

MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 17

The Montana Administrative Register (MAR), a twice-monthly publication, has three sections. The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted. The rule section indicates that the proposed rule action is adopted and lists any changes made since the proposed stage. The interpretation section contains the attorney general's opinions and state declaratory rulings. Special notices and tables are found at the back of each register.

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

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

| | |
|---------------------------------|---------------------------|
| In the matter of the proposed) | NOTICE OF PUBLIC HEARING |
| amendment of ARM 24.16.7506) | ON PROPOSED AMENDMENT AND |
| and 24.16.7537 and the) | ADOPTION |
| proposed adoption of) | |
| NEW RULE I relating to) | |
| wage claims mediation) | |

TO: All Concerned Persons

1. On October 7, 2003, at 1:00 p.m., the Department of Labor and Industry will hold a public hearing in the Clark Room in the basement of the Walt Sullivan Building, 1327 Lockey, Helena, Montana to consider the proposed amendment and adoption of the above-stated rules covering wage claim mediation.

2. The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the Department no later than 5:00 p.m., October 1, 2003, to advise us of the nature of the accommodation that you need. Please contact the Labor Standards Bureau, Attn: John Andrew, P.O. Box 6518, Helena, MT 59604-6518; telephone (406) 444-4619; fax (406) 444-7071; TDD (406) 444-5549; e-mail joandrew@state.mt.us.

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

24.16.7506 DEFINITIONS (1) through (10) remain the same.

(11) "Mediation" as used in these rules is the process described by 26-1-813, MCA.

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

AUTH: 39-3-202, 39-3-403, MCA

IMP: 39-3-202, 39-3-216, 39-3-403, MCA

REASON: There is reasonable necessity to adopt rules for wage claim mediation in order to implement the provisions of 39-3-216(2), MCA. The Department believes, based on its experience in providing mediation among wage claim parties, that the general civil statutory definition and procedures provide an appropriate framework for the administrative mediation process used by the Department's wage and hour unit. The definition of mediation contained in the Montana statutory provisions on evidence has been incorporated by reference to this rule to provide both a definition and a standardized set of procedures.

24.16.7537 REQUEST FOR FORMAL HEARING (1) and (2) remain the same.

(3) Upon receiving a timely, written request for a formal hearing, the department shall first conduct mediation of the dispute as provided by ~~will commence contested case proceedings. Any question as to whether the request is timely will be resolved by the board of personnel appeals~~ [NEW RULE I]. If mediation is unsuccessful, any unresolved issues will be resolved through contested case proceedings in accordance with these rules and Title 2, chapter 4, part 6, MCA.

AUTH: 39-3-202 and 39-3-403, MCA

IMP: 39-3-216, MCA

REASON: There is reasonable necessity to amend this rule to correspond with NEW RULE I and the statutory requirement for wage claim mediation added to 39-3-216, MCA. It is also necessary to remove a reference to the Board of Personnel Appeals as the underlying statutory provision was removed from statute in 1997, but the need to amend the rule was only recently brought to the notice of the Department.

4. The proposed new rule provides as follows:

NEW RULE I MEDIATION PROCEDURES (1) Pursuant to 39-3-216, MCA, and ARM 24.16.7537, if a party disputes the determination of the department, the department shall conduct mediation of the dispute.

(2) The department shall appoint a mediator and notify the parties, in writing, that a mediator has been appointed.

(3) The mediator shall contact the parties to establish the procedures used to conduct the mediation and set a time for the mediation. The mediator shall establish procedures taking into account the facts and circumstances of the matter.

(4) Mediation must be completed within 45 days from the date of notice of appointment of the mediator, unless all parties and the mediator agree to an extension or unless the case is withdrawn.

(5) If mediation resolves the dispute, the mediator shall issue appropriate documentation that states the terms of agreement for approval by the parties. The terms of the agreement may be confidential, and if so, the mediator shall also provide appropriate notice of settlement, signed by the parties, if such notice is required to dispose of any remaining issues.

(6) If mediation does not fully resolve the dispute, any unresolved issues will be resolved through contested case proceedings in accordance with ARM 24.16.7537 and Title 2, chapter 4, part 6, MCA.

(a) As permitted by 2-4-603, MCA, mediation may also be requested by parties to the case at any later time prior to full and final judgment.

(b) If a dispute has entered contested case proceedings, but further mediation resolves the dispute prior to a final

agency decision, the parties may either withdraw the case or sign a stipulation authorizing the mediator to request dismissal of the contested case hearing.

AUTH: 39-3-202, MCA

IMP: 2-4-603, 39-3-216, MCA

REASON: There is reasonable necessity to adopt rules for wage claim mediation in order to fully implement 39-3-216(2), MCA. This rule as proposed reflects the actual experience of the Labor Standards Bureau in mediating wage claims and provides clear guidelines to the parties in wage claim disputes. There is also reasonable necessity to clarify the mediator's authority, at the request of the parties, to request dismissal of an action. The lack of a formal rule regarding that authority has impeded the timely resolution of several recent contested cases pending before the Department. Clarification of the mediator's authority will relieve the parties from the clerical task of formally sending a written request for dismissal to the Department's Hearings Bureau.

5. Concerned persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted to:

John Andrew

Labor Standards Bureau

Employment Relations Division

Department of Labor and Industry

P.O. Box 6518, Helena, MT 59604-6518

and must be received by no later than 5:00 p.m., October 17, 2003. Comments may also be submitted electronically as noted in the following paragraph.

6. An electronic copy of this Notice of Public Hearing is available through the Department's site on the World Wide Web at <http://dli.state.mt.us/calendar.htm>, under the Calendar of Events, Administrative Rules Hearings section. Interested persons may make comments on the proposed rules via the comment forum, <http://forums.dli.state.mt.us>, linked to the Notice of Public Hearing, but those comments must be posted to the comment forum by 5:00 p.m., October 17, 2003. The Department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered. In addition, although the Department strives to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems, and that a person's technical difficulties in accessing or posting to the comment forum do not excuse late submission of comments.

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

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

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

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

/s/ WENDY J. KEATING
Wendy J. Keating, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

Certified to the Secretary of State: September 2, 2003

BEFORE THE BOARD OF LIVESTOCK
OF THE STATE OF MONTANA

| | | |
|--------------------------------|---|--------------------|
| In the matter of the |) | NOTICE OF PROPOSED |
| proposed amendment of ARM |) | AMENDMENT |
| 32.23.301 pertaining to |) | |
| fees charged by the department |) | NO PUBLIC HEARING |
| on the volume on all classes |) | CONTEMPLATED |
| of milk |) | |

TO: All Concerned Persons

1. On October 11, 2003, the department proposes to amend ARM 32.23.301 pertaining to fees charged by the department on the volume on all classes of milk.

2. The department of livestock will make reasonable accommodations for persons with disabilities who wish to participate in the rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact the department of livestock no later than 5:00 p.m. on October 6, 2003, to advise us of the nature of the accommodation that you need. Please contact Marc Bridges, 301 N. Roberts St. - Rm. 308, PO Box 202001, Helena, MT 59620-2001; phone: (406)444-7323; TTD number: 1-800-253-4091; fax: (406)444-1929; e-mail: mbridges@state.mt.us.

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

32.23.301 LICENSEE ASSESMENTS

(1) through (1)(d) remain the same.

(e) A fee of \$0.125 per hundredweight per month, with a minimum of \$50.00 per month, whichever is greater, or a maximum of \$1,050.00 per month, on the volume of all classes of milk produced and sold by a person licensed by the department, to be used for the administration of the milk inspection and milk diagnostic laboratory functions of the department.

(i) remains the same.

AUTH: Sec. 81-23-104, 81-23-202, MCA

IMP: Sec. 81-23-103, 81-23-202, MCA

4. STATEMENT OF REASONABLE NECESSITY. The rule is being amended to change fees that are currently charged by the department of livestock for administration of milk inspections and the milk diagnostic laboratory. Implementation of this new fee by HB 311 on July 1, 2003, resulted in a significant increase in fee assessments for extra large dairies. Department staff noted that larger farms do require more time to service, but do not necessarily require increased costs for staff. The implementation of the proposed maximum fee of \$1,050/month will therefore allow the Department to cover its

budget costs, but remain fair to all producers, both large and small.

The maximum fee cap will be made retroactive to July 1, 2003, to allow the Department to refund fees collected since that date which are in excess of the proposed maximum limit.

Approximately 111 persons would be affected, as there are currently 111 producers in the state. The total projected revenue will be approximately \$370,000 per year, based on the minimum and maximum fee amounts imposed by this proposed rule.

5. Concerned persons may submit their data, views or arguments concerning the proposed amendments in writing to Marc Bridges, 301 N. Roberts Street - Room 308A, PO Box 202001, Helena, MT 59620-2001, by faxing to (406)444-1929 or e-mailing to mbridges@state.mt.us to be received no later than 5:00 p.m., October 9, 2003.

6. If persons who are directly affected by the proposed amendment wish to express their data, views and arguments orally or in writing at a public hearing, they must make a written request for a hearing and submit this request along with any written comments they have to the same address as above. A request for hearing must be received no later than 5:00 p.m., October 9, 2003.

7. 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. Ten percent of those persons directly affected has been determined to be 11 based upon the current producers in the state.

8. An electronic copy of this Proposal Notice is available through the department's site at www.liv.state.mt.us.

9. The Montana department of livestock maintains a list of interested persons who wish to receive notice of rulemaking actions proposed by this department. Persons who wish to have their name added to the list shall make a written request, which includes the name and mailing address of the person to receive notices and specifies the area of interest that the person wishes to receive notices regarding. Such written request may be mailed or delivered to Marc Bridges, 301 N. Roberts Street - Room 308A, PO Box 202001, Helena, MT 59620-2001, faxed to (406)444-1929, e-mailed to mbridges@state.mt.us, or may be made by completing a request form at any rules hearing held by the department.

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

11. The Department proposes to apply this rule amendment retroactively to July 1, 2003, the original effective date of HB 311, which authorized this fee.

DEPARTMENT OF LIVESTOCK

By: /s/ Marc Bridges
Marc Bridges, Exec. Officer,
Board of Livestock
Department of Livestock

By: /s/ Carol Grell Morris
Carol Grell Morris,
Rule Reviewer

Certified to the Secretary of State September 2, 2003.

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

| | | |
|--------------------------------|---|--------------------|
| In the matter of the amendment |) | NOTICE OF PROPOSED |
| of ARM 37.2.101, 37.2.102, |) | AMENDMENT |
| 37.2.301, 37.2.502, 37.2.701, |) | |
| 37.2.702, 37.2.703, 37.2.705, |) | |
| 37.2.706, 37.2.707, 37.2.720, |) | |
| 37.2.902 and 37.2.907 |) | |
| pertaining to department |) | |
| procedures for administrative |) | |
| rules, recovery and offset of |) | |
| debts, self-sufficiency |) | |
| trusts, state facility |) | |
| reimbursement and community |) | NO PUBLIC HEARING |
| services block grants |) | CONTEMPLATED |

TO: All Interested Persons

1. On October 11, 2003, the Department of Public Health and Human Services proposes to amend the above-stated rules.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice. If you need to request an accommodation, contact the department no later than 5:00 p.m. on October 3, 2003, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

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

37.2.101 PROCEDURES FOR ADOPTING, AMENDING, AND REPEALING AGENCY RULES (1) The department of public health and human services, for purposes of establishing departmental rulemaking procedures, ~~hereby~~ adopts and incorporates by reference the attorney general's model procedural rules 1 through 7 found in ARM 1.3.102 through ~~ARM~~ 1.3.210, except for the attorney general's sample rule notice forms. A copy of the attorney general's model rules may be obtained by contacting the Attorney General's Office, Justice Building, 215 North Sanders, P.O. Box 201401, Helena, MT 59620-1401, telephone (406) 444-2026.

(2) The department utilizes its own rule notice forms which meet all Montana Administrative Procedure Act (MAPA) requirements. Samples of these forms can be obtained from the Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, MT 59601-4210, telephone (406) 444-5622.

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

37.2.102 PROCEDURES FOR THE ISSUANCE OF DECLARATORY RULINGS (1) The department of public health and human services ~~hereby~~ adopts and incorporates by reference attorney general's model procedural rules 22 through 24 and 28 found in ARM 1.3.227 through ~~ARM 1.3.299~~ and 1.3.233 which set forth the procedures for the issuance of declaratory rulings. A copy of the ~~amended~~ model rules may be obtained by contacting the Attorney General's Office, Justice Building, 215 North Sanders, P.O. Box 201401, Helena, MT 59620-1401, telephone (406) 444-2026.

