a non-safety-related defect or deficiency, the operator will be informed of the defect or deficiency and requested to correct it. Failure to correct the defect or deficiency within 30 days of notice will result in suspension from the state rotation system until the defect or deficiency is corrected;

(c) if the inspection identifies a safety-related defect or deficiency, the tow truck will be immediately taken out of service. The tow truck cannot be used in the state rotation system until the reinspection confirms that the defect or deficiency has been corrected; and

(d) if either the inspection form or certification decal is lost, removed, rendered unreadable, or destroyed, the operator must immediately notify the nearest Montana Highway Patrol office that can provide a copy of the inspection report from its files and/or reissue a certification decal.

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

AUTH: 61-8-911, MCA

IMP: 61-8-907, MCA

REASON: The proposed rule changes are offered in response to the September 2010 audit of the Montana Professional Tow Truck Act by the Legislative Audit Division. Specifically, these proposed rule changes address recommendation numbers 7 and 8 of the Audit Report.

The Audit Report recommended that the Department of Justice strengthen assurance of tow truck driver licensing and that tow truck drivers have attained the minimum certification or experience by requiring operators to submit an active driver roster. This recommendation is addressed in these proposed rules under new (5). This section also addresses which specific nationally recognized certification programs are acceptable in Montana.

The Audit Report also recommended amending the administrative rules to allow greater flexibility in the timing of annual safety inspections. These proposed rules allow for a four-month inspection period between September 1 and December 31 annually.

Finally, these proposed rules allow the department to impose sanctions on tow truck operators who submit false, inaccurate, or deficient information on their forms. Such sanctions will aid the department's enforcement of these rules as noted in the Audit Report and ensure public safety.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to: Kelley Hubbard, Department of Justice, 215 North Sanders, P.O. Box 201401, Helena, MT 59620-1401; telephone (406) 444-2026; Montana Relay Service 711; fax (406) 444-3549; or e-mail khubbard@mt.gov, and must be received no later than 5:00 p.m. on October 6, 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 they have to Kelley Hubbard at the above address no later than October 6, 2011.

6. If the agency receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of the persons who are directly affected by the proposed action; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. The number of persons affected is at least 300.

7. An electronic copy of this notice is available through the Department of Justice web site at <http://doj.mt.gov/resources/administrativerules.asp>. The department strives to make the electronic copy of this notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems, and that a person's difficulties in sending an e-mail do not excuse late submission of comments.

8. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 4 above, or may be made by completing a request form at any rules hearing held by the department. A copy of the interested person's request form may be printed from the Department of Justice's web site at <http://doj.mt.gov/resources/administrativerules.asp>, and mailed to the rule reviewer.

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The sponsors were notified by e-mail on August 22, 2011.

/s/ J. Stuart Segrest  
J. Stuart Segrest  
Rule Reviewer

/s/ Steve Bullock  
Steve Bullock  
Attorney General  
Department of Justice

Certified to the Secretary of State on August 29, 2011.

BEFORE THE DEPARTMENT OF JUSTICE  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 23.6.106 pertaining to the Tow ) PROPOSED AMENDMENT  
Truck Complaint Resolution )  
Committee )

TO: All Concerned Persons

1. On October 13, 2011, at 1:30 p.m., the Department of Justice will hold a public hearing in the auditorium of the Scott Hart Building, 303 North Roberts, Helena, Montana, to consider the proposed amendment of the above-stated rule.

2. The Department of Justice will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Justice no later than September 30, 2011, to advise us of the nature of the accommodation that you need. Please contact Kathy Stelling, Department of Justice, 215 North Sanders, P.O. Box 201401, Helena, MT 59620-1401; telephone (406) 444-2026; Montana Relay Service 711; fax (406) 444-3549; or e-mail [kstelling@mt.gov](mailto:kstelling@mt.gov).

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

23.6.106 TOW TRUCK COMPLAINT RESOLUTION COMMITTEE – JURISDICTION AND PROCEDURE (1) remains the same.

(2) As part of the annual inspection process, each tow truck operator shall submit a copy of its towing service rates to the Montana Highway Patrol. Tow truck operators may supplement their annual towing service rate filings at any time by notifying the Montana Highway Patrol in writing of any changes to towing service rates. The towing service rates must include at a minimum the operator's base rate of compensation per hour, per mile, or per pound for each class of equipment and any additional hourly rates or other charges that may be applied. Towing rates shall be submitted in writing to the Montana Highway Patrol at the same address as the MV5 form. The towing service rates submitted annually for each company shall be made available to the Tow Truck Complaint Resolution Committee. The towing service rates will be used by the Tow Truck Complaint Resolution Committee in evaluating the reasonableness of a charge and/or whether a charge is unfair or deceptive in the context of a consumer complaint.

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

~~(34)~~ Complaints must be signed and submitted in writing to the Office of Consumer Protection (OCP) in the Attorney General's Office, 2225 Eleventh Avenue, P.O. Box 200151, Helena, MT 59620-0151, ~~or a member of the committee.~~ The complaint must identify the tow truck operator against whom it is filed and include a description of the underlying facts giving rise to the complaint.

(45) After receiving a written complaint, the OCP shall forward a copy of the complaint to the tow truck operator complained of, who has 20 days to respond in writing to the OCP. If the tow truck operator fails to respond within 20 days, beginning on the 21st day, the tow truck operator shall be suspended from participating in the state and local rotation system for a period of 30 days. ~~The tow truck operator shall remain suspended from participating in the state and local rotation system until the tow truck operator responds to the OCP.~~

(5) through (7) remain the same but are renumbered (6) through (8).

(89) If after a hearing the committee finds the complaint to have merit, the committee may:

(a) and (b) remain the same.

(c) permanently suspend the operator from participating in the state rotation system; or

(d) order appropriate restitution to the prevailing party; or

~~(de)~~ issue some other sanction that a majority of the committee agrees is appropriate.

(910) The committee's decision is subject to judicial review under 2-4-702, MCA.

AUTH: 61-8-911, 61-8-912, MCA

IMP: 61-8-908, 61-8-912, MCA

REASON: The proposed rule changes are offered in response to the September 2010 audit of the Montana Professional Tow Truck Act by the Legislative Audit Division. Specifically, this proposed rule change addresses recommendation number 9 of the Audit Report.

The Audit Report recommended that the Department of Justice require tow truck operators submit their service rates to the Montana Highway Patrol as part of the annual inspection process and to be made available to the Tow Truck Complaint Resolution Committee. Under new (2), this proposed rule follows that recommendation.

The proposed rule change also clarifies that the proper party to receive an initial consumer complaint regarding a tow truck matter is the Office of Consumer Protection (OCP). Additionally, the changes clarify the period of suspension for failing to respond in writing to a consumer complaint forwarded to a tow truck operator by the OCP.

4. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Assistant Attorney General Kelley Hubbard, Department of Justice, 215 North Sanders, P.O. Box 201401, Helena, MT 59620-1401; telephone (406) 444-2026; Montana Relay Service 711; fax (406) 444-3549; or e-mail khubbard@mt.gov, and must be received no later than October 17, 2011.

5. Assistant Attorney General Kelley Hubbard, Department of Justice, has been designated to preside over and conduct this hearing.

6. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 4 above or may be made by completing a request form at any rules hearing held by the department. A copy of the interested person's request form may be printed from the Department of Justice's web site at <http://doj.mt.gov/resources/administrativerules.asp>, and mailed to the rule reviewer.

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

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

/s/ J. Stuart Segrest  
J. Stuart Segrest  
Rule Reviewer

/s/ Steve Bullock  
Steve Bullock  
Attorney General  
Department of Justice

Certified to the Secretary of State on August 29, 2011.

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

In the matter of the amendment of )  
ARM 24.138.509 dental hygiene )  
limited access permit, 24.138.2719 )  
medical assistance program relapse, )  
amendment and transfer of )  
24.138.3201 through 24.138.3209 )  
regarding dentist administration of )  
anesthesia, and the adoption of NEW )  
RULES I through III anesthesia )  
definitions, committee, and permits )

NOTICE OF PUBLIC HEARING ON  
PROPOSED AMENDMENT,  
AMENDMENT AND TRANSFER,  
AND ADOPTION

TO: All Concerned Persons

1. On October 3, 2011, at 9:30 a.m., a public hearing will be held in room B-07, 301 South Park Avenue, Helena, Montana, to consider the proposed amendment, amendment and transfer, and adoption of the above-stated rules.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Board of Dentistry (board) no later than 5:00 p.m., on September 28, 2011, to advise us of the nature of the accommodation that you need. Please contact Dennis Clark, Board of Dentistry, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513; telephone (406) 841-2390; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 841-2305; e-mail [dlibsdden@mt.gov](mailto:dlibsdden@mt.gov).

