

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

In the matter of the amendment of) NOTICE OF PUBLIC HEARING ON
ARM 37.5.119, 37.27.106,) PROPOSED AMENDMENT
37.106.101, 37.106.106, 37.106.107,)
37.106.113, 37.106.126, 37.106.133,)
37.106.134, 37.106.137, 37.106.138,)
37.106.139, and 37.106.1401)
pertaining to certificate of need)

TO: All Concerned Persons

1. On December 9, 2021, at 10:00 a.m., the Department of Public Health and Human Services will hold a public hearing via remote conferencing to consider the proposed amendment of the above-stated rules. Interested parties may access the remote conferencing platform in the following ways:

(a) Join Zoom Meeting at: <https://mt-gov.zoom.us/j/87454003846>; meeting ID: 874 5400 3846; or

(b) Dial by telephone +1 646 558 8656; meeting ID: 874 5400 3846. Find your local number: <https://mt-gov.zoom.us/u/kb5VkRAeJA>.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Public Health and Human Services no later than 5:00 p.m. on November 24, 2021, to advise us of the nature of the accommodation that you need. Please contact Heidi Clark, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

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

37.5.119 HEALTH LONG-TERM CARE FACILITY CERTIFICATE OF NEED: APPLICABLE HEARING PROCEDURES (1) Hearings relating to a health long-term care facility certificate of need are available to the extent granted and as provided in 50-5-306, MCA, ARM 37.106.115, and 37.106.120. The provisions of ARM 37.5.304, 37.5.307, 37.5.310, 37.5.311, 37.5.313, 37.5.316, 37.5.318, 37.5.322, 37.5.325, 37.5.328, 37.5.331, 37.5.334, and 37.5.337 do not apply to such hearings.

(2) Hearings relating to a health long-term care facility certificate of need will be conducted in person in Helena, ~~Lewis and Clark County~~, Montana, at a location designated by the department, unless the parties mutually agree to conduct the hearing telephonically.

AUTH: 53-2-201, 53-6-113, MCA
IMP: 50-5-306, MCA

37.27.106 DEPARTMENT PROCEDURES FOR APPROVAL OF CHEMICAL
DEPENDENCY TREATMENT PROGRAMS (1) remains the same.

(2) Chemical dependency treatment programs seeking departmental approval of one or more of the services shall submit written application to the department on a form provided by the department.

(a) remains the same.

(3) The application shall be completed as per instructions: and contain the following:

(a) A letter from the applicant, including supporting information and statistics, showing that there is a need in the community for the type of services requested in the application ~~and does not duplicate existing services.~~

~~(b) If applicable, evidence that the program has met the certificate of need rules and regulations as required by the Montana Certificate of Need Law.~~

~~(c) (b) Evidence that the need for the requested services are included in the county plan as required by 53-24-211, MCA.~~

(4) through (10) remain the same.

AUTH: 53-24-204, 53-24-208, MCA
IMP: 53-24-208, MCA

37.106.101 DEFINITIONS (1) For the purpose of this subchapter:

(a) "Capital expenditure" is defined as provided in 50-5-101, MCA.

~~(a) (b) "Current state health Long-term care facilities plan" means the compilation of components plan prepared by the department containing guidelines for determining need for health long-term care facilities and services subject to certificate of need review that is most recently adopted approved by the Governor and a statewide health coordinating council appointed by the governor; a separate component adopted by the statewide health coordinating council and the governor for a single type of service or facility is part of the current state health plan director of the department.~~

(c) "Long-term care facility" is defined as provided in 50-5-301, MCA.

~~(b) "Health service" means a major subdivision, as determined by the department, within diagnostic, therapeutic, or rehabilitative areas of care, including alcohol, drug abuse, and mental health services, that may be provided by a health care facility. Specific treatments, tests, procedures, or techniques in the provisions of care do not, by themselves, constitute a health service.~~

~~(i) "Health service" includes radiological diagnostic health services offered in, at, through, by, or on behalf of a health care facility, including services offered in space leased or made available to any person by a health care facility except when the capital expenditure for the addition to or replacement of the same service is less than \$750,000.~~

~~(c) "Major medical equipment" is defined as provided in 50-5-101, MCA, and the department interprets the phrase "substantial sum of money" in that definition to mean "more than \$750,000".~~