AUTH: Sec. 2-4-202, MCA
IMP: Sec. 2-4-501, MCA

37.2.301 PURPOSE AND SCOPE (1) Except as provided in (2), this ~~subchapter~~ subchapter implements for the department and ~~the~~ department of revenue the mechanisms provided in Title 17, chapter 4, MCA, for recovery and offset of monetary sums owing to the state of Montana related to the provision of services through the programs administrated by the department.

(2) The recovery and offset of debts being enforced or collected by the department under Title IV-D of the Social Security Act is implemented by ARM ~~46.30.1301, 46.30.1303 and 46.30.1305~~ 37.62.1501, 37.62.1503 and 37.62.1505.

(3) remains the same.

AUTH: Sec. 17-4-110 and 53-2-201, MCA
IMP: Sec. 17-4-104, 53-2-108 and 53-2-201, MCA

37.2.502 SELF-SUFFICIENCY TRUSTS: DEFINITIONS For the purposes of these rules, the following definitions apply:

~~(1)~~ (2) "Department funded services" means services and items normally purchased by the department for recipients of its programs. Department funded services are typically provided by a service provider through a contract with the department or by fee reimbursement from the department. The term also includes services provided by a service provider through a contract with the department of corrections or by free reimbursement from the department of corrections.

~~(2)~~ (1) "Department" means the department of public health and human services ~~(effective 7/1/95)~~ provided for in Title 2, chapter 15, part 22, MCA.

~~(3)~~ (5) "Person with a disability" means a disabled person as defined at 45 USC 1382c(a)(3) (1995) who has a medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. 45 USC 1382c(a)(3) (1995) is a federal statute that is ~~hereby~~ adopted and incorporated ~~herein~~ by this reference. A copy of the cited regulation is available upon request from the Department of Public Health and Human Services, Office of Legal Affairs, 111 N. Sanders, P.O. Box 4210, Helena, MT 59604-4210.

~~(4)~~ (3) "Beneficiary" means a person who is eligible to be a beneficiary of a self-sufficiency trust as provided in ARM 37.2.503.

~~(5)~~ (4) "Life care plan" means a written plan established to govern the provision of supplemental services purchased with the monies of a self-sufficiency trust.

(6) through (8) remain the same.

(9) "Special charitable account" means the account within the state's self-sufficiency trust account established for the purpose of receiving charitable donations to fund services for persons who have developmental disabilities, mental illness, and physical disabilities, or who are otherwise eligible for department services, as defined by the department.

(10) remains the same.

AUTH: Sec. 53-2-201 and 53-18-103, MCA

IMP: Sec. 53-18-101, 53-18-102, 53-18-103, 53-18-104 and 53-18-105, MCA

37.2.701 DEFINITIONS (1) and (2) remain the same.

(3) "Financially responsible person" means a spouse of a resident, the natural or adoptive parents of a resident under 18 years of age, or a guardian or conservator to the extent of the guardian's or conservator's responsibility for the financial affairs of the person who is a resident under applicable Montana law establishing the duties and limitations of guardianship or conservatorships.

(4) and (5) remain the same.

(6) "Liquid assets" means stocks, bonds, certificates of deposit, etc., which can be readily converted to cash.

(7) "Personal needs" means the reasonable cost of toiletries, newspapers, or other personal comfort items not normally supplied by an institution. The department ~~Department~~ will use the standards for medicaid guidelines as a minimum. The standards for medicaid guidelines are published in the Department Medical Assistance Guidelines Manual (see MA 904-1 and 904-3). A copy of these standards can be obtained from the Department of Public Health and Human Services, ~~Operations and Technology~~ Fiscal Services Division, Fiscal Bureau, 111 N. North Sanders, P.O. Box 6429, Helena, ~~Montana~~ MT 59604-6429.

(8) "Real property" means land, and permanent attachments ~~thereto~~ including trees, buildings and infrastructure.

AUTH: Sec. 53-1-403, MCA

IMP: Sec. 53-1-401, MCA

37.2.702 INCOME (1) Income means economic benefit received by a resident or financially responsible person from any source, and includes, but is not limited to:

(a) through (c) remain the same.

(d) net receipts from nonfarm self-employment (receipts from a nonfarm business, profession, or occupation, after deductions for reasonable operating expenses);

(e) and (f) remain the same.

(g) periodic payments from social security, unemployment compensation insurance, union strike funds, workers compensation, veterans benefits, public assistance (including, but not limited to, aid to families with dependent children or temporary assistance for needy families, supplemental security income, and non-federally-funded general assistance or general relief) and other government payments or benefits, disability benefits and training stipends;

(h) alimony, child support, and military family allotments or other regular support from an absent family member or someone not living in the household;

(i) private pensions, government employee pensions (including military retirement pay), railroad retirement, and regular insurance, trust or annuity payments;

(j) college or university scholarships, grants, fellowships, and assistantships;

(k) dividends, interest, or net royalties;

(l) distributions from estates or trusts, net gambling and lottery winnings; capital gains; proceeds from the sale of personal or real property (house, automobile, etc.); tax refunds, federal earned income credit, government subsidies or grants; gifts, one-time insurance payments, recoveries for injury or loss; and

(m) the value of non-cash benefits (including but not limited to in-kind compensation, personal use of a business vehicle, housing, food, utilities and payment of personal expenses or obligations).

AUTH: Sec. 53-1-403, MCA

IMP: Sec. 53-1-405, MCA

37.2.703 FIXED EXPENSES (1) Fixed expenses shall be limited to reasonable and necessary living and mandatory expenses over which the resident or responsible person has little or no control, and which have been incurred or committed to prior to admission. These expenses may include, but are not limited to:

(a) housing expenses such as:

(i) through (xi) remain the same.

(xii) special improvement districts (SID^s) and rural improvement districts (RID^s);

(b) through (l) remain the same.

(m) burial contract committed to prior to, or during the inpatient stay;

(n) child or adult day care;

(o) and (p) remain the same.

AUTH: Sec. 53-1-403, MCA

IMP: Sec. 53-1-405, MCA

37.2.705 ABILITY TO PAY DETERMINATION (1) Upon receipt of sufficient financial information and documentation, the department may determine the fixed expenses of the resident or financially responsible person. The following shall apply to

food, clothing and transportation expenses:

(a) allowances for food and clothing needs shall be based on data reported periodically by the USDA center for nutrition policy and promotion. A copy of the allowances for food and clothing are available upon request from the Department of Public Health and Human Services, ~~Operations and Technology~~ Fiscal Services Division, Fiscal Bureau, 111 North Sanders, P.O. Box 6429, Helena, ~~Montana~~ MT 59604-6429; and

(b) through (3) remain the same.

(4) Liquid assets which exceed eligibility standards for medicaid shall be considered available to pay the cost of care unless protected as follows:

(a) as protected by law ~~71~~

(b) an order of the court ~~71~~ or

(c) the medicaid spousal impoverishment program.

(5) through (6) (c) remain the same.

AUTH: Sec. 53-1-403 and 53-1-405, MCA

IMP: Sec. 53-1-405, MCA

37.2.706 PROCEDURE TO OBTAIN FINANCIAL INFORMATION FOR ABILITY TO PAY DETERMINATION (1) remains the same.

(2) The department shall allow the resident or financially responsible person 30 days from the date of the request or date of mailing to respond. If the resident or financially responsible person is contacted by mail, the department shall allow an additional ~~3~~ three days for the response.

(3) remains the same.

AUTH: Sec. 53-1-403, MCA

IMP: Sec. 53-1-406, MCA

37.2.707 MONTHLY PAYMENT AMOUNT (1) The charge assessed against each resident or financially responsible person shall be the lower of:

(a) and (b) remain the same.

(c) the maximum parental liability, for parents of a long-term resident shall be based on data reported periodically by the United States department of agriculture (USDA) center for nutrition policy and promotion. The liability shall commence on the 121st day of care. The current maximum parental liability amount is available upon request from the Department of Public Health and Human Services, ~~Operations and Technology~~ Fiscal Services Division, Fiscal Bureau, 111 North Sanders, P.O. Box 6429, Helena, ~~Montana~~ MT 59604-6429.

(2) The department may accept a monthly payment that is less than the assessed charges, with the balance accumulating as a liability of the resident or financially responsible person under the following circumstances:

(a) and (b) remain the same.

(c) when a resident whose care treatment plans provide for discharge and economic independence within ~~1~~ one year, and additional funds are needed for:

(i) and (ii) remain the same.

AUTH: Sec. 53-1-403, MCA
IMP: Sec. 53-1-405, MCA

37.2.720 ABILITY TO PAY, ADMINISTRATIVE REVIEW AND FAIR HEARING (1) remains the same.

(2) The request for administrative review must:

~~(a)~~ be submitted to the department in writing; ~~it must~~

~~(b)~~ state the reasons the person contends that the determination is incorrect or fails to comply with legal requirements; ~~and must;~~

~~(c)~~ include any additional information and substantiating documentation which the person wishes the department to consider in the administrative review; ~~;~~

~~(a)~~ A request for administrative review must ~~(d)~~ be received by the department within 30 days of mailing of the department's ability to pay determination letter; ~~and~~

~~(e)~~ Administrative review requests must be mailed or delivered to the Department of Public Health and Human Services, ~~Operations and Technology~~ Fiscal Services Division, Institutional Reimbursement Bureau, 111 N. North Sanders, P.O. Box 6420, Helena, MT 59604-6420.

(3) A resident or financially responsible person aggrieved by an adverse department administrative review determination under this rule, may request a fair hearing in accordance with ARM 37.5.304, 37.5.305, 37.5.307, 37.5.310, 37.5.311, 37.5.313, 37.5.316, 37.5.322, 37.5.325, 37.5.328, 37.5.331, 37.5.334 and 37.5.337.

AUTH: Sec. 53-1-403, MCA
IMP: Sec. 53-1-407 and 53-1-408, MCA

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

(1) "Act" means the Omnibus Budget Reconciliation Act of 1981.

~~(2)~~ ~~(4)~~ "CSBG" means the community services block grant.

~~(3)~~ ~~(6)~~ "Director" means the director of the department of public health and human services.

~~(4)~~ ~~(7)~~ "Poverty line" means the official poverty line established by the director of the federal office of management and budget.

(5) "Department" means the department of public health and human services.

~~(6)~~ ~~(3)~~ "County" means the board of county commissioners.

~~(7)~~ ~~(2)~~ "Contractor" means human resource development council, one of the state's 10 organizations designated as a community action agency under the provisions of section 210 of the Economic Opportunity Act of 1964 which is a nonprofit community organization serving low income persons in a multi-county area that has the same boundaries as one or more substate planning districts established by executive order of the governor.

AUTH: Sec. 53-2-201, MCA

IMP: HB 2 of the First Special Session, 1981 and Sec. 53-10-501, MCA

37.2.907 CONTRACTOR PLAN ASSURANCES AND CONTENT (1) A contractor must assure in its contractor plan that it will only use the funds:

- (a) remains the same.
- (b) to provide activities designed to assist low-income participants including the elderly poor:
 - (i) through (c) remain the same.
 - (d) to coordinate and establish linkages between governmental and other social services programs to assure the effective delivery of services to low-income individuals;
 - (e) remains the same.
 - (f) to meet department-identified priorities which address one or more of the eligible activities described in (1)(a) through (e) ~~above~~.

(2) Not all of items in (1)(b) through (f) ~~above~~ must be proposed in a contractor plan. However, the contractor does have to certify that it is providing a range of services and activities having a measurable and potentially major impact on the causes of poverty in its community, commensurate with the amount of money received.

(3) The contractor plan shall contain the additional assurances that:

- (a) remains the same.
- (b) CSBG funds will be used to provide for coordination between anti-poverty programs and, where appropriate, with emergency energy crisis intervention programs under Title XXVI of the Act (relating to low-income home energy assistance) conducted in the county;

- (c) remains the same.
- (d) the contractor will prepare and submit to the state, at least once every ~~2~~ two years, an independent audit of the CSBG funds;

- (e) remains the same.
- (f) no person shall on the ground of race, color, national origin or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity funded, in whole or in part, with CSBG funds. Any prohibition against discrimination on the basis of age under the Age Discrimination Act of 1975 or with respect to an otherwise qualified handicapped individual as provided in Section 504 of the Rehabilitation Act of 1973 shall also apply to any such program or activity;

- (g) CSBG funds will not be used for the purchase or improvement of land, or the purchase, construction, or permanent improvement (other than low-cost residential weatherization or other energy-related home repair) of any building or other facility;

- (h) it will permit and cooperate with any federal or state investigation related to the CSBG; and

- (i) each contractor must have a board of directors constituted so as to assure that:

(i) one-third of the members of the board are elected public officials, currently holding office, or their representatives, except that if the number of elected officials reasonably available and willing to serve is less than one-third of the membership of the board, membership on the board of appointive public officials may be counted in meeting such one-third requirements;

(ii) remains the same.