3. GENERAL STATEMENT OF REASONABLE NECESSITY: The 2011 Montana Legislature enacted Chapter 100, Laws of 2011 (House Bill 94), an act generally revising professional and occupational licensing laws, including the revision of definitions and the administration of anesthesia pertaining to dentistry. The bill was signed by the Governor on April 1, 2011, and will be effective October 1, 2011. The legislative changes comport with the 2007 American Dental Association nomenclature, guidelines, and policies. Accordingly, the board is proposing to adopt New Rules I through III and amend the current anesthesia rules in subchapter 32 to coincide with the statutory changes and further implement the legislation. Where additional specific bases for a proposed action exist, the board will identify those reasons immediately following that rule. The board is also renumbering the rules within subchapter 32 for clarity and better organization, and to allow the board to add additional rules within the existing rules in future rulemaking projects. Authority and implementation cites are being amended to accurately reflect all statutes implemented through the rule and provide the complete sources of the board's rulemaking authority.

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

24.138.509 DENTAL HYGIENE LIMITED ACCESS PERMIT (1) through (1)(e) remain the same.

(f) submits a completed application and pays all appropriate fees.

(2) through (5)(e) remain the same.

AUTH: 37-1-131, 37-4-205, 37-4-405, MCA

IMP: 37-4-405, 37-4-406, MCA

REASON: The board determined it is reasonably necessary to amend this rule to clarify that a completed application is required to obtain a limited access permit. Although an application has always been a standard requirement, staff discovered the omission during a review of the board rules and is amending for consistency within board rules.

24.138.2719 RELAPSE (1) and (2) remain the same.

(3) A participant who has ~~second~~ more than one relapse or a severe relapse shall during the period the participant is under contract with the program must be reported to the board screening panel for review.

(4) remains the same.

(5) The board must take disciplinary action against the license of a participant who has more than two relapses during the period the participant is under contract with the program.

AUTH: 37-1-131, 37-4-205, 37-29-201, MCA

IMP: 37-1-131, 37-1-312, 37-4-311, 37-4-312, 37-4-313, 37-4-314, MCA

REASON: The 2011 Montana Legislature enacted Chapter 122, Laws of 2011 (House Bill 25), an act expanding and revising certain licensing boards' medical assistance programs and requiring board action on certain program violations. The bill was signed by the Governor on April 7, 2011, and will be effective October 1, 2011. The board is amending this rule to align with the requirement in HB 25 that boards take disciplinary action against licensees who return to using prohibited or proscribed substances three times while under contract with medical assistance programs.

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

24.138.3201 (24.138.3217) PRACTICE OF ANESTHESIA (1) Dentists licensed in ~~this state~~ Montana shall not ~~apply~~ administer moderate sedation, deep sedation, or general anesthesia or conscious sedation techniques, unless and until they have met all of the requirements set forth in these anesthesia rules. ~~To "apply" general anesthesia or conscious sedation means to administer the agent to the~~

patient and does not include performing dental procedures upon a patient to whom another person, qualified under 37-4-511, MCA, has given the agent.

(2) Violation of these rules shall constitute grounds for disciplinary actions as provided in 2-4-631(3) and 37-1-136, MCA.

(3) remains the same.

AUTH: 37-1-131, 37-4-205, MCA

IMP: 37-1-131, 37-4-101, 37-4-511, MCA

24.138.3202 (24.138.3219) PERMIT REQUIRED FOR ADMINISTRATION OF ANESTHESIA (1) To administer moderate sedation or deep sedation/general anesthesia or conscious sedation, a Montana licensed dentist must possess a permit.

(2) and (3) remain the same.

(4) The board may grant to a Montana licensed dentist, upon receipt of an application and payment of the initial inspection fee, a temporary permit authorizing the dentist to administer moderate sedation or deep sedation/general anesthesia, light general anesthesia, or conscious sedation for a period not to exceed 120 days or until the inspectors are able to make the inspection. This temporary permit may be extended upon board approval.

AUTH: 37-1-131, 37-4-205, MCA

IMP: 37-1-131, 37-4-101, 37-4-511, MCA

24.138.3203 (24.138.3221) MINIMUM QUALIFYING STANDARDS (1) With respect to deep sedation/general anesthesia, no dentist shall be permitted to administer ~~or monitor~~ deep sedation/general anesthesia during a dental procedure or dental-surgical procedure, unless and until he or she satisfies the qualifications set forth in 37-4-511(4), MCA.

(a) No dentist shall be permitted to administer deep sedation/general anesthesia until he or she has satisfactorily completed residencies accredited by the Commission on Dental Education in the following areas:

(i) a minimum of four years in an oral and maxillofacial surgery residency;  
and

(ii) a minimum of two years in an advanced general dentistry education program in dental anesthesiology.

(2) Dentists providing moderate sedation or deep sedation/general anesthesia or conscious sedation must present evidence of successful completion of an advanced course in cardiac life support within the three most recent years. ~~As used in this subchapter, the terms "general anesthesia" and "conscious sedation" do not include "nitrous oxide/oxygen sedation" used alone or in conjunction with a single oral sedative agent~~ Web-based courses must include a hands-on lab or megacode portion of training.

(3) With respect to ~~conscious~~ moderate sedation, no dentist shall administer drugs to achieve the state known as ~~conscious~~ moderate sedation during a dental procedure or a dental-surgical procedure, unless he or she has received formal training in ~~conscious~~ moderate sedation techniques from an institution, organization,



or training course approved by the board consisting of a minimum of 40 clock hours of didactic instruction and 20 clock hours of additional patient contact. If training for moderate sedation is through continuing education, proof of course content must accompany the initial application in the form of a course outline or syllabus. A minimum of 60 hours of instruction plus management of at least 20 dental patients, by the intravenous route, per participant, are required to achieve competency in moderate sedation techniques. The dentist must furnish evidence of having completed this training.

~~(a) This requirement does not apply to the administration of an oral drug for the purpose of providing mild relaxation.~~

~~(b) (a) All requirements for the use of conscious moderate sedation or deep sedation/general anesthesia will apply as indicated, regardless of the agent used or the route of administration, when the intended or probable effect is a level of depression greater than mild relaxation minimal sedation.~~

~~(4) With respect to nitrous oxide/oxygen inhalation sedation used alone or in conjunction with a single oral sedative agent, no dentist shall use nitrous oxide/oxygen on a patient unless he has completed before completing a course of instruction of at least a minimum of 14 clock hours of didactic and clinical training. This instruction must include didactic and clinical instruction in an accredited dental school, hospital, or dental society sponsored course, and must include instruction in the safety and management of emergencies, including a clinical component. This course of instruction may be completed as part of the predoctoral dental education program or in a postdoctoral continuing education competency course.~~

~~(a) remains the same.~~

~~(5) In order to administer enteral minimal and/or combination inhalation sedation, the dentist must complete a minimum of 16 hours of training, including a clinical component. Training must include the treatment of a compromised airway and other life-threatening emergencies. The course may be completed in a predoctoral dental education curriculum or in a postdoctoral continuing education competency course.~~

~~(a) Supplemental dosing can be used for enteral minimal sedation or enteral minimal sedation and/or combination inhalation sedation.~~

~~(b) Nitrous oxide/oxygen may only be used with a single drug for minimal sedation.~~

~~(6) No dentist shall administer or employ any agent(s) which has a narrow margin for maintaining consciousness, including, but not limited to, ultrashort-acting barbiturates, including, but not limited to, sodium methohexital, thiopental, propofol, ketamine, etomidate, and similarly acting drugs, or quantity of agent(s), or technique(s), or any combination, thereof, that would possibly render a patient deeply sedated or generally anesthetized, unless he or she holds a valid deep sedation/general anesthesia permit issued by the board.~~

AUTH: 37-1-131, 37-4-205, MCA

IMP: 37-1-131, 37-4-101, 37-4-511, MCA

24.138.3204 (24.138.3223) MINIMUM MONITORING STANDARDS (1)

Minimum standards for monitoring patients for deep sedation/general anesthesia shall include the following:

(a) remains the same.