~~(d) "Swing-bed" means a licensed hospital, or medical assistance facility, or critical access hospital bed that is also certified for the provision of long-term care pursuant to 42 CFR 482.66 58.~~

~~(2) The following terms appears in the Montana Code Annotated, are is not defined in the statutes, and are is interpreted by the department to mean the following:~~

~~(a) The phrase "enforceable capital expenditure commitment," as used in 50-5-305, MCA, means an obligation incurred by or on behalf of a health long-term care facility when:~~

~~(i) through (iii) remain the same.~~

~~(b) The phrase "office of a private physician, dentists or other physical or mental health care professionals, including chemical dependency counselors", used in 50-5-301, MCA, as an exception from the definition of "health care facility", to mean the private offices of those professionals, whether practicing individually or as a group, and associated facilities that are:~~

~~(i) located on the premises of the professional's offices;~~

~~(ii) operated as an integral part of the professional's private practice; and~~

~~(iii) primarily available only to the professionals whose offices are located on the premises. Such facilities may include outpatient services and observation beds, but may not include inpatient services.~~

~~AUTH: subsection (2) is advisory only but may be a correct interpretation of the law; 50-5-103, 50-5-302, MCA~~

~~IMP: 50-5-101, 50-5-301, 50-5-302, 50-5-304, 50-5-305, 50-5-306, 50-5-307, 50-5-308, 50-5-309, 50-5-310, 50-5-316, 50-5-317, MCA~~

37.106.106 SUBMISSION OF LETTER OF INTENT (1) Any person proposing an activity other than those to which ~~(3)~~ (2) and ~~(4)~~ (3) below apply and that is subject to review under 50-5-301, MCA, and not exempt under 50-5-309, MCA, shall submit to the department a letter of intent that contains the following:

~~(a) and (b) remain the same.~~

~~(c) a detailed statement outlining whether the proposal involves:~~

~~(i) the addition of a new service that is offered by or on behalf of the long-term care facility that was not offered by or on behalf of the long-term care facility within the 12-month period before the month in which the service would be offered, and, if so, an estimate of the annual operating and amortization expenses required to provide it;~~

~~(ii) the construction, development, or other establishment of a health long-term care facility that did not previously exist or is being replaced;~~

~~(iii) the construction, remodeling, renovation, or replacement of a health care facility requiring a capital expenditure of more than \$1,500,000;~~

~~(iv) remains the same but is renumbered (iii).~~

~~(v) the expansion of a geographic service area of a home health agency;~~

~~(vi)~~ (iv) the use of hospital beds to provide nursing or intermediate developmental disability care and, if so, the number of beds involved; or

(v) the provision of hospital beds to provide long-term care; or

(vii) remains the same but is renumbered (vi).

(d) through (n) remain the same.

~~(2) For letters of intent submitted under (1) of this rule, in determining whether or not a capital expenditure for equipment is over \$750,000, the department will review the list submitted by the applicant pursuant to (1)(e) of this rule and will include in the cost calculation the cost of any support equipment necessary to the proper function of the item of major medical equipment in question.~~

(3) (2) Any person or persons desiring to acquire or enter into a contract to acquire 50% or more of an existing health long-term care facility (whether through a single transaction or by adding to a portion already owned) must submit to the department a written letter noting intent to acquire the facility and containing the following:

(a) the services currently provided by the health long-term care facility and the present and proposed bed capacity of the facility;

(b) and (c) remain the same.

~~(4)~~ (3) Any person proposing to increase or relocate from one facility or site to another no more than 10 beds or less or 10% or less of the licensed beds, and no beds have been added or relocated in the two years prior, must submit to the department a letter of intent containing the following as one of the conditions that 50-5-301(1)(b), MCA, requires to be met in order to be exempt from certificate of need review for the change:

(a) and (b) remain the same.

(4) When a person incurs an obligation by or on behalf of a long-term care facility for a capital expenditure that exceeds \$5 million and does not otherwise require a certificate of need, the person shall upon completion of the project:

(a) notify the department of the total amount of the expenditure; and

(b) provide the department a description of the project.

~~(5) As required by 50-5-302(2), MCA, p~~Persons who acquire 50% or more of an existing health long-term care facilities facility but who do not file the notice of intent required by (3) (2) of this rule and 50-5-302(2), MCA, are subject to certificate of need review for the purposes of this subchapter and as required by 50-5-301(1)(c), MCA.