(iii) the remainder of the members are officials or members of business, industry, labor, religious, welfare, education, or other major groups and interests in the community.

(4) The contractor plan must contain:

(a) remains the same.

(b) a description of which services and activities will be carried out and the means to be used to provide those services and activities. Such description shall also include the geographic areas to be served, and categories or characteristics of individuals to be served. If direct services are planned, only individuals with income below the poverty line are eligible; and

(c) remains the same.

(5) The program period will begin January 1 and end on December 31 of the same year. All contractor plans/budget material must be proposed for completion during that period. Should unusual or extraordinary circumstances occur, the department will consider requests for amendment(s) to the contractor plan.

(6) remains the same.

AUTH: Sec. 53-2-201, MCA

IMP: HB 2 of the First Special Session, 1981 and Sec. 53-10-504, MCA

3. The 1995 Legislature by Chapter 546, Laws of Montana 1995 reorganized several Departments and created the Department of Public Health and Human Services. The various rules for the disbanded Departments were transferred to the Department of Public Health and Human Services and were gradually transferred into one unified title, Title 37.

Each of the former departments utilized its own method of formatting and references. The Department's goal generally is to apply a consistent framework of formatting and references to the various rules that were transferred from the disbanded departments. The Department is therefore undertaking to review each individual chapter and provide any necessary changes to formatting and correcting internal rule cites and any other general difficulties it has noted in each chapter. This notice makes such corrections in the chapter on departmental procedures.

Corrections made include updating internal cites to their new transferred cites, correcting capitalization, hyphenation and typographical errors in the text of the rules. There are no

substantive changes being made in this notice.

4. Interested persons may submit their data, views or arguments concerning the proposed action in writing to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, no later than 5:00 p.m. on October 9, 2003. Data, views or arguments may also be submitted by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

5. If a person who is directly affected by the proposed action wishes to express data, views and arguments orally or in writing at a public hearing, that person must make a written request for a public hearing and submit such request, along with any written comments to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us no later than 5:00 p.m. on October 9, 2003.

6. If the Department of Public Health and Human Services receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of those who are directly affected by the proposed action, from the Administrative Rule Review Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who are directly affected, a hearing will be held at a later date and a notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be more than 25 based on the number of individuals affected by rules covering departmental procedures.

Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and
Human Services

Certified to the Secretary of State September 2, 2003.

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

| | | |
|--------------------------------|---|--------------------|
| In the matter of the amendment |) | NOTICE OF PROPOSED |
| of ARM 37.8.105, 37.8.106, |) | AMENDMENT |
| 37.8.126, 37.8.127, 37.8.128, |) | |
| 37.8.129, 37.8.302, 37.8.303, |) | |
| 37.8.808, 37.8.1801, |) | |
| 37.8.1802, 37.8.1803, and |) | |
| 37.8.1808 pertaining to |) | |
| records and statistics |) | NO PUBLIC HEARING |
| |) | CONTEMPLATED |

TO: All Interested Persons

1. On October 11, 2003, the Department of Public Health and Human Services proposes to amend the above-stated rules.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice. If you need to request an accommodation, contact the department no later than 5:00 p.m. on October 3, 2003, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

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

37.8.105 PRESERVATION OF OLD RECORDS (1) Employees of the department, for purposes of making old or faded records suitable for microfilming or photocopying may:

(a) trace those parts of the record that are too dim to be microfilmed; ~~or~~

(b) and (c) remain the same.

(2) If (1)(b) or (c) ~~above~~ are employed, the original record must be retained for reference purposes.

(3) and (4) remain the same.

AUTH: Sec. 50-15-102 and 50-15-103, MCA

IMP: Sec. 50-15-102 and 50-15-103, MCA

37.8.106 AMENDMENT OF VITAL RECORDS (1) through (3) remain the same.

(4) In the case of adoption, establishment of paternity, or legitimation, a new certificate, which does not indicate that it was altered, will replace the original birth certificate. In order to establish the replacement certificate, the department must be provided with a certified copy of the certificate of adoption, a certified copy of the final order of adoption, a

certified copy of the court order establishing paternity, or an acknowledgment of paternity signed by both parents and notarized. The child's name, as it appears on the original certificate, the child's date of birth, and, if available, the county of birth must also be provided.

(5) Except in the cases cited in (4) ~~above~~, amendment of a registrant's given names or surnames on a birth certificate may be made only if the department receives a certified copy of an order from a court of competent jurisdiction. The court order or request that directs the name change must include the registrant's name as it appears on the certificate, the registrant's date of birth, and, if available, the county of birth, parents' names including mother's maiden name, and information sufficient to locate and identify the record to be altered. If the order from the court directs the issuance of a new certificate that does not show amendments, the new certificate will not indicate on its face that it was altered.

(6) remains the same.

(7) In cases other than those cited in (4) through (6) ~~above~~, the department may amend any portion of a vital record if a requestor submits a correction affidavit that includes the following:

(a) remains the same.

(b) the date and place of birth, death, or fetal death, or date and place of marriage or marital termination;

(c) and (d) remain the same.

(e) certification by the affiant that all affected parties concur in the change(s), and that the affiant assumes the responsibility of supplying irrefutable proof that the changes are correct. If not all parties agree to the change(s), an order of a court of competent jurisdiction directing that the change(s) be made is required;

(f) remains the same.

(g) the notary's statement, signature, and seal.

(8) remains the same.

AUTH: Sec. 50-15-102, 50-15-103, 50-15-204 and 50-15-223,
MCA

IMP: Sec. 50-15-102, 50-15-103, 50-15-204 and 50-15-223,
MCA

37.8.126 ACCESS TO RECORDS (1) remains the same.

(2) The following people may obtain a certified copy of a birth record:

(a) remains the same.

(b) a spouse, child, or parent of a registrant to whom the requested record pertains, upon establishing their identity and relationship to the registrant to the satisfaction of the certifying official;

(c) through (e) remain the same.

(3) The following may not receive a copy, certified or uncertified, of a registrant's birth records:

(a) a former spouse whose marriage to the registrant was terminated through divorce, annulment, or invalidation and who

has subsequently remarried; or

(b) and (4) remain the same.

(5) A clerk of the district court may issue a certified copy of a marriage or marital termination record to anyone listed in (2) ~~above~~ after receiving a completed application for the record and establishing the identity of the requestor and the requestor's relationship to the registrant~~(s)~~.

(6) A certifying official may not file, issue, or certify a copy of a vital record from another state or country.

(7) remains the same.

AUTH: Sec. 50-15-103, 50-15-113 and 50-15-122, MCA

IMP: Sec. 50-15-103, 50-15-113, 50-15-121 and 50-15-122, MCA

37.8.127 APPLICATION FOR COPY OF VITAL RECORD (1) remains the same.

(2) For a certified or non-certified copy of a birth record, in addition to the requirements of (1) ~~above~~, the request must include:

(a) through (e) remain the same.

(3) For a certified or non-certified copy of a death record, in addition to the requirements of (1) ~~above~~, the application must include:

(a) through (c) remain the same.

AUTH: Sec. 50-15-102, 50-15-103 and 50-15-121, MCA

IMP: Sec. 50-15-103 and 50-15-121, MCA

37.8.128 CONTENTS OF CERTIFIED AND NON-CERTIFIED COPIES

(1) through (1)(d) remain the same.

(2) Each certified birth record must include, in addition to the items in (1) ~~above~~:

(a) the given name~~(s)~~ of the registrant;

(b) through (g) remain the same.

(3) Each certified death record must include, in addition to the items in (1) ~~above~~:

(a) the given name~~(s)~~ of the registrant;

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

AUTH: Sec. 50-15-102, 50-15-103 and 50-15-121, MCA

IMP: Sec. 50-15-103, 50-15-121 and 50-15-122, MCA

37.8.129 FORMAT AND PAPER REQUIREMENTS FOR CERTIFIED COPIES (1) With the exception noted in (2) ~~below~~, effective February 15, 2003, all certified copies of birth, death, and fetal death records must be issued on paper that contains the following security features:

(a) through (4) remain the same.

AUTH: Sec. 50-15-102, 50-15-103 and 50-15-122, MCA

IMP: Sec. 50-15-102, 50-15-103, 50-15-121, 50-15-122 and 50-15-123, MCA

37.8.302 PARENTAL REVIEW OF BIRTH CERTIFICATE INFORMATION

(1) and (2) remain the same.

(3) If a birth occurs outside of a health care facility, the person responsible for certifying the live birth and filing the birth certificate under the provisions of 50-15-221(4), MCA, must fulfill the same duties as those specified in (1) and (2) ~~above~~ for a health care facility administrator.

AUTH: Sec. 50-15-102, MCA

IMP: Sec. 50-15-102, 50-15-103, 50-15-108, 50-15-109 and 50-15-221, MCA

37.8.303 DELAYED BIRTH CERTIFICATE

(1) Any person born in the state of Montana whose birth was not properly recorded within ± one year after the birth may file and receive a delayed birth certificate if the requirements of this rule are met.

(2) remains the same.

(3) The person filing the form must submit to the department documents proving the applicant's name, the date and place of birth, and the applicant's parents' names. Documentation of the name of the applicant and the date and place of birth must be supported by at least the following:

(a) if the record is filed within five years after the date of birth, either a health care facility record created at the time of birth and two pieces of documentary evidence meeting the requirements of (4) ~~below~~ or, if a health care facility record is not available, three pieces of such documentary evidence; or

(b) if the record is filed five years or more after the date of birth, three pieces of documentary evidence meeting the requirements of (5) ~~below~~.

(4) and (5) remain the same.

(6) No two of the documents submitted as evidence may be from the same source and only one document may be a sworn affidavit. A sworn affidavit must state the date and place of birth of the applicant, establish the age of the affiant and the fact that the affiant was present at the birth, and be signed by a person who is at least 10 years older than the applicant for the delayed birth certificate.

(7) Of the documents that are not sworn affidavits, at least one must establish the place, month, day, and year of birth; one must establish the town or county and state of birth; and they must establish the full names of both parents, including the mother's maiden name.

(8) remains the same.

(9) If an application for a delayed birth certificate is incomplete or does not meet the department's issuance criteria, as listed above, the department shall notify the applicant of:

(a) the problem(s);

(b) the procedures necessary to rectify the problem(s); and

(c) remains the same.

(10) If, after notification, the application is not actively pursued for a period of 180 days, the application and

supporting documents will be returned to the applicant and a new fee, application~~7~~ and supporting documentation will be required to reapply.

AUTH: Sec. 50-15-102 and 50-15-204, MCA

IMP: Sec. 50-15-103 and 50-15-204, MCA

37.8.808 DEAD BODY REMOVAL AUTHORIZATION (1) A completed dead body removal authorization form must include, as a minimum:

(a) insofar as possible, the decedent's full name or, in the case of a fetal death, the full name of the mother;

(b) the place of death, including city~~7~~1 county~~7~~1 name and address of facility~~7~~ if applicable~~7~~1 address of a place which is not a named facility~~7~~ or the specific geographic location if an address does not exist;

(c) the date death occurred or was first discovered, or date of delivery if a fetal death;

(d) a signed and dated authorization statement~~7~~ along with, if applicable, a signed and dated certification of oral authorization;

(e) a signed and dated statement of assumption of responsibility for filing the death or fetal death certificate; and

(f) remains the same.

(2) The ~~person~~ (physician, physician's designee, coroner having jurisdiction~~7~~ or mortician~~7~~ who authorizes the removal of a dead body or the remains of a fetal death from the place of death must complete a dead body removal authorization on the department's form and, before or at the time of removal, if the person authorizing removal is:

(a) a physician or physician's designee, give all three copies of the form to the person in charge of disposition;

(b) a coroner or mortician, retain a copy of the completed form and give the other two copies to the person in charge of disposition, unless (2)(c) applies; or

(c) also the person in charge of disposition, retain all three copies and comply with (3) ~~below~~.

(3) remains the same.

(4) If the registrar receives more than one copy of a completed dead body removal authorization form, ~~s/he~~ must retain one copy and provide the other copy to the coroner having jurisdiction.