(i) vital signs - to include blood pressure, heart rate, pulse, and respiratory rate oximetry results. Temperature may be necessary; and

(ii) and (1)(b) remain the same.

(i) vital signs - to include blood pressure, heart rate, pulse, and respiratory rate oximetry results to be taken and recorded at least every five minutes; and

(ii) precordial or pretracheal stethoscope or capnography used to monitor respiratory rate and pulse rate; and

~~(iii) pulse oximetry, and~~

~~(iv) (iii) continuous electrocardiac monitoring, and;~~

~~(v) (iv) an intravenous line, and;~~

~~(vi) (v) continuous monitoring of skin and mucosal color, and;~~

(vi) end tidal CO2 monitoring must be utilized for intubated patients under general anesthesia; and

(vii) and (1)(c) remain the same.

(i) vital signs - to include blood pressure, pulse, respiratory rate and oximetry results recorded at the completion of the procedure and prior to discharge; with associated times; and

(ii) the patient must not leave the recovery area until the cardiovascular, and respiratory stability, and absence of nausea and vomiting are assured, and the patient is awake and oriented.

(2) The minimum standards for monitoring conscious moderate sedation patients shall include the following:

(a) remains the same.

(i) vital signs to include blood pressure, pulse, and respiratory rate, and oximetry results; and

(ii) blood pressure monitoring for pediatric patients only as indicated, unless unable to obtain.

(b) remains the same.

(i) continuous electrocardiac monitoring need not be applied to the fully-awake and alert patient. on American Society of Anesthesiologists (ASA) Class 2 and greater patients;

(ii) all vital signs -to include blood pressure, heart rate, pulse, and respirations oximetry results to be monitored and recorded at least every five minutes appropriate intervals. Only appropriate blood pressure and oximetry results monitoring for pediatric patients need be recorded, unless unable to obtain;

(iii) a precordial or pretracheal stethoscope or capnography used to continually monitor respiration and pulse rate; and

~~(iv) pulse oximetry, and~~

(v) remains the same, but is renumbered (iv).

(2)(c) remains the same.

(i) vital signs, blood pressure, heart rate, pulse, and respirations oximetry results should be taken at completion of the procedure and prior to discharge;

(ii) only appropriate blood pressure and oximetry results monitoring for pediatric patients need be recorded; When these parameters are unable to be obtained, other documentation should be evident, verifying adequate respiratory and cardiovascular function; and

(iii) prior to discharge, cardiovascular and respiratory systems must be adequate, with the absence of nausea and vomiting.

(3) Minimum standards for monitoring ~~nitrous oxide/oxygen~~ minimal sedation used alone or in conjunction with a single oral sedative agent patients shall include the following:

(a) pre-op:

(i) vital signs, blood pressure, and heart rate; or

(ii) for pediatric patients, all vital signs, unless unable to obtain.

~~(a)~~ (b) when the dentist who administers the nitrous oxide/oxygen and/or is not in the operator, there must be a dental auxiliary who remains with the patient and provides direct observation. The dental auxiliary must have specific instruction in the observation of nitrous oxide/oxygen sedated patients and shall monitor the patient until discharged.

(4) During dental procedures, the facility must be staffed by supervised monitoring personnel, all of whom are capable of handling procedures, problems, and emergency incidents, and have successfully completed basic life support the American Heart Association's Basic Life Support for Healthcare Providers, or its equivalent.

(a) With respect to a full deep sedation/general anesthesia facility, in addition to the dentist and dental assistant, there must be at least one person present to monitor vital signs. That person must be either:

(i) ~~an~~ a physician anesthesiologist licensed to practice medicine in ~~the state~~ of Montana; or

(ii) a certified registered nurse anesthetist recognized in that specialty by the Montana Board of Nursing; or

(iii) ~~a trained health professional who has received at least one year of postgraduate training in the administration of general anesthesia.~~ dentist who has successfully completed an accredited advanced dental education program in dental anesthesiology;

(iv) an oral and maxillofacial surgeon who has successfully completed an accredited oral and maxillofacial training program; or

(v) a trained healthcare professional.

~~(b) With respect to light general anesthesia, in addition to the dentist and dental assistant, there must be one person present whose duties are to monitor vital signs. This person must be trained in basic life support and their task dedicated to monitoring.~~

~~(c)~~ (b) When ~~conscious~~ moderate sedation is used, the dentist shall be qualified and permitted to administer the drugs and appropriately monitor the patient, and have successfully completed a course in advanced cardiac life support. In addition to the dentist, at least one other person on staff and present in the office must have successfully completed basic life support the American Heart Association Basic Life Support for Healthcare Providers, or its equivalent.

AUTH: 37-1-131, 37-4-205, 37-4-408, MCA

IMP: 37-1-131, 37-4-101, 37-4-408, 37-4-511, MCA

24.138.3205 (24.138.3225) FACILITY STANDARDS (1) A deep sedation/general anesthesia facility under these rules must contain a minimum of equipment, supplies, and drugs, including, but not limited to, the following:

(a) and (b) remain the same.

(c) laryngoscope, endotracheal tubes, and a Magill forcep, and alternative airway devices such as a laryngeal mask airways of appropriate size;

(d) through (f) remain the same.

(g) a precordial or pretracheal stethoscope or capnograph;

(h) pulse oximeter; and

(i) suction devices, standard and emergency;-

(j) for intubated patients under general anesthesia, must include end tidal CO2 monitoring; and

(k) when malignant hyperthermia triggering agents are routinely used, medications used to treat hyperthermia must be immediately available.

(2) A ~~conscious~~ moderate sedation facility under these rules must contain a minimum of equipment, supplies, and drugs, including, but not limited to, the following:

(a) remains the same.

(b) precordial or pretracheal stethoscope or capnograph;

(c) through (e) remain the same.

(f) appropriate drugs for emergencies; and

(g) suction devices, standard and emergency; and-

(h) continuous electrocardiac monitoring on American Society of Anesthesiologists (ASA) Class 2 and greater patients.

(3) A facility in which nitrous oxide/oxygen, ~~is used alone or in conjunction with a single oral sedative agent, is administered,~~ must contain a minimum of equipment and supplies appropriate to meet emergencies.

AUTH: 37-1-131, 37-4-205, MCA

IMP: 37-1-131, 37-4-101, 37-4-511, MCA

24.138.3206 (24.138.3227) ~~ON-SITE~~ ONSITE INSPECTION OF FACILITIES

(1) Each facility where ~~conscious~~ moderate sedation or deep sedation/general anesthesia is to be provided shall be initially inspected by a team appointed by the board, prior to the initial issuance of the appropriate permit to administer anesthesia on the premises, and at intervals not to exceed five years. Adequacy of the facility and competency of the anesthesia team will be evaluated by the inspection team. The inspection team shall consist of at least two individuals. One member must hold a deep sedation/general anesthesia permit. Any dentist whose facility is to be inspected shall be notified at least 30 days prior to the inspection, and the names of the inspection team shall be provided to the dentist.

(2) The ~~on-site~~ onsite inspection shall include a test of the applicant and the applicant's staff on their abilities to recognize and manage complications likely to occur, considering the techniques being used. Early recognition of complications will

be emphasized. The facility must be inspected for the presence of drugs and equipment appropriate for the level of sedation or anesthesia to be provided. Monitoring assistants shall be examined for their knowledge of their respective roles in normal operating procedures and in various emergency situations. The inspection team shall evaluate office staff in proficiency in handling emergency procedures. The inspection team shall evaluate the accuracy of anesthesia ~~record-keeping~~ record-keeping.

(3) If the ~~on-site~~ onsite inspection team finds deficiencies present in the inspected office, the facility shall be given 30 days to address the deficiencies. If, at the completion of this 30-day period, the deficiencies have not adequately been rectified, the board will limit the practitioner's permit to apply moderate sedation or deep sedation/general anesthesia ~~or conscious sedation~~ only in qualifying facilities.

(4) If serious life-threatening deficiencies are found by the ~~on-site~~ onsite inspection team, the board will immediately limit the practitioner's permit by refusing to permit the administration of moderate sedation or deep sedation/general anesthesia ~~or conscious sedation~~ on the premises.

(5) An individual who provides anesthesia at multiple facilities must be inspected at one facility only. The individual must state all facilities are compliant for the equipment requirements.