AUTH: Sec. 50-15-102, MCA

IMP: Sec. 50-15-102 and 50-15-405, MCA

37.8.1801 REPORTABLE TUMORS (1) The following tumors are designated as reportable:

(a) remains the same.

(b) skin cancer of the labia, vulva, penis~~7~~ or scrotum;

(c) benign tumor of the brain, including a:

(i) meningioma (cerebral meninges); i

(ii) pinealoma (pineal gland); i or

(iii) remains the same.

(d) carcinoid tumor, whether malignant, benign, or not otherwise specified (NOS).

(2) A benign tumor other than one of those listed in (1) ~~of this rule~~ may be reported to the department for inclusion in the tumor registry if prior approval has been obtained from the ~~department [Tumor Registry,~~ Department of Public Health and Human Services, Public Health and Safety Division, Montana Central Tumor Registry, Room 205, 111 N. Sanders, 1400 Broadway, PO Box 202951, Helena, Montana, 59604 MT 59620-2951; phone: 444-6786].

(3) A tumor which is otherwise reportable, but has been diagnosed and recorded using the words "questionable", ~~"possible"~~ "possible", "suggests", or "equivocal" is not considered a reportable tumor.

(4) Whenever records of a patient with a tumor which would be reportable, if confirmed, contain the words "suspect", "probable", "suspicious", "compatible with" or "consistent with" in reference to that tumor, the tumor is considered reportable.

(5) In order for the department to maintain current reporting, hospitals shall submit to the department information on reportable tumors within ~~6~~ six months from the date of discharge; independent laboratories shall submit to the department information on reportable tumors within ~~6~~ six months from the date the laboratory service associated with the tumor was rendered.

AUTH: Sec. 50-15-706, MCA

IMP: Sec. 50-15-703, MCA

37.8.1802 REQUIRED RECORDS, INITIAL ADMISSION AND TREATMENT (1) Whenever a hospital initially provides medical services to any patient relating to a tumor designated as reportable by ARM 37.8.1801, it must collect, record, and make available to the department the following information about that patient:

- ~~(1)~~ (a) name and current address of patient;
- ~~(2)~~ (b) patient's address at time of diagnosis;
- ~~(3)~~ (c) social security number;
- ~~(4)~~ (d) name of spouse, if any;
- ~~(5)~~ (e) phone number;
- ~~(6)~~ (f) race, sex, marital status, and religion (optional);
- ~~(7)~~ (g) age at diagnosis, place of birth, and month, day and year of birth;
- ~~(8)~~ (h) name, address, and phone number of friend or relative to act as contact, plus relationship of that contact to patient;
- ~~(9)~~ (i) date and place of initial diagnosis;
- ~~(10)~~ (j) primary site of tumor (paired organ);
- ~~(11)~~ (k) sequence of primary tumors, if more than one;
- ~~(12)~~ (l) other primary tumors;
- ~~(13)~~ (m) method of confirming diagnosis;
- ~~(14)~~ (n) histology, including dates, place, histologic type, and slide number;

- ~~(15)~~ (o) summary staging, including whether in situ, localized, regional, distant~~7~~ or unstaged, with no information;
- ~~(16)~~ (p) description of tumor and its spread, if any, including size in centimeters, number of positive nodes, number of nodes examined~~7~~ and site of distant metastases;
- ~~(17)~~ (q) whether American joint committee on cancer (AJCC) ~~or TNM~~ staging is utilized~~7~~ and if so, the findings of the staging;
- ~~(18)~~ (r) cumulative summary of all therapy directed at the subject tumor, including:
 - ~~(a)~~ (i) date of therapy;
 - ~~(b)~~ (ii) specific type of surgery or radiation therapy, if any~~7~~ and details of chemical, hormonal~~7~~ or other kinds of treatment; and
 - ~~(c)~~ (iii) if no therapy given, reason for lack of therapy;
- ~~(19)~~ (s) status at time of latest recorded information, i.e., whether alive or dead~~7~~ tumor in evidence or recurring~~7~~ or status unknown;
- ~~(20)~~ (t) if recurrence of tumor, type and distant sites of first recurrence;
- ~~(21)~~ (u) names of physicians primarily and secondarily responsible for follow-up;
- ~~(22)~~ (v) date of each follow-up; and
- ~~(23)~~ (w) if patient has died, date of death, place, cause~~7~~ and whether autopsy performed.

AUTH: Sec. 50-15-706, MCA
IMP: Sec. 50-15-703, MCA

37.8.1803 REQUIRED RECORDS, FOLLOW-UP (1) Whenever a patient for whom information has been provided to the tumor registry is admitted to the hospital providing the information on an inpatient or outpatient basis for further treatment related to the tumor for which original registration in the tumor registry was made, the hospital must keep on file the following information:

- ~~(1)~~ (a) patient's name, noting any change from previous records;
- ~~(2)~~ (b) any paired organ involvement, noting sequence;
- ~~(3)~~ (c) subsequent histology, including dates, place, histology type, slide number~~7~~ and procedure;
- ~~(4)~~ (d) date, type of procedure~~7~~ and findings of any surgery or other exploratory measure;
- ~~(5)~~ (e) date and type of any administration of radiation;
- ~~(6)~~ (f) date of any administration of hormones, chemotherapy, immunotherapy~~7~~ or any other kind of treatment;
- ~~(7)~~ (g) date of death and/or last follow-up;
- ~~(8)~~ (h) if death has occurred, the place, cause~~7~~ and whether an autopsy was performed;
- ~~(9)~~ (i) if autopsy performed, its findings pertaining to cancer;
- ~~(10)~~ (j) status at time of latest recorded information, i.e., whether alive or dead~~7~~ tumor in evidence or has recurred~~7~~ or status is unknown;

~~(11)~~ (k) if recurrence of tumor, type and distant sites of first recurrence; and
~~(12)~~ (l) names of those physicians primarily and secondarily responsible for follow-up treatment.

AUTH: Sec. 50-15-706, MCA

IMP: Sec. 50-15-703, MCA

37.8.1808 REQUIRED RECORDS, INDEPENDENT CLINICAL LABORATORIES (1) Whenever a clinical laboratory which is not owned or operated by a hospital provides laboratory services for any patient relating to a tumor designated as reportable by ARM 37.8.1801, it must collect, record, and make available to the department the following information about that patient:

~~(1)~~ (a) name and current address of patient;
~~(2)~~ (b) patient's address at time of diagnosis;
~~(3)~~ (c) social security number;
~~(4)~~ (d) name of spouse, if any;
~~(5)~~ (e) race, sex, and marital status;
~~(6)~~ (f) age at diagnosis, + month, day and year of birth;
~~(7)~~ (g) date and place of initial diagnosis;
~~(8)~~ (h) primary site of tumor (paired organ);
~~(9)~~ (i) sequence of primary tumors, if more than one;
~~(10)~~ (j) method of confirming diagnosis;
~~(11)~~ (k) histology, including dates, place, histologic type, + and slide number;
~~(12)~~ (l) summary staging, including whether in situ, + localized, + regional, + distant, + or unstaged, with no information;
~~(13)~~ (m) description of tumor and its spread, if any, including size in centimeters, number of positive nodes, number of nodes examined, + and site of distant metastasis;
~~(14)~~ (n) status at time of latest recorded information, i.e., whether alive or dead, + tumor in evidence or recurring, + or status unknown; and
~~(15)~~ (o) names of physicians primarily and secondarily responsible for follow-up.

AUTH: Sec. 50-15-706, MCA

IMP: Sec. 50-15-703, MCA

3. The 1995 Legislature by Chapter 546, Laws of Montana 1995 reorganized several departments and created the Department of Public Health and Human Services. The various rules for the disbanded departments were transferred to the Department of Public Health and Human Services and were gradually transferred into one unified title, Title 37.

Each of the former departments utilized its own method of formatting and references. The Department's goal generally is to apply a consistent framework of formatting and references to the various rules that were transferred from the disbanded departments. The Department is therefore undertaking to review each individual chapter and provide any necessary changes to

formatting and correcting internal rule cites and any other general difficulties it has noted in each chapter. This notice makes such corrections in the chapter on records and statistics.

Corrections made include updating internal cites to their new transferred cites, correcting capitalization, hyphenation, section numbering and typographical errors in the text of the rules. The Department is also taking this opportunity to correct Department addresses in the rules to ensure that the proper Division and address are reflected. There are no substantive changes being made in this notice.

4. Interested persons may submit their data, views or arguments concerning the proposed action in writing to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, no later than 5:00 p.m. on October 9, 2003. Data, views or arguments may also be submitted by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

5. If a person who is directly affected by the proposed action wishes to express data, views and arguments orally or in writing at a public hearing, that person must make a written request for a public hearing and submit such request, along with any written comments to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us no later than 5:00 p.m. on October 9, 2003.

6. If the Department of Public Health and Human Services receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of those who are directly affected by the proposed action, from the Administrative Rule Review Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who are directly affected, a hearing will be held at a later date and a notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be more than 25 based on the number of individuals affected by rules covering department records and statistics.

Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and
Human Services

Certified to the Secretary of State September 2, 2003.

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

| | | |
|--------------------------------|---|--------------------|
| In the matter of the amendment |) | NOTICE OF PROPOSED |
| of ARM 37.12.301, 37.12.305, |) | AMENDMENT |
| 37.12.306, 37.12.310, |) | |
| 37.12.311, 37.12.312, |) | |
| 37.12.314, 37.12.315, |) | |
| 37.12.316, 37.12.320, |) | |
| 37.12.324, 37.12.326, |) | |
| 37.12.337, 37.12.338, |) | |
| 37.12.341, 37.12.345, |) | |
| 37.12.346, 37.12.401, |) | |
| 37.12.601 and 37.12.603 |) | NO PUBLIC HEARING |
| pertaining to laboratories |) | CONTEMPLATED |

TO: All Interested Persons

1. On October 11, 2003, the Department of Public Health and Human Services proposes to amend the above-stated rules.

The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who need an alternative accessible format of this notice. If you need to request an accommodation, contact the department no later than 5:00 p.m. on October 3, 2003, to advise us of the nature of the accommodation that you need. Please contact Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210; telephone (406)444-5622; FAX (406)444-1970; Email dphhslegal@state.mt.us.

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

37.12.301 DEFINITIONS For the purpose of this subchapter:

(1) and (2) remain the same.

(3) "Bachelor degree or equivalent" means a college degree with the equivalent of 30 semester hours in a biological or physical science program or at least 4 ~~four~~ years of experience in a specific related scientific discipline.

(4) remains the same.

(5) "Chemical hygiene plan" means a document written by a laboratory that describes the procedures used to store, handle, and dispose of chemicals in the laboratory.

(6) "Contaminated" means exceeding a maximum contaminant level established in ARM Title 17, chapter 38, subchapter 2 ~~of the Administrative Rules of Montana.~~

(7) through (12) remain the same.

(13) "Initial demonstration of analytical capability" means the procedure described in the method cited in 40 CFR ~~Part~~ part 136, ~~Appendix~~ appendix A, July 1998 edition, for chemistry analysis, used to determine a laboratory's accuracy and

precision in applying an analytical method.

(14) "Key personnel" means a laboratory's director, supervisor, and quality assurance officer, all of whom meet the requirements of the EPA laboratory certification manual.

(15) "Method detection limit" means the minimum concentration of a substance that can be measured and reported with 99% confidence that the analyte concentration is greater than zero as determined from analysis of a sample containing the analyte in a given matrix as described in 40 CFR ~~Part~~ part 136, ~~Appendix~~ appendix B, 1 July 1995 edition.

(16) through (19) remain the same.

(20) "Standard operating procedures (SOPs)" means a laboratory's written document which details the steps of an operation, analysis, or action whose techniques and procedures are thoroughly prescribed and is accepted by the laboratory as the procedure for performing certain routine or repetitive tasks.

(21) "Variance" means written approval from the environmental laboratory allowing a laboratory to use a method, procedure, or equipment other than that required by these rules that meets the purpose and intent of these rules and that has been shown to have no adverse material effects on the accuracy of analyses.

(22) remains the same.

AUTH: Sec. 50-1-202, MCA

IMP: Sec. 50-1-202 and 75-6-106, MCA

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

(a) ~~Submit~~ a completed application to the Department of Public Health and Human Services, ~~Operations and Technology~~ Public Health and Safety Division, Environmental Laboratory, 1400 Broadway, Cogswell Building, P.O. 202951, Helena, MT 59620-2951, on forms provided by the department. The application must include:

(i) through (8) remain the same.

AUTH: Sec. 50-1-202, MCA

IMP: Sec. 50-1-202 and 75-6-106, MCA

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

(a) meet all of the applicable personnel, equipment, training, and facility requirements of this subchapter;

(b) at least once during the ~~3~~ three year term of its license, pass an on site inspection by an agent of the environmental laboratory that shows compliance with the requirements of these rules for the license category in question; and

(c) remains the same.

AUTH: Sec. 50-1-202, MCA

IMP: Sec. 50-1-202 and 75-6-106, MCA

37.12.310 LICENSURE FEES (1) The following fees must be submitted to the department, under the circumstances noted, by laboratories conducting analyses of public water supplies:

(a) and (b) remain the same.

(c) \$250 plus travel expenses for a second inspection during the ~~3~~ three year term of a license that is necessary for approval of a new laboratory location; there is no charge for one inspection during the term of the license;

(d) through (g) remain the same.

AUTH: Sec. 50-1-202, MCA

IMP: Sec. 50-1-202, MCA

37.12.311 DURATION OF LICENSE (1) A license granted to an in-state laboratory is for a ~~3~~ three year period provided:

(a) through (c) remain the same.

(2) A reciprocal license granted to an out-of-state laboratory is for the same period as the license, certification, or other approval granted by the approving authority, provided that:

(a) through (c) remain the same.

AUTH: Sec. 50-1-202, MCA

IMP: Sec. 50-1-202 and 75-6-106, MCA

37.12.312 PROVISIONAL LICENSE (1) through (1)(b) remain the same.

(2) Provisional licensure will be granted only after an on site inspection, and is in effect for ~~4~~ one year or until full licensure is granted, whichever is earlier.

(3) remains the same.

(4) In order for a laboratory applying for a microbiology license for the first time to upgrade from provisional licensure status to fully licensed status, a microbiology laboratory must be in continual operation for ~~4~~ one year, accurately analyze any required audit samples, and undergo a second on site inspection to verify that its methodologies and quality control meet the standards of this subchapter.

AUTH: Sec. 50-1-202, MCA

IMP: Sec. 50-1-202 and 75-6-106, MCA

37.12.314 RESTRICTION OF LICENSE (1) The department may place conditions upon the license of a laboratory under the following circumstances:

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

(i) through (ii)(B) remain the same.

(b) ~~T~~he laboratory notifies the department, after the fact, of changes in personnel, equipment, or procedures that

have a material effect on the analyses of analytes for which it is approved. In this case, conditional approval will remain in effect until:

(i) and (ii) remain the same.

AUTH: Sec. 50-1-202, MCA

IMP: Sec. 50-1-202 and 75-6-106, MCA

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

(a) through (f) remain the same.

(g) falsifies data, or engages in deceptive practices such as reporting another laboratory's data without giving credit on the report to the laboratory which performed the analysis;

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

(i) fails to report the results of unsatisfactory test results of samples or maximum contaminant level (MCL) violations to the department of environmental quality as required under ARM Title 17, chapter 38, subchapter 2 ~~of the Administrative Rules of Montana.~~

(2) remains the same.

AUTH: Sec. 50-1-202, MCA

IMP: Sec. 50-1-202 and 75-6-106, MCA

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

(4) The department ~~hereby~~ adopts and incorporates by reference the EPA laboratory certification manual (EPA 815-B-97-001, "Manual for the Certification of Laboratories Analyzing Drinking Water", March, 1997), which contains criteria, procedures, and quality assurance standards required by the environmental protection agency that must be met by laboratories analyzing drinking water to determine compliance with the federal Clean Water Act and its rules. A copy of the manual may be obtained from the Department of Public Health and Human Services, ~~Operations and Technology~~ Public Health and Safety Division, Environmental Laboratory, 1400 Broadway, Cogswell Building, P.O. Box 202951, Helena, MT 59620-2951, telephone: (406)-444-3444.

AUTH: Sec. 50-1-202, MCA

IMP: Sec. 50-1-202 and 75-6-106, MCA

37.12.320 PROFICIENCY TESTING (1) remains the same.

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

(a) whenever required by the EPA, enroll and participate in a proficiency testing program approved by the environmental laboratory for each analyte or interdependent analyte group, or,

for each analyte or interdependent analyte group for which proficiency testing is not available or required, the laboratory must establish, maintain, and document the accuracy and reliability of its procedures through a quality assurance plan;

(b) through (f) remain the same.

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

(a) through (d) remain the same.

(4) A laboratory may not:

(a) through (f) remain the same.

(g) knowingly receive a proficiency testing sample from another laboratory for analysis and fail to notify the department of the receipt of the other laboratory's sample within ~~5~~ five business days of discovery.

(5) Results of proficiency tests must be within the control limits established by the EPA as specified in chapter IV of the EPA laboratory certification manual for each analysis for which the laboratory requests approval. These limits are determined by using the known concentration of the analyte in the sample, and by the application of accepted statistical procedures.

(6) through (8) remain the same.

(9) The department ~~hereby~~ adopts and incorporates by reference the acceptance limits for regulated parameters in chapter IV of the EPA laboratory certification manual (EPA 815-B-97-001, "Manual for the Certification of Laboratories Analyzing Drinking Water", March, 1997), which contains the critical elements for chemistry that a laboratory must meet, including the acceptance limits required by the EPA for metals, inorganics, ~~volatile~~ volatile organic compounds, and synthetic organics in drinking water samples. A copy of chapter IV may be obtained from the Department of Public Health and Human Services, ~~Operations and Technology~~ Public Health and Safety Division, Environmental Laboratory, 1400 Broadway, Cogswell Building, P.O. Box 202951, Helena, MT 59620-2951, telephone: (406)-444-3444.

AUTH: Sec. 50-1-202, MCA

IMP: Sec. 50-1-202 and 75-6-106, MCA

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

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

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

37.12.326 CHANGE IN LOCATION (1) A licensed laboratory which intends to change its physical location shall notify the department 90 days prior to the relocation. The notification shall include the following:

(a) remains the same.
(b) ~~A~~ notification of any personnel, equipment, or analytic method changes which will occur as a result of the relocation; and

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

(3) through (6) remain the same.

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

37.12.337 SAFETY (1) A laboratory shall develop and maintain a safety program, including an education-based safety program, which meets the requirements of the Montana Safety Culture Act, Title 39, chapter 71, part 15, MCA, and ARM 24.30.2501, 24.30.2503, 24.30.2507, 24.30.2521, 24.30.2541, 24.30.2442, 24.30.2551, 24.30.2553, 24.30.2554 and through 24.30.2558 implementing that act and adopted by the department of labor and industry.

(a) the department ~~hereby~~ adopts and incorporates by reference those portions of ARM 24.30.2501, 24.30.2503, 24.30.2507, 24.30.2521, 24.30.2541, 24.30.2442, 24.30.2551, 24.30.2553, 24.30.2554 and through 24.30.2558, which contain requirements that employers must meet concerning the establishment of educational safety programs and safety programs for employers who employ more than five employees. A copy of those rules may be obtained from the Department of Public Health and Human Services, Office of Legal Affairs, 1400 Broadway, Cogswell Building, P.O. Box 202951, Helena, MT 59620-2951.

(2) and (3) remain the same.

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

37.12.338 LABORATORY EQUIPMENT AND SUPPLIES (1) through (5) remain the same.

(6) The department ~~hereby~~ adopts and incorporates by reference the standards contained in the EPA laboratory certification manual (EPA 815-B-97-001, "Manual for the Certification of Laboratories Analyzing Drinking Water", March, 1997) for sources of distilled or deionized water. A copy of the manual may be obtained from the Department of Public Health and Human Services, ~~Operations and Technology~~ Public Health and

Safety Division, Environmental Laboratory, 1400 Broadway, Cogswell Building, P.O. Box 202951, Helena, MT 59620-2951, telephone: (406)-444-3444.

AUTH: Sec. 50-1-202, MCA

IMP: Sec. 50-1-202 and 75-6-106, MCA

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

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

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

(c) If a test shows a positive total coliform, fecal coliform, or E. coli result, a laboratory must immediately notify the supplier and within 24 hours notify the ~~department of environmental quality~~ (DEQ) of that fact. A total coliform-positive result is based on a confirmed phase for the multiple tube fermentation technique and presence-absence (P-A) coliform test, or verified test for membrane filter technique. No requirement exists for confirmation of positive Colilert/Colisure tests, fecal coliform tests, or E. coli tests. In those rare cases where a presumptive total coliform-positive culture does not confirm or verify as such, but is found to be fecal coliform or E. coli positive, the sample is considered total coliform-positive and fecal coliform/E.coli positive;

(d) remains the same.

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

AUTH: Sec. 50-1-202, MCA

IMP: Sec. 50-1-202 and 75-6-106, MCA

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

(4) The laboratory's analysts must:

(a) meet all of the qualifications and conditions set forth in chapter IV of the EPA laboratory certification manual, except those noted in (5) and (6) ~~below~~, and:

(b) if operating the following, have the training noted, unless the department approves a specialized training course as a substitute:

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

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

(iii) through (6) remain the same.

(7) The department ~~hereby~~ adopts and incorporates by reference chapter IV of the EPA laboratory certification manual (EPA 815-B-97-001, "Manual for the Certification of Laboratories Analyzing Drinking Water", March, 1997), which establishes qualifications for staff training and experience and conditions for approval of laboratories conducting chemical analyses of public drinking water. A copy of ~~the above~~ chapter IV may be obtained from the Department of Public Health and Human Services, ~~Operations and Technology~~ Public Health and Safety Division, Environmental Laboratory, 1400 Broadway, Cogswell Building, P.O. Box 202951, Helena, MT 59620-2951.

AUTH: Sec. 50-1-202, MCA

IMP: Sec. 50-1-202 and 75-6-106, MCA

37.12.346 CRITICAL ELEMENTS FOR MICROBIOLOGY LABORATORY LICENSURE (1) through (3) remain the same.

(4) Supervising analysts must verify all results of testing performed by analysts in training and co-sign those results.

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

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

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

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

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

and

(b) Analysts must have a minimum of ~~4~~ four days of training at the environmental laboratory with a successful evaluation from the state training personnel, with the exception that up to two days training may be waived at the discretion of the microbiology certification officer based upon education and experience of the analyst.

(6) remains the same.

(7) The department ~~hereby~~ adopts and incorporates by reference chapter V of the EPA laboratory certification manual (EPA 815-B-97-001, "Manual for the Certification of Laboratories Analyzing Drinking Water", March, 1997), which establishes qualifications for staff training and experience and conditions for approval of laboratories conducting microbiological analyses of public drinking water. A copy of ~~the above~~ chapter V may be obtained from the Department of Public Health and Human Services, ~~Operations and Technology~~ Public Health and Safety Division, Environmental Laboratory, 1400 Broadway, Cogswell Building, P.O. Box 202951, Helena, MT 59620-2951.

AUTH: Sec. 50-1-202, MCA

IMP: Sec. 50-1-202 and 75-6-106, MCA

37.12.401 LABORATORY FEES FOR ANALYSES (1) Fees for clinical analyses performed by the laboratory of the department of public health and human services are as follows, with the exception noted in (3) ~~below~~:

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

(2) Effective June 4, 1999, fees for environmental analyses performed by the laboratory of the department of public health and human services are as follows, with the exceptions noted in (3) and (4) ~~below~~:

(a) through (j) (x) remain the same.

(3) The fees specified in (1) and (2) ~~of this rule~~ will be lowered by the department of public health and human services to a level not exceeding the cost to the department of the test in question whenever larger batches of samples or a change of analysis method warrants lower fees.

(4) Fees for analyses other than those listed in (1) and (2) ~~of this rule~~ will be established at the level of comparable analyses or by calculating the chemists' hourly charge for time worked, if there is no comparable analysis.

AUTH: Sec. 50-1-202, MCA

IMP: Sec. 50-1-202, MCA

37.12.601 CERTIFICATE FORM (1) In addition to the information required by 40-1-203 and 40-1-204, MCA, the certificate form shall include the following:

~~(1)(a)~~ (a) An indication by the certifying physician that either:

~~(a)(i)~~ (i) the applicant submitted to a standard serological test for rubella immunity within the past ~~6~~ six months and that both the applicant and the other party to the proposed marriage

have examined the report of such test; or

~~(b)(ii)~~ the applicant is exempt from the requirement for serological testing on medical grounds, as specified in ARM 37.12.608-;

~~(2)(b)~~ Certification by the applicant-; and

~~(3)(c)~~ Acknowledgment of receipt of the certificate by the clerk of the district court who is to issue the marriage license.