(6) ~~Five-year~~ Five-year reinspections may be performed by one inspector, unless the dentist being inspected, or board, requests two inspectors. Reinspections for moderate sedation permits may be performed by dentists holding a moderate sedation permit or a deep sedation/general anesthesia permit. For deep sedation/general anesthesia permits, reinspections must be performed by another dentist holding a deep sedation/general anesthesia permit.

AUTH: 37-1-131, 37-4-205, MCA

IMP: 37-1-131, 37-4-101, 37-4-511, MCA

24.138.3207 (24.138.3229) REQUIREMENTS FOR CONTINUING EDUCATION IN ANESTHESIA (1) All dentists holding permits to provide deep sedation/general anesthesia must submit evidence of having attended a minimum of 20 ~~clock~~ hours of ~~anesthesia specific~~ continuing education every three years.

(2) All dentists holding permits to provide ~~conscious~~ moderate sedation must submit evidence of having attended a minimum of 12 ~~clock~~ hours of ~~anesthesia specific~~ continuing education every three years.

(3) remains the same.

(a) deep sedation/general anesthesia;

(b) ~~conscious~~ moderate sedation;

(c) through (e) remain the same.

(f) pharmacology of utilized drugs; and

(g) advanced cardiac life support, up to a maximum of eight hours of continuing education.

(4) through (7) remain the same.

AUTH: 37-1-131, 37-1-319, 37-4-205, MCA

IMP: 37-1-306, 37-1-319, 37-4-101, 37-4-511, MCA

24.138.3208 (24.138.3231) REPORTING ADVERSE OCCURRENCES (1)

All dentists engaged in the practice of dentistry in the state of Montana must submit written reports to the board within seven days of any incident, injury, or death resulting in temporary or permanent physical or mental disability, or death involving the application of minimal sedation, moderate sedation, deep sedation, general anesthesia, conscious sedation or nitrous oxide/oxygen sedation, administered alone or in conjunction with another oral agent, to any dental patient for whom said dentist, or any other dentist, has rendered any dental or medical service. Routine hospitalization to guard against postoperative complications or for patient comfort need not be reported where complications do not, thereafter, result in injury or death, as ~~herein before~~ hereinbefore set forth. The report required by this rule shall include, but not be limited to, the following information:

- (a) remains the same.
- (b) a description of the physical condition of the patient ~~unless Class I (as defined by the American Society of Anesthesiologists)~~ and American Society of Anesthesiologists (ASA) classification;
- (c) through (e) remain the same.
- (f) a description in detail of symptoms of any complications, including, but not be limited to, onset of problems and symptoms of the patient; ~~and~~
- (g) a description of the patient's condition upon termination of any procedure undertaken; ~~and~~
- (h) disposition of patient and subsequent treatment.

AUTH: 37-1-131, 37-4-205, MCA  
IMP: 37-1-131, 37-4-101, 37-4-511, MCA

24.138.3209 (24.138.3215) ANESTHESIA FEE SCHEDULE

(1) <del>Full</del> <u>Deep sedation/general anesthesia</u> application fee	\$200
(2) <del>Full</del> <u>Deep sedation/general anesthesia</u> permit renewal fee	25
(3) <del>Light general anesthesia</del> application fee	200
(4) <del>Light general anesthesia</del> permit renewal fee	25
(5) (3) <del>Conscious</del> <u>Moderate</u> sedation application fee	200
(6) (4) <del>Conscious</del> <u>Moderate</u> sedation permit renewal fee	25
(7) and (8) remain the same, but are renumbered (5) and (6).	

AUTH: 37-1-131, 37-4-205, MCA  
IMP: 37-1-134, 37-4-101, 37-4-511, MCA

REASON: The board is amending this rule to correct the fees associated with the anesthesia permits as amended in HB 94. Because current holders of light general permits will be issued a deep sedation/general anesthesia permit and the fees are identical, the board anticipates no change in annual revenue.

6. The proposed new rules provide as follows:

NEW RULE I DEFINITIONS (1) "Administration of anesthesia" is the route by which an agent is administered to a patient as follows:

(a) "enteral administration" means the agent is absorbed through the gastrointestinal tract or oral mucosa (oral, rectal, or sublingual);

(b) "parenteral administration" means the agent is absorbed intramuscularly, intravenously, intranasally, submucosally, subcutaneously, or intraosseously;

(c) "transdermal administration" means the agent is absorbed through a patch or by iontophoresis through the skin;

(d) "transmucosal administration" means the agent is absorbed across the mucosa (intranasal, rectal, or sublingual); and

(e) "inhalation administration" means a gaseous or volatile agent is introduced into the lungs and absorbed through the gas/blood interface. Because sedation and general anesthesia are a continuum, it is not always possible to predict how an individual patient will respond. Practitioners intending to produce a given level of sedation should be able to diagnose and manage the physiologic consequences (rescue) for patients whose level of sedation becomes deeper than initially intended.

(2) "Deep sedation" means a drug-induced depression of consciousness during which patients cannot be easily aroused, but respond purposefully following repeated or painful stimulation. The ability to independently maintain ventilatory function may be impaired. Patients may require assistance in maintaining a patent airway, and spontaneous ventilation may be inadequate. Cardiovascular function is usually maintained.

(3) "General anesthesia" means a drug-induced loss of consciousness during which patients are not arousable, even by painful stimulation. The ability to independently maintain ventilatory function is often impaired. Patients often require assistance in maintaining a patent airway, and positive pressure ventilation may be required, because of depressed spontaneous ventilation or drug-induced depression of neuromuscular function. Cardiovascular function may be impaired.

(4) "Incremental dosing" means administration of multiple doses of an agent until the desired effect is obtained, not to exceed the maximum recommended dose (MRD).

(5) "Inhalation sedation" means the use of nitrous oxide/oxygen in concentrations of up to 70/30 percent to provide mild relaxation and analgesia. Nitrous oxide/oxygen may produce minimal sedation, moderate sedation, deep sedation, or general anesthesia when used in combination with a sedative agent or agents. Inhalation sedation may be used in the pediatric or adult populations.

(6) "Maximum recommended dose" (MRD) means maximum Food and Drug Administration (FDA)-recommended dose of a drug, as printed in the FDA-approved labeling for unmonitored dose.

(7) "Minimal sedation" means a minimally depressed level of consciousness, produced by a pharmacological method, that retains the patient's ability to independently and continuously maintain an airway and respond normally to tactile stimulation and verbal command. Although cognitive function and coordination may be modestly impaired, ventilatory and cardiovascular functions are unaffected. When the intent is minimal sedation for adults, the appropriate dose of a single

enteral drug is no more than the MRD of a drug that can be prescribed for unmonitored home use.

(8) "Moderate sedation" means a drug-induced depression of consciousness during which patients respond purposefully to verbal commands, either alone or accompanied by light tactile stimulation. No interventions are required to maintain a patent airway, and spontaneous ventilation is adequate. Cardiovascular function is usually maintained. The drugs and/or techniques used for moderate sedation should render the unintended loss of consciousness unlikely. Repeated dosing of an agent before the effects of previous dosing is obtained may result in a greater alteration of the state of consciousness than intended. A patient whose only response is reflex withdrawal from a painful stimulus is not in a state of moderate sedation.

(9) "Supplemental dosing" means a single additional dose of the initial dose of the initial drug necessary for prolonged procedures under minimal sedation. The supplemental dose should not exceed one-half of the initial total dose and should not be administered until the dentist has determined that one clinical half-life of the initial dose has passed. The total aggregate dose must not exceed one and a half times the MRD on the day of administration.

(10) "Titration" is the administration of incremental doses of a drug until a desired effect is obtained.

(11) "Trained healthcare professional" means a person who serves as an anesthesia monitor in a dental office. Such person shall maintain current certification in the American Heart Association's Basic Life Support for Healthcare Providers or its equivalent, shall be trained in monitoring patient vital signs, and shall be competent in the use of monitoring and emergency equipment appropriate for the level of sedation utilized. (The term "competent" as used in these rules means displaying special skill or knowledge derived from training and experience).