AUTH: Sec. 40-1-206, MCA

IMP: Sec. 40-1-203 and 40-1-204, MCA

37.12.603 PROCEDURES (1) The procedure for completion of the medical certificate when the examination is made in Montana is as follows:

(a) remains the same.

(b) The laboratory shall examine the specimen, fill out the lower half of the certificate form, and transmit it with a confidential report of results to the physician.

(c) After examination of the laboratory report, and after the report has been exhibited to and examined by the applicant and the other party to the marriage, the physician shall complete the form and give it to the applicant.

(d) remains the same.

(2) The procedure for completion of the medical certificate when the examination is made outside of Montana is as follows:

(a) Certificate forms and blood test forms have been forwarded to each state health department and are available at these sources or directly from the Department of Public Health and Human Services, ~~Operations and Technology~~ Public Health and Safety Division, Environmental Laboratory, 1400 Broadway, Cogswell Building, P.O. Box 202951, Helena, MT 59620-2951.

(b) remains the same.

(c) Blood tests made outside Montana must be done in approved laboratories, which include state and territorial health department laboratories and laboratories within their jurisdictions approved by them, U.S. public health service laboratories, laboratories operated by the U.S. armed forces and veteran's administration, provincial public health laboratories of Canada, and laboratories licensed under the provisions of the Clinical Laboratories Improvement Act of 1967.

(d) Certificate forms provided by other states having comparable laws will be accepted for persons who have received serological tests outside of Montana provided such tests are performed not more than ~~6~~ six months prior to the issuance of a marriage license.

AUTH: Sec. 40-1-206, MCA

IMP: Sec. 40-1-203, 40-1-204 and 40-1-206, MCA

3. The 1995 Legislature by Chapter 546, Laws of Montana 1995 reorganized several departments and created the Department of Public Health and Human Services. The various rules for the

disbanded departments were transferred to the Department of Public Health and Human Services and were gradually transferred into one unified title, Title 37.

Each of the former departments utilized its own method of formatting and references. The Department's goal generally is to apply a consistent framework of formatting and references to the various rules that were transferred from the disbanded departments. The Department is therefore undertaking to review each individual chapter and provide any necessary changes to formatting and correcting internal rule cites and any other general difficulties it has noted in each chapter. This notice makes such corrections in the chapter on laboratories.

Corrections made include updating internal cites to their new transferred cites, correcting capitalization, hyphenation and typographical errors in the text of the rules and to incorporate secretary of state terminology when referring to rule sections and subsections. The Department is also taking this opportunity to correct Department addresses in the rules to ensure that the proper Division and address are reflected. There are no substantive changes being made in this notice.

4. Interested persons may submit their data, views or arguments concerning the proposed action in writing to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, no later than 5:00 p.m. on October 9, 2003. Data, views or arguments may also be submitted by facsimile (406) 444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us. The Department also maintains lists of persons interested in receiving notice of administrative rule changes. These lists are compiled according to subjects or programs of interest. For placement on the mailing list, please write the person at the address above.

5. If a person who is directly affected by the proposed action wishes to express data, views and arguments orally or in writing at a public hearing, that person must make a written request for a public hearing and submit such request, along with any written comments to Dawn Sliva, Office of Legal Affairs, Department of Public Health and Human Services, P.O. Box 4210, Helena, MT 59604-4210, by facsimile (406)444-1970 or by electronic mail via the Internet to dphhslegal@state.mt.us no later than 5:00 p.m. on October 9, 2003.

6. If the Department of Public Health and Human Services receives requests for a public hearing on the proposed action from either 10% or 25, whichever is less, of those who are directly affected by the proposed action, from the Administrative Rule Review Committee of the legislature, from a governmental agency or subdivision, or from an association having no less than 25 members who are directly affected, a hearing will be held at a later date and a notice of the hearing will be published in the Montana Administrative Register. Ten

percent of those directly affected has been determined to be more than 25 based on the number of individuals affected by rules covering laboratories.

Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and
Human Services

Certified to the Secretary of State September 2, 2003.

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

In the matter of the amendment of)
ARM 2.43.404, 2.43.418 and)
2.43.506, pertaining to membership) NOTICE OF AMENDMENT
options for officials elected to)
positions covered by the Public)
Employees' Retirement System and)
the reporting of those officials)
by their employers)

TO: All Concerned Persons

1. On July 17, 2003, the Public Employees' Retirement Board published MAR Notice No. 2-2-332 regarding amendments to ARM 2.43.404, 2.43.418, and 2.43.506, at page 1420 of the 2003 Montana Administrative Register, Issue Number 13.

2. The Board has amended ARM 2.43.404, 2.43.418, and 2.43.506 exactly as proposed.

3. No comments or testimony were received.

/s/ Terry Teichrow
Terry Teichrow, President
Public Employees' Retirement Board

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

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

Certified to the Secretary of State September 2, 2003.

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

| | | |
|----------------------------------|---|--------------------|
| In the matter of the adoption |) | NOTICE OF ADOPTION |
| of new Rule I and amendment of |) | AND AMENDMENT |
| ARM 2.43.422, 2.43.423 and |) | |
| 2.43.428, pertaining to the |) | |
| purchase of federal volunteer |) | |
| service by members of the Public |) | |
| Employees' Retirement System |) | |
| Defined Benefit Retirement Plan |) | |

TO: All Concerned Persons

1. On July 17, 2003, the Public Employees' Retirement Board (Board) published MAR Notice No. 2-2-331 at page 1414 of the 2003 Montana Administrative Register, Issue Number 13 regarding proposed new Rule I and proposed amendments to ARM 2.43.422, 2.43.423 and 2.43.428, pertaining to the purchase of federal volunteer service by members of the Public Employees' Retirement System Defined Benefit Plan. Then, on August 14, 2003, in response to comments received from a Legislative Services Division staff attorney regarding the inadequacy of the rationale for the proposed new Rule I, the Board published MAR Notice No. 2-2-338 at page 1707 of the 2003 Montana Administrative Register, Issue Number 15, regarding proposed changes to New Rule I.

2. The Board has adopted new Rule I, ARM 2.43.442, as proposed but with the following changes, stricken matter interlined, new matter underlined:

2.43.442 ELIGIBLE FEDERAL VOLUNTEER SERVICE (1) through (1)(a) remain as proposed.

(b) any documented, successfully completed required term of service in the following National and Community Service Act (NCSA) programs:

(i) through (2)(d) remain as proposed.

AUTH: 19-2-403, MCA

IMP: 19-3-515, MCA

3. The Board has amended ARM 2.43.422, 2.43.423, and 2.43.428 exactly as proposed.

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

COMMENT 1: A Legislative Services staff attorney commented that the proposed Rule I does not address United States service programs other than the Peace Corps. The Legislative Services staff attorney believes that this omission results in a rule that is in direct conflict with the statute.

RESPONSE: The Board acknowledges that the only United States service program addressed in Rule I is the Peace Corps. This is intentional. The statute implemented by Rule I, section 19-3-515, MCA, provides in pertinent part: "[A] member . . . may . . . purchase . . . up to 5 years of the member's service as a volunteer in a United States service program, such as the peace corps, or successful completion of a term of service in a national service position as described in the National and Community Service Act of 1990 . . ."

The statute thus provides for the purchase of two distinct types of federal volunteer service: (1) service in a "United States service program, such as the Peace Corps;" and (2) a successfully completed specific term of service described in the National and Community Service Act of 1990. However, the statute is silent regarding the criteria used to determine exactly what a United States service program is or whether a United States service program is similar to the Peace Corps.

Board staff have made numerous contacts and researched federal law trying to determine what other types of United States service programs exist. No definition of "United States service programs" has been found. No service programs similar to the Peace Corps have been identified.

Absent further guidance from the Legislature regarding the intent of the phrase "United States service programs, such as the peace corps" the Board is in no position to permit the purchase of service from any United States service program other than the Peace Corps. Requiring the Board to identify "United States service programs" without further criteria could be considered an unconstitutional delegation of legislative authority. Were the Board to perform that exercise, it would be performing responsibilities that should have been exercised by the Legislature.

COMMENT 2: The same staff attorney commented earlier on the same issue addressed in Comment #1, the Board's requirement that a successful term of service be completed, and the adequacy of the Board's reason for Rule I.

RESPONSE: Those comments were addressed in MAR Notice No. 2-2-338.

/s/ Terry Teichrow
Terry Teichrow, President
Public Employees' Retirement Board

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

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

Certified to the Secretary of State September 2, 2003.

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the amendment) NOTICE OF AMENDMENT
of ARM 4.12.607 and 4.12.608)
relating to the reporting of)
fertilizer and fee schedules)

TO: All Concerned Persons

1. On July 31, 2003, the Department of Agriculture published MAR Notice No. 4-14-141 regarding the proposed amendment of ARM 4.12.607 and 4.12.608 relating to the reporting of fertilizer and fee schedules at page 1576 of the 2003 Montana Administrative Register, Issue Number 14.

2. The department has amended ARM 4.12.607 and 4.12.608 exactly as proposed.

3. No comments or testimony were received.

DEPARTMENT OF AGRICULTURE

/s/ W. Ralph Peck

Ralph Peck
Director

/s/ Tim Meloy

Tim Meloy, Attorney
Rule Reviewer

Certified to the Secretary of State on September 2, 2003.

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

In the matter of the adoption)
of new rules I and II, the)
amendment of ARM 12.10.103,)
12.10.104, 12.10.105, and) NOTICE OF ADOPTION,
12.10.106, and the repeal) AMENDMENT AND REPEAL
of ARM 12.10.101 pertaining)
to shooting range development)
grants)

TO: All Concerned Persons

1. On June 26, 2003, the Department of Fish, Wildlife and Parks (department) published MAR Notice No. 12-284 regarding the proposed adoption of new rules I and II, the amendment of ARM 12.10.103, 12.10.104, 12.10.105, and 12.10.106, and the repeal of ARM 12.10.101 pertaining to shooting range development grants at page 1217 of the 2003 Montana Administrative Register, Issue Number 12.

2. The department has adopted new rule I (ARM 12.10.110) exactly as proposed.

3. The department has adopted new rule II (ARM 12.10.112) with the following changes, stricken matter interlined, new matter underlined:

NEW RULE II (12.10.112) GRANT PRIORITY (1) As long as funds are sufficient to allocate grants to all eligible applicants, grants will be allocated on a first come, first served basis beginning with July 1 of each biennium.

(2) When the department receives more eligible applications for grants than funds are available, the department may include, but is not limited to, the following criteria to disperse funds and approve grants:

(a) needs of the community determined by distance to existing shooting ranges, ~~and~~/or annual club membership/range use;

(b) population of the county compared with numbers of shooting ranges allowing public use within the county;

(c) disabled accessibility improved to existing shooting range as a result of the project;

(d) types of firearms and archery equipment that can be used at the proposed project;

(e) range safety improved as a result of the proposed project; and

(f) impacts to the human environment.

AUTH: 87-1-279, MCA

IMP: 87-1-277, 87-1-278, 87-1-279, MCA

4. The department has amended ARM 12.10.103, 12.10.105

and 12.10.106 as proposed.

5. The department has amended ARM 12.10.104 with the following changes, stricken matter interlined, new matter underlined:

12.10.104 REIMBURSEMENT OF COSTS (1) All billing on a proposed project must be completed by ~~June 30 of each year~~ the end of each biennium.

(2) Reimbursement requests will be based upon actual costs or in-kind contributions, verified by receipts and documentation that the work was completed.

(3) With prior approval, the department will consider situations where work cannot be completed until funds are received. Which situations constitute a special circumstance or hardship, requiring dispersal of grant funds in advance, is at the department's discretion.

AUTH: 87-1-279, MCA

IMP: 87-1-276, 87-1-277, 87-1-278, 87-1-279, MCA

6. The department has repealed ARM 12.10.101 as proposed.

7. The following comments were received and appear with the department's responses:

COMMENT 1: One commenter from White Sulphur Springs thought that the criteria of new rule II (2)(a) and (b), using number of shooters as part of the grant priority, was unfair to rural communities. This individual noted that the closest available shooting range to the community is 70 miles away. He believed White Sulphur Springs has a great need for a shooting range but that it would have a smaller chance of receiving grant money than a city such as Great Falls that has a larger population.

RESPONSE: Actually White Sulphur Springs would score the same as Great Falls on the criteria in new rule II (2)(a) and (b). White Sulphur Springs would receive the maximum 10 points on (a) because there is no shooting range within 50 miles. On (b) Great Falls could receive more points because of its larger population. The department amended new rule II (2)(a) in the adoption notice to clarify that the department can consider distance or annual club membership/range use in distributing grant funds.