AUTH: 37-1-131, 37-4-205, MCA

IMP: 37-4-101, 37-4-511, MCA

NEW RULE II ANESTHESIA COMMITTEE (1) The board hereby creates a committee to be known as the Anesthesia Committee. The committee shall consist of five members appointed by the president of the board. One member of the committee shall be a member of the board. All other members of the committee shall hold a moderate sedation or deep sedation/general anesthesia permit. At least three members of the committee shall be practitioners who hold a deep sedation/general anesthesia permit. Two members of the committee shall be practitioners who hold a moderate sedation permit, if available. If the member appointed from the board holds a deep sedation/general anesthesia permit, he or she shall chair the committee. If the member appointed from the board does not hold a deep sedation/general anesthesia permit, another member of the committee who does hold a deep sedation/general anesthesia permit shall chair the committee. Members serve at the pleasure of the board.

(2) The committee shall meet at least once a year and review dentist credentialing for moderate sedation and deep sedation/general anesthesia permits,



and facilitate the inspection process for new anesthesia permit applications and anesthesia permit reinspections.

(3) The committee shall upon request of the board, advise the board on policies and procedures related to the regulation of minimal sedation, moderate sedation, deep sedation, general anesthesia, and nitrous oxide sedation.

AUTH: 37-1-131, 37-4-205, MCA

IMP: 37-4-101, 37-4-511, MCA

REASON: The board determined it is reasonably necessary to propose this rule and create a standing anesthesia committee comprised of dentists holding anesthesia permits. Due to the complex nature of anesthesia and the increase in anesthesia utilization in dental practice, the board concluded that a standing committee with anesthesia expertise will help to ensure public health and safety. The board intends for this committee to review anesthesia permit applications, oversee reinspections, and apprise the board of current trends in anesthesia on an ongoing basis.

NEW RULE III EFFECT OF 2011 STATUTE AND RULE AMENDMENTS ON CURRENTLY ISSUED ANESTHESIA PERMITS

(1) Any dentist whose board-issued permit to perform light general anesthesia is active on October 1, 2011, shall be issued a deep sedation/general anesthesia permit. The dentist must comply with all applicable statutory and regulatory requirements in order to renew the permit and to satisfy requirements for continuing education in anesthesia.

(2) Any dentist whose board-issued permit to perform full general anesthesia is active on October 1, 2011, shall be issued a deep sedation/general anesthesia permit. The dentist must comply with all applicable statutory and regulatory requirements in order to renew the permit and to satisfy requirements for continuing education in anesthesia.

(3) Any dentist whose board-issued permit to perform conscious sedation is active on October 1, 2011, shall be issued a moderate sedation permit. The dentist must comply with all applicable statutory and regulatory requirements in order to renew the permit and to satisfy requirements for continuing education in anesthesia.

(4) Individuals who have completed one year of anesthesia training prior to the adoption of the January 1, 2007 Commission on Dental Accreditation (CODA): Accreditation Standards for Advanced Dental Education Programs in Dental Anesthesiology, shall be permitted to apply for an anesthesia permit pending verification of satisfactory educational and professional experience as determined by the board.

(5) Individuals who have completed two or more years of anesthesia training prior to the adoption of the January 1, 2007 CODA Accreditation Standards for Advanced Dental Education Programs in Dental Anesthesiology, shall be permitted to apply for an anesthesia permit, pending verification of satisfactory educational and professional experience as determined by the board.

(6) Individuals who have completed an oral and maxillofacial surgery accredited residency of three years prior to the adoption of the January 1, 1988 CODA change of the length of residency to four years, shall be permitted to apply for an anesthesia permit.

AUTH: 37-1-131, 37-4-205, MCA  
IMP: 37-4-101, 37-4-511, MCA

REASON: In implementing the HB 94 statutory changes, the board is proposing this new rule to clarify the transition of current anesthesia permit holders into the two new permit categories and establish training and educational criteria for applicants.

7. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the Board of Dentistry, 301 South Park Avenue, P.O. Box 200513, Helena, Montana 59620-0513, by facsimile to (406) 841-2305, or by e-mail to [dlibsdden@mt.gov](mailto:dlibsdden@mt.gov), and must be received no later than 5:00 p.m., October 11, 2011.

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

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

10. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted on May 16, 2011, through the U.S. Parcel Service.

11. Mary Tapper, attorney, has been designated to preside over and conduct this hearing.

BOARD OF DENTISTRY  
DALE CHAMBERLAIN, DDS, 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 August 29, 2011

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

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 37.86.1101, 37.86.1102, ) PROPOSED AMENDMENT  
37.86.1105, and 37.86.1106 )  
pertaining to Medicaid pharmacy )  
reimbursement )

TO: All Concerned Persons

1. On September 29, 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, at 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 September 19, 2011, to advise us of the nature of the accommodation that you need. Please contact Kenneth Mordan, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

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

37.86.1101 OUTPATIENT DRUGS, DEFINITIONS (1) through (3) remain the same.

(4) "Estimated acquisition cost (EAC)" means the calculation of the provider's estimated cost of a drug for which no federal maximum allowable cost (FMAC) or state maximum allowable cost (SMAC) price has been determined. The EAC is the department's best estimate of what price providers are generally paying in the state for a drug in the package size providers buy most frequently. If actual wholesale cost is not available, the EAC is ~~85% of average wholesale price. the lesser of:~~

- (a) eighty-five percent of average wholesale price (AWP); or
- (b) wholesale acquisition cost (WAC) plus 2%.

(5) through (10) remain the same.

(11) "Active Pharmaceutical Ingredient" (API) means a nonrebatable bulk drug substance, which is defined in 21 CFR 207.3(a)(4)(2011) as any substance that is represented for use in a drug and that, when used in manufacturing, processing, or packaging of a drug, becomes an active ingredient of the drug product.

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

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

37.86.1102 OUTPATIENT DRUGS, REQUIREMENTS (1) and (2) remain the same.

(3) The department will only participate in the payment of legend and over-the-counter drugs listed on the department drug formulary, as determined by the Medicaid Drug Formulary Committee established by the department. The formulary committee is the Drug Use Review Board, established and operating in accordance with 42 USC 1396r-8 ~~(2008)~~ (2011), which governs Medicaid drug programs. The drug formulary includes a preferred drug list (PDL) of selected drugs that have a significant clinical benefit over other agents in the same therapeutic class and also represents good value to the department based on total cost. Prescribers must prescribe from the preferred drug list if medically appropriate.

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

(6) The department will not participate in the payment of a prescription drug: (a) remains the same.

(b) that is not subject to a rebate agreement between the manufacturer and the secretary of HHS as required by 42 USC 1396r-8 ~~(2008)~~ (2011); and

(c) that does not meet prior authorization criteria as determined by the Medicaid Drug Formulary Committee, established and operating in accordance with 42 USC 1396r-8 ~~(2008)~~ (2011), without the existence of a prior authorization request approved by the department or its designated representative. A list of drugs subject to prior authorization, known as the prior authorization drug list, will be provided to interested Medicaid providers.

(7) The department may pay for nonrebtable API bulk powders and excipients compounded in accordance with ARM 37.86.1105(4).

(7) remains the same but is renumbered (8).

~~(8)~~ (9) The department has a drug rebate program administered in accordance with 42 USC 1396r-8 ~~(2008)~~ (2011) and CMS state releases, CMS drug manufacturer releases, and the National Drug Rebate Agreement in effect in 2008, which the department adopts and incorporates by reference. A copy of all documents incorporated by reference in this rule may be obtained from the department web site at [www.dphhs.mt.gov](http://www.dphhs.mt.gov), or by writing to the Department of Public Health and Human Services, Health Resources Division, Acute Services Bureau, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(a) remains the same.

(b) 42 USC 1396r-8 ~~(2008)~~ (2011) states the requirements that must be met by the department, drug manufacturers, and providers to receive reimbursement for outpatient drugs that have been dispensed. This statute describes rebate agreements, covered drugs, prior authorization, reimbursement limits, and drug use review programs.

(9) and (10) remain the same but are renumbered (10) and (11).

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

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

37.86.1105 OUTPATIENT DRUGS, REIMBURSEMENT (1) through (2)(a) remain the same.

(b) The dispensing fees assigned shall range between:

(i) a minimum of \$2.00 and a maximum of \$4.94 for brand name drugs; and

(ii) a minimum of \$2.00 and a maximum of \$6.40 for preferred brand name drugs and generic drugs.

(c) and (d) remain the same.

(3) In-state pharmacy providers that are new to the Montana Medicaid program will be assigned ~~an interim \$4.94~~ the maximum dispensing fee in (2)(b) until a dispensing fee questionnaire, as provided in (2), can be completed for six months of operation. At that time, a new dispensing fee will be assigned which will be the lower of the dispensing fee calculated in accordance with (2) for the pharmacy or the ~~\$4.94~~ maximum allowed dispensing fee provided in (2)(b). Failure to comply with the six months dispensing fee questionnaire requirement will result in assignment of a dispensing fee of \$2.00.

(4) through (4)(h) remain the same.

(i) The department may reimburse for compounded nonrebutable API bulk powders and excipients on the department's drug formulary maintained in accordance with ARM 27.86.1102.

(5) remains the same.

(6) Full-benefit dual eligible recipients qualify for pharmaceutical drug coverage under Medicare Part D prescription drug plans (PDPs) on January 1, 2006 under 42 USC 1302, 1395w-101 through 1395w-152 ~~(2005)~~ (2011), the Medicare Prescription Drug Improvement and Modernization Act of 2003 (MMA). For purposes of the MMA and this rule, the term full-benefit dual eligible has the same meaning as stated in 42 CFR 423.772.

(7) The MMA allows PDPs to exclude from coverage the drug classes listed in 42 USC 1396r-8(d)(2) ~~(2005)~~ (2011). Montana Medicaid may also exclude these drugs and has chosen to do so except for the prescription and nonprescription drugs identified on the department's drug formulary. On January 1, 2006, Montana Medicaid's reimbursement for outpatient drugs provided to full-benefit dual eligible recipients, for whom third party payment is not available, will be limited to the excluded drugs identified on the department's drug formulary.

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

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

37.86.1106 CALCULATION OF THE STATE MAXIMUM ALLOWABLE CHARGE, THE ESTIMATED ACQUISITION CHARGE, AND PROVIDER'S USUAL AND CUSTOMARY CHARGE (1) remains the same.

(2) The estimated acquisition cost (EAC) for a drug is:

(a) remains the same.

~~(b) 85% of the average wholesale price (AWP) if there is no direct price available to providers in the state; or~~

~~(c)~~ (b) a department set SMAC for specified drugs or drug categories when the department determines that acquisition cost is lower than (2)(a) or ~~(b)~~ (c) based on national pricing data, or

- (c) the lesser of:
- (i) eighty-five percent of the average wholesale price (AWP) if there is no direct price available to providers in the state; or
  - (ii) the wholesale acquisition cost (WAC) plus 2%;
  - (3) remains the same.

AUTH: 53-6-101, 53-6-113, MCA

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

4. Statement of Reasonable Necessity: The Department of Public Health and Human Services (the department) is proposing amendments to ARM 37.86.1101, 37.86.1102, 37.86.1105, and 37.86.1106 pertaining to Medicaid pharmacy provider reimbursement.

The proposed rule change is necessary to add a wholesale acquisition cost (WAC) pricing field to the pharmacy reimbursement algorithm due to the discontinuance of average wholesale price (AWP) published by First DataBank and to adjust the dispensing fee to maintain cost neutrality and to provide incentives to providers to dispense generic and preferred brand name drugs which offer better value to the state. AWP pricing will remain in the pricing algorithm if it becomes available from another reliable source. In addition, language is being added to allow for the reimbursement of API compound drugs. The Center for Medicare and Medicaid Services (CMS) recently changed its definition of API bulk powders but advised state Medicaid programs that they could continue to be covered by pharmacy programs as nonrebutable products. The language is added to allow for proper reimbursement of these medically necessary compounded products. All federal statutes cited through the rules are also being updated to 2011 standards.

First DataBank, the department's current drug pricing file vendor, contracted through ACS, will discontinue publishing average wholesale price (AWP) as of the last week in September of 2011. Adding a wholesale acquisition cost (WAC), plus pricing mechanism, will allow the department to continue pricing drugs appropriately. AWP will be available through vendors other than First DataBank; however, it is unknown, at this time, how they would compare to the current AWP's as a comparative analysis is pending. Because WAC tends to reimburse generic drugs at a lower rate, an increase in dispensing fees for preferred brands and generic drugs will provide incentives to pharmacy providers to dispense drugs that offer the best value to the state.

#### ARM 37.86.1101

The department is proposing to add language to this rule so that it matches what is published in the department's drug pricing file vendor. The department is also proposing to add a definition for "Active Pharmaceutical Ingredient (API)", to the rule.

#### ARM 37.86.1102

The department is proposing amendments to update references to 42USC139r-8 from 2008 to 2011. The department is also proposing to add nonrebatable API bulk powders and excipients as reimbursable compound drug ingredients.

ARM 37.86.1105

The department is proposing language to differentiate the dispensing fee between brand name drugs and preferred brand name drugs and generics. The department is also proposing to remove references to \$4.94 and changes the maximum allowed.

ARM 37.86.1106

The department is proposing to add language to clarify the 85% of average wholesale cost (AWP) and wholesale acquisition cost (WAC) plus 2%.

Fiscal Impact

The proposed changes to ARM 37.86.1102 and 37.86.1106 are expected to have no fiscal impact to the department and no material effects on Medicaid recipients or Medicaid providers.

The estimated federal and state general fund and total cost to the department for the proposed rule changes are listed below, based on the blended federal medical assistance percentages (FMAP) method of 66.19% federal funds and 33.81% state funds:

<u>SFY 2012</u>	<u>Program</u>	<u>Fed</u>	<u>State</u>	<u>Total</u>
37.86.1101	Outpatient Drugs, Definitions	(\$802,224)	(\$409,776)	(\$1,212,000)
37.86.1105	Outpatient Drugs, Reimburse	<u>\$802,224</u>	<u>\$409,776</u>	<u>\$1,212,000</u>
		\$0	\$0	\$0

Persons and Entities Affected

The proposed rule changes could affect an estimated 105,113 Medicaid recipients and 265 pharmacy providers.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Kenneth Mordan, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail dphhslegal@mt.gov, and must be received no later than 5:00 p.m., October 6, 2011.



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

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

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

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

/s/ John Koch  
Rule Reviewer

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

Certified to the Secretary of State August 29, 2011.

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

In the matter of the amendment of ) NOTICE OF PUBLIC HEARING ON  
ARM 37.86.4201, 37.86.4202, and ) PROPOSED AMENDMENT  
37.86.4205 pertaining to dialysis )  
clinics )

TO: All Concerned Persons

1. On September 28, 2011, at 1:30 p.m., the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, at Helena, Montana, to consider the proposed 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 September 19, 2011, to advise us of the nature of the accommodation that you need. Please contact Kenneth Mordan, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

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

37.86.4201 FREESTANDING DIALYSIS CLINICS FOR END STAGE RENAL DISEASE, DEFINITIONS (1) "~~Freestanding dialysis clinics (FDC)~~" "Dialysis clinics (DC)" are facilities licensed by the officially designated authority in the state where the institution is located and certified by the ~~health care financing administration (HCFA)~~ Centers for Medicare and Medicaid Services (CMS) to:

(a) and (b) remain the same.

AUTH: 53-6-113, MCA

IMP: 53-6-101, MCA

37.86.4202 FREESTANDING DIALYSIS CLINICS FOR END STAGE RENAL DISEASE, REQUIREMENTS (1) remains the same.

(2) The provision of outpatient maintenance dialysis and related services by the ~~m~~Medicaid program ~~shall~~ will be coordinated with the ~~m~~Medicare renal disease program as provided in Title XVIII of the ~~Social Security Act and any other program providing the same or similar service~~ CFR Title 42 section 413.171 and 413.172.

(3) Outpatient maintenance dialysis and related services in a FDC shall will be provided only to a person who has been diagnosed as suffering from chronic ESRD by a physician.

AUTH: 53-6-113, MCA

IMP: 53-6-101, MCA

37.86.4205 FREESTANDING DIALYSIS CLINICS FOR END STAGE RENAL DISEASE, REIMBURSEMENT (1) Reimbursement for outpatient maintenance dialysis and other related services provided in a FDC shall will be as follows: a bundled composite rate of \$262 effective October 1, 2011. The department will not allow add-on adjustments to the composite rate.