COMMENT 2: One commenter noticed that although the grant program is a biennial appropriation, the amended ARM 12.10.104 stated that projects must be completed by June 30 of each year. He stated that the department should allow the grantees to utilize the grant funds within a two-year period.

RESPONSE: The department agrees and amended the rule to that effect.

COMMENT 3: Three individuals stated that being eligible to receive grant money only as a reimbursement after the in-kind contribution is complete does not allow their club to fully utilize the grant program. These individuals stated that they need the funds to purchase materials necessary to accomplish the in-kind work.

RESPONSE: The department acknowledges the validity of this comment and amended the rule to allow for special circumstances. With prior approval, the department will consider situations where work cannot be completed until funds are received. What situations constitute a special circumstance or hardship, requiring dispersal of grant funds in advance, is at the department's discretion.

COMMENT 4: One commenter questioned when someone can submit for reimbursement, monthly, quarterly or by project completion.

RESPONSE: The department can make payments at any time during the duration of the project, with the proper documentation.

By: /s/ M. Jeff Hagener
M. Jeff Hagener
Director

By: /s/ Martha C. Williams
Martha C. Williams
Rule Reviewer

Certified to the Secretary of State September 2, 2003

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

In the matter of the adoption) NOTICE OF ADOPTION AND
of New Rule I concerning) AMENDMENT
multi-game video gambling)
machine approval, New Rule II)
concerning software)
specifications for video multi-)
game machines, New Rule III)
concerning automated accounting)
and reporting system, video)
gambling machine hardware and)
software specifications, New)
Rule IV concerning daily pot)
raffles, amendment of ARM)
23.16.102, 23.16.103, 23.16.117,)
23.16.401, 23.16.502, 23.16.508,)
23.16.1245, 23.16.1716,)
23.16.1802, 23.16.1803,)
23.16.1807, 23.16.1822,)
23.16.1901, 23.16.1906,)
23.16.1907, 23.16.1914,)
23.16.1915, 23.16.1916, and)
23.16.2001 concerning)
definitions, requirements for)
permitting and fees, software)
specifications for multi-game)
video gambling machines and)
fingerprinting requirements)

TO: All Concerned Persons

1. On July 31, 2003, the Department of Justice published MAR Notice No. 23-16-141 regarding the proposed adoption and amendment of the above-stated rules at page 1601 of the 2003 Montana Administrative Register, Issue Number 14.

2. The Department of Justice has adopted New Rules I (23.16.2101), II (23.16.1909A), III (23.16.1920), and IV (23.16.2603); amended 23.16.102, 23.16.103, 23.16.117, 23.16.401, 23.16.502, 23.16.508, 23.16.1245, 23.16.1716, 23.16.1802, 23.16.1803, 23.16.1807, 23.16.1822, 23.16.1906, 23.16.1907, 23.16.1914, 23.16.1915, 23.16.1916, and 23.16.2001 exactly as proposed.

3. The department amends the remaining rule with the following changes, stricken matter interlined, new matter underlined:

23.16.1901 GENERAL SPECIFICATIONS OF VIDEO GAMBLING MACHINES (1) through (1)(d)(v)(A) remain as proposed.

~~(A)~~ (B) a mechanism that accepts cash in the form of bills that do not exceed \$20;

(vi) through (3) remain as proposed.

4. A public hearing was held on August 21, 2003. No comments were received from any interested persons and no testimony was offered. The Department has amended ARM 23.16.1901 because it inadvertently did not incorporate earmarking changes which were made in MAR Notice No. 23-16-140.

5. The following written comments were received from Rich Miller, Executive Director, Gaming Industry Association of Montana, Inc., and appear with the Department of Justice's responses.

Comment: Rule 1 Combination of Poker, Keno and Bingo - In a letter dated August 28, 2003, the Gaming Industry Association raised an objection to Rule I. Comments indicated the association thought language should be added to the rule that would release a machine owner from the agreement to connect a machine to the automated accounting and reporting system if 48 months had passed since the owner entered the agreement and the department still hadn't established an available connection date.

Response: The statute currently allows a machine owner to operate multiple games (keno, poker and/or bingo) in the same machine only if the machine is linked to an automated accounting and reporting system or committed by agreement to link to the system when connection is available. As published, the rule allows a machine owner to terminate an agreement to connect if the multiple games software is removed. The legislature would have to amend the statute to allow machines with multiple games software, not connected to an automated accounting and reporting system, to operate without an agreement.

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

/s/ Ali Bovington
ALI BOVINGDON, Rule Reviewer

Certified to the Secretary of State September 2, 2003.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the adoption) NOTICE OF ADOPTION
of NEW RULE I, interpreting)
legislative changes to statutes)
that regulate local building)
code enforcement programs)

TO: All Concerned Persons

1. On July 17, 2003, the Department of Labor and Industry published MAR Notice No. 24-301-169 regarding the public hearing on the proposed adoption of the above-stated rule relating to local building code enforcement programs, at page 1449 of the 2003 Montana Administrative Register, issue no. 13.

2. On August 7, 2003, the Department held a public hearing on the proposed new rule in Helena. One member of the public attended and made oral comment. No other comment was received by the August 15, 2003, deadline.

3. The comment received and the Department's response are as follows:

COMMENT: Neil Poulson, representing the City of Bozeman and the Montana Chapter of the International Code Council, spoke generally in support of adopting the new rule. In addition, he suggested that the Department adopt the International Plumbing Code.

RESPONSE: The Department acknowledges Mr. Poulson's support. The International Plumbing Code is not addressed in NEW RULE I. The Department will keep Mr. Poulson's suggestion in mind when plumbing-related matters are proposed for amendment at some point in the future.

4. The department has adopted NEW RULE I, ARM 24.301.231, exactly as proposed.

5. This rule will be effective October 1, 2003.

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

/s/ WENDY J. KEATING
Wendy J. Keating, Commissioner
DEPARTMENT OF LABOR & INDUSTRY

Certified to the Secretary of State September 2, 2003.

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

In the matter of the amendment)
of ARM 37.106.704 pertaining)
to critical access hospital)
(CAH))

NOTICE OF AMENDMENT

TO: All Interested Persons

1. On July 17, 2003, the Department of Public Health and Human Services published MAR Notice No. 37-294 regarding the public hearing on the proposed amendment of the above-stated rule at page 1460 of the 2003 Montana Administrative Register, issue number 13.

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

37.106.704 MINIMUM STANDARDS FOR A CRITICAL ACCESS HOSPITAL (CAH) (1) through (2)(d) remain as proposed.

(3) A critical access hospital shall provide emergency services meeting the emergency needs of patients in accordance with acceptable standards of practice, including the following standards:

(a) through (c) remain as proposed.

(d) A practitioner is on duty or on call and physically available at the facility within one hour at all times, unless the procedures described in (3)(e) ~~or (f)~~ are adopted and implemented.

~~(e) If the facility cannot ensure that a practitioner is available within one hour after a patient first contacts the facility, within that hour, the director of nursing or alternate must:~~

~~(i) evaluate the condition of the patient;~~

~~(ii) determine whether a practitioner can reach the facility before the hour is up; and~~

~~(iii) if the practitioner will not be available, arrange for the transport of the patient to another facility capable of providing the appropriate level of care.~~

~~(f)~~ (e) Facilities with 10 or fewer beds that are located in frontier areas having fewer than six persons per square mile and who have ~~less than two full-time equivalent~~ one medical ~~providers~~ provider regularly available in the area may provide emergency services through a registered nurse if they have requested and been granted a waiver by the state survey agency for medicare and medicaid. In these instances:

(i) and (ii) remain as proposed.

(iii) a registered nurse meeting the qualifications specified in (3)~~(f)~~ (e)(ii) must be physically present 24 hours per day is either on duty or on call and physically available at

the facility within 30 minutes at all times; and
(iv) through (5) remain as proposed.

AUTH: Sec. 50-5-233, MCA
IMP: Sec. 50-5-233, MCA

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

COMMENT #1: Montana statutory and case law does not allow ARM 37.103.704(1) to be adopted to the extent that it authorizes certified registered nurse anesthetists (CRNAs) to furnish anesthesia services in hospitals or critical access hospitals without the current physician supervision requirement and adoption of the proposed rule constitutes an expansion of the scope of practice of CNRAs.

RESPONSE: The Department disagrees with these comments. Incorporation by reference of 42 CFR 485, subpart F, as updated through March of 2003, into ARM 37.106.704 will not violate Montana law, will not authorize CNRAs to administer anesthesia without supervision and will not expand the scope of practice of CNRAs.

The portion of 42 CFR 485, subpart F, which contains the "physician supervision requirement" regarding CRNAs is located at 42 CFR 485.639, which provides in relevant part as follows:

(c) Administration of anesthesia. The CAH designates the person who is allowed to administer anesthesia to CAH patients in accordance with its approved policies and procedures and with State scope-of-practice laws.

(1) Anesthesia must be administered by only -- (i) A qualified anesthesiologist; (ii) A doctor of medicine or osteopathy other than an anesthesiologist; including an osteopathic practitioner recognized under section 1101(a)(7) of the Act; (iii) A doctor of dental surgery or dental medicine; (iv) A doctor of podiatric medicine; (v) A certified registered nurse anesthetist (CRNA), as defined in Sec. 410.69(b) of this chapter; (vi) An anesthesiologist's assistant, as defined in Sec. 410.69(b) of this chapter; or (vii) A supervised trainee in an approved educational program, as described in Secs. 413.85 or 413.86 of this chapter.

(2) In those cases in which a CRNA administers the anesthesia, the anesthetist must be under the supervision of the operating practitioner except as provided in paragraph (e) of this section. An anesthesiologist's assistant who administers anesthesia must be under the supervision of an anesthesiologist.

(e) Standard: State exemption. (1) A CAH may be exempted from the requirement for physician supervision of CRNAs as described in paragraph (c)(2) of this section, if the State in which the CAH is located submits a letter to CMS signed by the Governor, following consultation with the State's Boards of Medicine and Nursing, requesting exemption from physician supervision for CRNAs. The letter from the Governor must attest that he or she has consulted with the State Boards of Medicine and Nursing about issues related to access to and the quality of anesthesia services in the State and has concluded that it is in the best interests of the State's citizens to opt-out of the current physician supervision requirement, and that the opt-out is consistent with State law.

Thus, because the Governor of Montana has not exercised the opt-out provision contained in subsection (e), 42 CFR 485.639 currently requires that Montana CRNAs be supervised by an "operating practitioner" when administering anesthesia. Furthermore, 42 CFR 485.639 only permits the governor of a state to opt-out of the supervision requirement if opting out is "consistent with state law".

So, upon adoption of the proposed amendment to ARM 37.106.704, CNRAs will not be authorized to administer anesthesia unsupervised. This would require that the Governor exercise the opt-out provision of 42 CFR 485.639(e), which the Governor may not do unless opting out is consistent with Montana law. If opting out is not consistent with Montana law, the Governor may not opt-out, and the proposed amendment will have no effect whatsoever upon the administration of anesthesia by CRNAs.

As a result, incorporation by reference of 42 CFR 485, subpart F, as updated through March of 2003, into ARM 37.106.704 will not authorize CRNAs to furnish anesthesia services in critical access hospitals without supervision, nor will it expand the scope of practice of CRNAs. Both are dependent upon matters beyond the scope of the proposed amendments, which do nothing more than synchronize the requirements of state licensure with the requirements of Medicare certification.

COMMENT #2: The proposed rule change to incorporate 42 CFR 485 Subpart F as updated through March 1, 2003 will make the regulations consistent for CAHs who are regulated under both state licensing regulations and federal certification requirements. The current disparity between the two standards is confusing to providers. The proposed rules allow Montana to exercise an "opt-out" provision from Medicare requirements for physician supervision of certified registered nurse anesthetists (CRNAs) in order to receive federal Medicare reimbursement for anesthesiology services. The Board of Medical Examiners and the Board of Nursing have been consulted and agree with this proposed change. The proposed change will increase access to anesthesiology services in rural areas. I strongly support

these proposed changes.

RESPONSE: The Department appreciates the support for the proposed rule change. The Governor must write a letter to the Centers for Medicare and Medicaid Services (CMS) to request the "opt-out" provision for CRNA services. If the Governor chooses to write this letter, it will become effective upon submission to CMS.

COMMENT #3: The issue of the "opt-out" for Montana CRNAs has been thoroughly discussed by all involved parties for almost two years. Legislation was attempted during the 2003 session by anesthesiologists to mandate supervision of CRNAs. That legislation was unanimously defeated in committee. Opting out of the federal rule requiring physician supervision of CRNAs best serves the needs of rural and urban Montana communities. Seven other rural states have taken advantage of the opportunity provided by the CMS federal rule. Please move the rule changes forward to completion.

RESPONSE: The Department appreciates the support for the proposed rule change. The Governor must write a letter to the Centers for Medicare and Medicaid Services (CMS) to request the "opt-out" provision for CRNA services. If the Governor chooses to write this letter, it will become effective upon submission to CMS.

COMMENT #4: In the proposed rule at ARM 37.106.704(2)(a), (b), (c) and (d), it appears that a CAH would have to meet all four criteria rather than one of the criteria.

RESPONSE: The Department disagrees. The four criteria are listed correctly with an "or" between (2)(c) and (2)(d). If all four criteria had to be met, the Department would have used "and" between (2)(c) and (2)(d).

COMMENT #5: Renumbered section (2) of ARM 37.106.704 that expands the necessary provider definition is fine as proposed.

RESPONSE: The Department appreciates the support.

COMMENT #6: A facility should not be expected to receive prior authorization even if they have more than three providers. All of my medical staff could become unavailable due to illness, weather, funeral leave or other unforeseen circumstances.

RESPONSE: The Department presumes that the comment refers to ARM 37.106.704(3)(f). This subsection of the rule requires that a facility obtain a waiver to provide emergency room coverage by a registered nurse (RN). The waiver process is meant to address very limited circumstances where the facility has been unable to obtain coverage for their emergency room. It is not a prior authorization process such as the one that was allowed for medical assistance facilities several years ago. The federal

authorizing language for critical access hospitals does not provide for this type of prior authorization process to address an unforeseen staffing shortage that arises in the CAH. Facilities must have plans in place to address all reasonable contingencies and avoid the kinds of shortages that are described in the comment.

COMMENT #7: What is the definition of two FTE providers? Is an FTE a 40-hour equivalent? Does the FTE have to be hospital based or does it mean clinic based or on call or a salaried position that is part of the mix?

RESPONSE: The Department agrees that the proposed language is unclear since many medical providers are not employees of the critical access hospital (CAH) and full-time equivalent (FTE) is a term usually used in conjunction with employment. The rule has been modified to reflect that the critical access hospital has only one medical provider regularly available in the area where the facility is located to take emergency room call. The substitute language is intended to address communities that have a surgeon or specialist that comes to the CAH on a regular but sporadic basis and one regular medical provider. It will also address situations where a locum tenem provider is used, since this would not be a regular provider. In both these examples, CAHs would be considered to have a single provider for the purposes of this rule.

COMMENT #8: Change ARM 37.106.704(2)(f) to "two or less medical providers" rather than the current language of less than two full-time equivalent medical providers. This would allow more CAHs to qualify.

RESPONSE: The Department disagrees with the suggested change to the rule. Coverage should normally be able to be arranged when two medical providers are available to provide care. There is no doubt that emergency room coverage by a doctor, physician assistant-certified, or advanced practice registered nurse is more comprehensive and serves the public better than an assessment by a RN and subsequent remotely directed treatment. The Department does not believe that the public would be well served by the proposed change.

COMMENT #9: Changes proposed in ARM 37.106.704(3)(d) and (e) are unnecessary since these rules reflect the old Medical Assistance Facility emergency coverage concept which is no longer necessary with the addition of the Alternative ER Coverage model for CAHs.

RESPONSE: The Department concurs that the proposed language in (3)(e) is unnecessary and has removed it. The language at (3)(d) is needed in conjunction with the language describing when registered nurses may provide emergency room coverage. The proposed subsection (3)(f) will be renumbered (3)(e) in the final rule.

COMMENT #10: ARM 37.106.704(3)(f)(i) through (iv) should be removed from the final rule and be maintained by the Department as a procedure rather than being incorporated into the Administrative Rules of Montana. This will provide greater flexibility for both affected CAHs and the Department during the initial implementation stage of this new option.

RESPONSE: The Department disagrees. These subsections have generated multiple comments and multiple suggestions about how it might best be handled. There is no doubt that emergency room assessment and treatment by a doctor, physician assistant-certified or advanced practice registered nurse is more comprehensive and serves the public better than assessment and treatment by a RN. These subsections outline when that RN may provide emergency coverage. The Department does not believe that the public would be well served by the suggested change.

COMMENT #11: If the Department believes they must include criteria for the new CAH Alternative ER Coverage model in the Administrative Rules, all of the criteria from the April 21, 2003 guidelines should be included and they should be the only criteria included. These criteria were developed through lengthy discussions between MHA, affected CAHs and the Department. They were presented by the Governor's office to the Boards of Nursing and Medical Examiners for comment and received no objections.

RESPONSE: The Department disagrees that it is necessary to include all of the proposed criteria in the draft 2003 certification waiver guidelines in the proposed licensure rule. The Department has proposed what it believes to be a comprehensive rule. In addition to providing the proposed criteria, the proposed rules were sent to the Boards of Nursing and Medical Examiners for comment. Neither boards commented on nor objected to the proposed rules. It should also be pointed out that MHA and affected CAHs are being given an opportunity to comment on the proposed rule through this rule hearing process.

COMMENT #12: ARM 37.106.704(3)(f)(iii) requiring a registered nurse to be "physically present 24 hours per day" whenever an approved Critical Access Hospital is using the Alternative ER Model should be stricken from the final rule. The Department developed these criteria without input from affected parties. It was not included in the draft criteria. It is unrealistic, unworkable and fails to consider the nurse staffing challenges of small frontier CAHs that have very low emergency room volumes (less than 20 visits per month) and even lower inpatient admissions (approximately two per month).

RESPONSE: The public is being provided an opportunity to comment on the proposed rule in accordance with state law through this rule hearing process. The Department has concluded, based on this comment and subsequent input the Department solicited from several CAH providers, that on site

coverage by a registered nurse (RN) covering the emergency room is not feasible. The final rule will reflect that the RN can be "on call" as long as the RN is available on site within 30 minutes. The maximum wait time of 30 minutes was decided upon because it assures a timely assessment for the patient, while recognizing the current nursing shortage in rural Montana that is resulting in many facilities having great difficulty in maintaining staffing levels. The requirement for 24-hour staffing would likely result in very small CAHs having to discontinue service altogether. This compromise was reached in the interest of maintaining services in the frontier regions of Montana.

COMMENT #13: ARM 37.106.704(3)(f)(iii) requiring a registered nurse to be "physically present 24 hours per day" whenever an approved Critical Access Hospital is using the Alternative ER Model should be stricken from the final rule. The federal regulations do not require or imply that the registered nurse be "physically present 24 hours per day." The proposed rule ignores the federal conditions of participation found at 42 CFR 485.631(a)(5) which require a CAH to have a registered nurse, clinical nurse specialist or licensed practical nurse on duty only when the CAH has one or more inpatients. The proposed rule conflicts with the intent of federal regulations that allow states to establish an Alternative ER Coverage model. 42 CFR 485.618 allows CAHs to have a registered nurse on call and immediately available by telephone or radio contact and available on site within 60 minutes. The proposal also conflicts with Federal Law (C201) as stated in State Operations Manual Provider Certification transmittal #9, dated May 1999 in item X: CAH anti-dumping requirements B. A CAH is not required to have emergency staff on site 24 hours a day when it has no inpatients. Staff, including nursing, must be available within 30 minutes.

RESPONSE: The Department disagrees with the contention that state law cannot be more restrictive than federal guidelines. The State of Montana is given the authority to determine licensure standards. This includes the emergency response time that Montana will allow as long as these times are equal to or less than the time frames contained in the federal regulations. The state is also given the latitude to adopt or not adopt RN alternative coverage in the emergency room. In deciding an adequate response time, the state must take into consideration the safety of the patient who arrives at the emergency room needing assessment and treatment. A wait of 60 minutes to be assessed by a registered nurse who must consult another practitioner before treatment begins does not seem to be in the best interest of the public. The final rule will reflect a maximum wait time of 30 minutes. Please see the response to Comment #12 for further explanation.

COMMENT #14: The proposed rule requiring a registered nurse to be physically in the CAH is not feasible. The rule should state

that registered nurse is on call and can respond to the emergency in a timely fashion.

RESPONSE: The Department concurs and has amended the proposed rule. Please see the response to Comment #12 for further explanation.

COMMENT #15: The suggested changes to ARM 37.106.704(3) are a reasonable solution to a difficult situation with necessary safeguards in place. In a critical situation, the reality is that the proposed mode of managing the problem may be the only acceptable response.

RESPONSE: The Department has amended the rule based on other comments on this section. Please see the response to Comment #12 for further explanation.

COMMENT #16: Subsection (3)(f)(iii) would require me to work my RNs day and night without allowing them any days off until the provider returns or hire traveling RNs. Traveling RNs would not provide the skills necessary, the cost would not be feasible, and we would not have the ability to provide documentation regarding their ER capabilities. We currently have a LPN on site and a RN on call 24/7 within 20 minutes of the facility. The rule needs to be changed to include the LPN as an acceptable screening alternative or ease the on site requirement for the RN.

RESPONSE: The Department concurs that 24 hour on site coverage by a RN is not feasible and has amended the proposed rule. Please see the response to Comment #12 for further explanation.

The Department considered and rejected the recommendation to allow the LPN to provide the ER assessment. A CAH who used a LPN for emergency room coverage, would not be eligible for Medicare certification or subsequent reimbursement.

COMMENT #17: Section (3)(f)(iii) would eliminate one burden while adding another one. Rather than 24 hour on site coverage, it would be feasible to have a RN on call who would be able to be on site within 20 minutes at any time, under any climatic conditions.

RESPONSE: The Department concurs and has amended the proposed rule. Please see the response to Comment #12 for further explanation.

COMMENT #18: The proposed rule will provide flexibility to best meet the healthcare needs of Montana by allowing an alternative model in the emergency room for critical access hospitals. We support the requirement that registered nurses providing emergency services coverage must have documented education and competency in emergency care and be physically present 24 hours a day to provide safe, quality care for rural citizens.

RESPONSE: The Department appreciates the support for the proposed education and competency requirements. The Department has amended the requirement for 24 hour on site coverage based on other comments received. Please see the response to Comment #12 for further explanation.

COMMENT #19: Any telecommunication advice given by a non-staff member of the CAH should be cleared prior to use by the medical staff. In the case of Nurse Practitioners (NP) providing telecommunication coverage, the NP should be affiliated and supervised by a physician to be certain that medical standard for the facility is upheld.

RESPONSE: The Department believes the intent of the rule change has been misunderstood. The reason that an advanced practice registered nurse would be used as a consultant to the registered nurse is because the CAH medical staff is not available.

COMMENT #20: The Department should not require the physician assistant certified (PA-C) to have his supervising physician sign the agreement with the facility. My PA-C contracts with the CAH and is not an employee of the facility. The supervising physician has no contractual arrangement with the CAH and an agreement of this type may be construed as obligating the supervising physician to be on call. The regulation of the PA-C is in the domain of the State Board of Medical Examiners and not the Department of Health.

RESPONSE: This comment refers to a requirement in the draft certification waiver criteria. It is beyond the scope of this rule process but the Department will consider the comment as it finalizes its Alternative Emergency Care Coverage Model criteria.

Dawn Sliva
Rule Reviewer

/s/ Gail Gray
Director, Public Health and
Human Services

Certified to the Secretary of State September 2, 2003.

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE

Interim Committees and the Environmental Quality Council

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

Economic Affairs Interim Committee:

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

and

- Office of Economic Development.

Education and Local Government Interim Committee:

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

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

- Department of Public Health and Human Services.

Law and Justice Interim Committee:

- Department of Corrections; and
- Department of Justice.

Energy and Telecommunications Interim Committee:

- Department of Public Service Regulation.

Revenue and Transportation Interim Committee:

- Department of Revenue; and
- Department of Transportation.

State Administration, and Veterans' Affairs Interim Committee:

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

Environmental Quality Council:

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

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

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

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

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

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

Use of the Administrative Rules of Montana (ARM):

- | | |
|-------------------------------------|---|
| Known Subject | 1. Consult ARM topical index. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued. |
| Statute Number and Department | 2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers. |

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through June 30, 2003. This table includes those rules adopted during the period July 1, 2003 through September 30, 2003 and any proposed rule action that was pending during the past six-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through June 30, 2003, 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 2002 and 2003 Montana Administrative Registers.

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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