~~(a) FDCs will be reimbursed under the composite rate reimbursement system for independent facilities in accordance with 42 CFR 413.172 (b) subpart H and as detailed in the HIM-15, chapter 27. The department hereby adopts and incorporates by reference 42 CFR 413. subpart H (1989 edition) and the HIM-15, chapter 27 (1983 edition). Copies may be obtained from the Department of Public Health and Human Services, Health Policy and Services Division, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.~~

~~(b) The reimbursement period will be the FDC's fiscal year.~~

~~(c) These reimbursement rules are in addition to those contained in ARM 46.12.509(2) through (6).~~

AUTH: 53-6-113, MCA

IMP: 53-6-101, MCA

#### 4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (the department) is proposing amendments to ARM 37.86.4201, 37.86.4202, and 37.86.4205 regarding Medicaid freestanding dialysis services. The purpose of the proposed rule amendments is to revise the current administrative rules governing dialysis.

The Medicare Improvements for Patients and Providers Act of 2008 (MIPPA), requires the Centers for Medicare and Medicaid Services (CMS) to implement a bundled prospective payment system (PPS) to renal dialysis facility providers. This new requirement replaces the current basic case-mix adjusted composite payment system and will cover all the resources used in providing outpatient dialysis treatment. This single-bundled composite payment rate requirement is a change from the composite rate and fee-for-service payment methodology currently in use.

Currently the department is following Medicare's methodology which has become very complex. The department would need to make major changes to the Medicaid Management Information System (MMIS) in order to incorporate all of the Medicare suggested adjustments. The department thinks this would add unneeded complexity. Instead, the department is proposing a per diem fee of \$262 per day for someone who is only covered by Medicaid. For the vast majority of patients on

dialysis, who are receiving both Medicare and Medicaid, the department will continue to pay their Medicare co-pay and deductible.

ARM 37.86.4201

Since both independent and hospital-based dialysis clinics are reimbursed under the same methodology, the change in the definition will place all dialysis clinics under one definition. The term "Health Care Financing Administration (HCFA)" was replaced with CMS.

ARM 37.86.4202

The federal code cites were changed in order to provide the reader information of where to find the revised definitions to be used within the ESRD program and the principles of the new rate payment system.

ARM 37.86.4205

The department has constructed an all-inclusive rate that has the benefit of encompassing all Medicare-allowable services into a single PPS that can be updated on an annual basis.

Fiscal Impact

The new proposed method of reimbursement is estimated to be budget neutral with no fiscal impact.

Person and Entities Affected

The proposed changes will affect approximately 20 dialysis clinic providers, both in and out of state. The proposed changes will not affect services provided to Medicaid clients.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Kenneth Mordan, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail [dphhslegal@mt.gov](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., October 6, 2011.

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

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

program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 5 above or may be made by completing a request form at any rules hearing held by the department.

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

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

/s/ John Koch  
Rule Reviewer

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

Certified to the Secretary of State August 29, 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 37.80.101 and 37.80.201 ) PROPOSED AMENDMENT  
pertaining to permissive licensing )  
facilities exclusion from subsidy child )  
care program )

TO: All Concerned Persons

1. On September 29, at 1:30 p.m., the Department of Public Health and Human Services will hold a public hearing in Room 207 of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on September 19, 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:

37.80.101 PURPOSE AND GENERAL LIMITATIONS (1) through (12) remain the same.

(13) The Child Care Assistance Program will be administered in accordance with:

(a) remains the same.

(b) the Montana Child Care Manual in effect on ~~February 1, 2011~~ September 1, 2011. The Montana Child Care Manual, dated ~~February 1, 2011~~ September 1, 2011, is adopted and incorporated by this reference. The manual contains the policies and procedures utilized in the implementation of the department's Child Care Assistance Program. A copy of the Montana Child Care Manual is available at each child care resource and referral agency; at the Department of Public Health and Human Services, Human and Community Services Division, 111 N. Jackson St., P.O. Box 202925, Helena, MT 59620-2925; and on the department's web site at www.childcare.mt.gov.

AUTH: 52-2-704, 53-4-212, MCA

IMP: 52-2-702, 52-2-704, 52-2-713, 52-2-731, 53-2-201, 53-4-211, 53-4-601,

53-4-611, 53-4-612, MCA

37.80.201 NONFINANCIAL REQUIREMENTS FOR ELIGIBILITY AND PRIORITY FOR ASSISTANCE (1) through (9) remain the same.

(10) Child care assistance is only available under this chapter for child care provided by:

(a) a legally certified provider who is certified under this chapter; or

(b) a licensed or registered child care facility certified under this chapter, excluding facilities licensed solely for drop-in, irregular, intermittent, and occasional care.

(11) remains the same.

AUTH: 40-4-234, 52-2-704, 53-4-212, MCA

IMP: 52-2-704, 52-2-713, 52-2-721, 52-2-722, 52-2-723, 52-2-731, 53-2-201, 53-4-211, 53-4-601, 53-4-611, MCA

4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) is proposing to make changes to ARM 37.80.101 and 37.80.201 for the following reasons:

ARM 37.80.101

This rule currently adopts and incorporates by reference the Montana Child Care Manual effective February 1, 2011. The department proposes to make some revisions to this manual that will take effect on September 1, 2011. The proposed amendment is necessary to incorporate the revisions of the manual into the administrative rules and to permit all interested parties to comment on the department's policies. Manuals and draft manual material are available for review at each local Office of Public Assistance and on the department's web site at [www.bestbeginnings.mt.gov](http://www.bestbeginnings.mt.gov).

Following is a brief overview of the Child Care Manual sections with substantive changes related to the above ARM changes.

Section 1-8 - Overview - Best Beginnings Child Care Scholarships - Provider Eligibility - Overview - Providers Shall Maintain Their License, Registration, or Payment Number

This manual provision is being updated to include the following language: "Facilities licensed solely for drop-in, irregular, intermittent, and occasional care are excluded". This language is related to the adoption by the Quality Assurance Division, Licensing Bureau of a new provider licensing type: ARM 37.95.1101(1) defines "Drop-in day care center" or "center" as "means a day care center which only provides care to children on an irregular, intermittent, and occasional basis and that provides care only when parents are not in the same premises or not immediately available". ARM 37.95.101(2) defines "Irregular, intermittent, and occasional basis" as "means

periods of time less than four days a week for no more than three consecutive weeks". It is the use of the terms "irregular, intermittent, and occasional" that prohibits the use of this facility-type by the Best Beginnings Child Care Scholarship Program because subsidized child care is based on scheduled care. Regular licensed day care centers, registered family and group day care homes, and certified legally registered providers can be selected by families receiving subsidy assistance because these facility-types offer regularly scheduled care.

#### ARM 37.80.201

This rule is being updated to include language related to the adoption by the Quality Assurance Division, Licensing Bureau of a new provider licensing type: Permissive Licenses, ARM 37.95.1102(1) and (2) defines drop-in care center as "a day care center which only provides care to children on an irregular, intermittent, and occasional basis and that provides care only when parents are not in the same premises or not immediately available". "Irregular, intermittent, and occasional basis means periods of time less than four days a week for no more than three consecutive weeks." It is the use of the terms "irregular, intermittent, and occasional" that prohibits the use of this facility-type by the Best Beginnings Child Care Scholarship Program because subsidized child care is based on scheduled care. Regular licensed day care centers, registered family and group day care homes, and certified legally registered providers can be selected by families receiving subsidy assistance because these facility-types offer regularly scheduled care.

#### Fiscal Impact

The department does not anticipate any adverse affect or any fiscal impact associated with the proposed amendments to the manual and to these rules.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Kenneth Mordan, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail [dphhslegal@mt.gov](mailto:dphhslegal@mt.gov), and must be received no later than 5:00 p.m., October 6, 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/ Francis X. Clinch  
Rule Reviewer

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

Certified to the Secretary of State August 29, 2011.

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

In the matter of the adoption of a )  
temporary emergency rule closing the ) NOTICE OF ADOPTION OF A  
Blackfoot River from Wisherd Bridge ) TEMPORARY EMERGENCY RULE  
to the confluence with the Clark Fork )  
River in Missoula County )

TO: All Concerned Persons

1. The Department of Fish, Wildlife and Parks (department) has determined the following reasons justify the adoption of a temporary emergency rule:

(a) The West Riverside wildfire is burning near Bonner, Montana.

(b) Fire suppression efforts include several helicopters bucketing water from the Blackfoot River.

(c) The closure is necessary so helicopter crews can safely operate and maneuver without potential collisions with recreationists on the river. The closure is also necessary so recreationists, including those with limited maneuverability, are not subject to potential collision with large, heavy water buckets suspended from helicopters.

(d) Therefore, as this situation constitutes an imminent peril to public health, safety, and welfare, and this threat cannot be averted or remedied by any other administrative act, the department adopts the following temporary emergency rule. The emergency rule will be sent as a press release to newspapers throughout the state. Also, signs informing the public of the closure will be posted at access points. The rule will be sent to interested parties, and published as a temporary emergency rule in Issue No. 17 of the 2011 Montana Administrative Register.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of the notice. If you require an accommodation, contact the department no later than 5:00 p.m. on September 22, 2011, to advise us of the nature of the accommodation that you need. Please contact Jessica Fitzpatrick, Fish, Wildlife and Parks, 1420 East Sixth Avenue, P.O. Box 200701, Helena, MT 59620-0701; telephone (406) 444-9785; fax (406) 444-7456; or e-mail [jfitzpatrick@mt.gov](mailto:jfitzpatrick@mt.gov).

3. The temporary emergency rule is effective August 25, 2011, when this rule notice is filed with the Secretary of State.

4. The text of the temporary emergency rule provides as follows:

RULE I BLACKFOOT RIVER TEMPORARY EMERGENCY CLOSURE

(1) A portion of the Blackfoot River is located in Missoula County.

(2) The Blackfoot River is closed from Wisherd Bridge to the confluence with the Clark Fork River to all public occupation and recreation including, but not limited to, floating, swimming, wading, and boating.

(3) This rule is effective as long as this stretch of river is needed as a source of water for fire suppression efforts.

AUTH: 2-4-303, 87-1-303, MCA  
IMP: 2-4-303, 87-1-303, MCA

5. The rationale for the temporary emergency rule is as set forth in paragraph 1.

6. This rule is in effect as long as the stretch of river is needed as a source of water for fire suppression and the department determines the Blackfoot River is again safe for occupation and recreation. This will depend on the extent and duration of the fire in the area. Posted signs regarding the emergency closure will be removed when the rule is no longer effective. Notice of repeal of this emergency rule will be published in the Montana Administrative Register.

7. Concerned persons are encouraged to submit their comments to the department. They should submit their comments along with their names and addresses to Chet Crowser, Department of Fish, Wildlife and Parks, 3201 Spurgin Road, Missoula, MT 59804; fax (406) 542-5500; or e-mail ccrowser@mt.gov. Any comments must be received no later than October 7, 2011.

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

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

/s/ Art Noonan  
Art Noonan  
Acting Director  
Department of Fish, Wildlife and Parks  
Acting Secretary  
Fish, Wildlife and Parks Commission

/s/ Rebecca Jakes Dockter  
Rebecca Jakes Dockter  
Rule Reviewer

Certified to the Secretary of State August 25, 2011.

BEFORE THE DEPARTMENT OF CORRECTIONS  
OF THE STATE OF MONTANA

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

TO: All Concerned Persons

1. On May 26, 2011 the Department of Corrections published MAR Notice No. 20-9-47 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 808 of the 2011 Montana Administrative Register, Issue Number 10. On July 28, 2011, the department published an amended notice and extension of comment period on the above-stated rules at page 1345 of the Montana Administrative Register, Issue Number 14.

2. On June 28, 2011 the department held a public hearing on the proposed amendment. The department received comments from the Legislative Services Division.

3. The department has amended ARM 20.9.302, 20.9.306, 20.9.308, 20.9.311, and 20.9.315 as proposed.

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

COMMENT #1: The first comment from the Legislative Services Division staff noted that Mont. Code Ann. § 52-5-129(7) requires that on appeal from the department to a district court, a youth must be provided with a written transcript of a hearing upon request. The proposed amendment of ARM 20.9.311 does not distinguish between an appeal from a hearings officer to the department as opposed to an appeal from the department to the district court. The amendments appear to exempt the department from providing a written transcript across the board.

RESPONSE #1: The department agrees and has made the suggested changes to ARM 20.9.311 in an amended notice at page 1345 of the Montana Administrative Register, Issue Number 14.

COMMENT #2: The second comment from the Legislative Services Division staff noted that in ARM 20.9.320 "office" should be changed to "officer" and the word "arrest" should be changed to "detention" to reflect the change in usage.

RESPONSE #2: The department agrees with the suggested changes to ARM 20.9.320.

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

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

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

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

/s/ Diana L. Koch

Diana L. Koch  
Rule Reviewer

/s/ Mike Ferriter

Mike Ferriter, Director  
Department of Corrections

Certified to the Secretary of State August 29, 2011

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

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 37.82.101, 37.82.1005, and )  
37.82.1320 pertaining to Medicaid )  
eligibility )

TO: All Concerned Persons

1. On July 14, 2011, the Department of Public Health and Human Services published MAR Notice No. 37-552 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 1293 of the 2011 Montana Administrative Register, Issue Number 13.

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

3. 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 commenter who represents an organization stated they support increasing the personal needs allowance from \$40 to \$50 in keeping with current policy and as approved by the Legislature in 2007. Also, with respect to veterans with veteran's pension of \$90 or less, they support the change in keeping with federal requirements to not count the \$90 (or less) pension as income and to set the personal needs allowance at \$50.

However, the commenter opposes the change which reduces the personal needs allowance of veterans whose pensions are greater than \$90. They are not aware of any federal requirement to reduce the personal needs allowance for some veterans from \$90 to \$50 per month. Nor are they aware of any action taken by the Legislature to reduce this amount. What the department is proposing means that some veterans will retain their \$90 (or lower pension) and also \$50 personal needs allowance so they will have \$140 available monthly for personal needs. Those with pensions over \$90 will only have \$50 available for personal needs each month. This is inequitable among veterans as compared to each other. This is also a very inappropriate way to treat veterans. A veteran, with a pension over \$90, earned that pension because of extensive service in the military. Why would the state of Montana target this group for a reduction in their personal needs allowance? Even without the reduction, they are being allowed to keep very little of the pensions they earned through their military service.

The commenter recommends that the personal needs allowance for those with pensions over \$90 per month NOT be reduced to \$50 per month, but remain at \$90 per month.

RESPONSE #1: In the past, as a result of erroneous guidance from the Health Care Financing Administration (HCFA), the agency that preceded the Centers for Medicare and Medicaid Services (CMS), the department gave some veterans a larger personal needs allowance than was given to other veterans and to nonveterans. Due to this incorrect information from CMS, the department gave veterans with pensions of \$90 or less a month a personal needs allowance of \$90 per month while veterans with pensions of more than \$90 per month and nonveterans were allowed a personal needs allowance of only \$40 per month, or later \$50 per month. The department then learned that federal law does not specify that veterans with pensions of \$90 or less should be given a larger personal needs allowance but instead provides that the first \$90 of a veteran's pension must be disregarded, i.e., not counted as income, in determining the amount the veteran is required to pay to the nursing facility for the veteran's care if the veteran's pension is \$90 or less. When the department became aware that federal law mandates an income disregard for veterans with pensions of \$90 or less, rather than mandating a higher personal needs allowance for all veterans, the department changed its policy to bring it in line with federal law by providing that all nursing home residents receive the same personal needs allowance and veterans with pensions of \$90 or less their pension disregarded.

As the commenter notes, the federal Medicaid regulations do not prohibit the department from giving veterans whose pensions are more than \$90 a month a personal needs allowance of \$90. However, the Medicaid State Plan indicates that higher personal needs allowance may only be provided to persons "with greater need". Veterans with pensions of more than \$90 do not, as a group, have a greater financial need. Additionally, the department's nursing home budget for the current biennium was based on the assumption that the personal needs allowance for all veterans would be \$50 per month. The department has no excess funds to supplement the nursing home budget if the personal needs allowance for veterans with pensions of more than \$90 were given a personal needs allowance of \$90 instead of \$50. The department will therefore adopt as proposed the amendment to ARM 37.82.1320 that provides a personal needs allowance of \$50 for all nursing home residents and an income disregard of up to \$90 for veterans with pensions of \$90 or less.

/s/ Barbara B. Hoffmann  
Rule Reviewer

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

Certified to the Secretary of State August 29, 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<br>Subject | 1. Consult ARM Topical Index.<br>Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued. |
| Statute          | 2. Go to cross reference table at end of each number and title which lists MCA section numbers and department corresponding ARM rule numbers.                     |

## ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through 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.

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

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