(6) The person must send a letter of intent to the Department of Public Health and Human Service, Office of Inspector General, Certificate of Need Program, 2401 Colonial Drive, P.O. Box 202953, Helena, MT 59620-2953.

AUTH: 50-5-103, 50-5-302, MCA

IMP: 50-5-301, 50-5-302, MCA

37.106.107 SUBMISSION OF APPLICATIONS (1) through (4) remain the same.

(5) The original and ~~six~~ two copies of the application must be submitted to the department.

(6) through (10) remain the same.

AUTH: 2-4-201, 50-5-103, 50-5-302, MCA
IMP: 50-5-302, 50-5-310, MCA

37.106.113 CRITERIA AND FINDINGS (1) The criteria listed in (a) through (k) ~~below~~ are statutory criteria required by 50-5-304, MCA, and will be considered by the department in making its decision:

- (a) the degree to which the proposal being reviewed:
 - (i) remains the same.
 - (ii) provides data that demonstrates the need for services contrary to the current state ~~health~~ long-term care facilities plan, including ~~but not limited to~~ waiting lists, projected service volumes, differences in cost and quality of services, and availability of services; or
 - (iii) is consistent with the current state ~~health~~ long-term care facilities plan.
- (b) and (c) remain the same.
- (d) the immediate and long-term financial feasibility of the proposal as well as the probable impact of the proposal on the costs of and charges for providing ~~health~~ long-term care services by the person proposing the ~~health~~ long-term care service;
- (e) through (g) remain the same.
- (h) the relationship, including the organizational relationship, of the ~~health~~ long-term care services proposed to be provided to ancillary or support services;
 - (i) in the case of a construction project, the costs and methods of the proposed construction, including the costs and methods of energy provision, and the probable impact of the construction project reviewed on the costs of providing ~~health~~ long-term care services by the person proposing the construction project;
 - (j) the distance, convenience, cost of transportation, and accessibility of ~~health~~ services offered by long-term care facilities for persons who live outside urban areas in relation to the proposal; and
- (k) remains the same.

(2) In addition to the statutory criteria cited in (1) ~~above~~, the department will consider the following in making its decision:

- (a) ~~whether the equal access~~ the medically underserved population, as well as all other people within the geographical area documented as served by the applicant, will have equal access to the subject matter of the proposal; and
- (b) whether patients will experience problems including, ~~but not limited to~~, cost, availability, or accessibility in obtaining care of the type proposed in the absence of the proposed new service.

AUTH: 50-5-103, 50-5-304, MCA
IMP: 50-5-304, MCA

37.106.126 SWING-BEDS: REVIEW CRITERIA (1) A certificate of need may be issued to a hospital, ~~or~~ medical assistance facility, or critical access hospital to establish swing-beds only if, in addition to compliance with all other applicable provisions of 50-5-304, MCA, and ARM 37.106.113:

- (a) remains the same.

(b) no more than 50% of the excess bed capacity of the hospital, or medical assistance facility, or critical access hospital will be approved as swing_beds. Excess bed capacity is the difference between the number of licensed beds in the facility and the average acute care occupancy level of the facility over the three years prior to the date of the application for certificate of need.

(2) The utilization of swing_beds by a medical assistance facility or critical access hospital is subject to certificate of need review only if, as required by 50-5-301(1)(e) (b), MCA, the facility did not offer long-term care during the 12 months prior to the month the service is scheduled to commence and the service will add annual operating and amortization expenses of \$150,000 or more.

AUTH: 50-5-304, MCA

IMP: 50-5-304, MCA

37.106.133 CERTIFICATE OF NEED APPLICATION: INTRODUCTION AND COVER LETTER (1) remains the same.

(2) The applicant must send a cover letter, containing the information included in the original letter of intent with any pertinent revisions, to the Department of Public Health and Human Services, ~~Quality Assurance Division~~ Office of Inspector General, Certificate of Need Program, 2401 Colonial Drive, P.O. Box 202953, Helena, MT 59620-2953. The cover letter must accompany the original and each of the ~~six~~ two copies of the information required by ARM 37.106.134.

AUTH: 2-4-201, 50-5-302, MCA

IMP: 50-5-302, MCA

37.106.134 CERTIFICATE OF NEED APPLICATION: REQUIRED INFORMATION The following must be included in a certificate of need application:

(1) remains the same.

(2) A description of the project's accessibility to the public. In particular, the following information must be included:

(a) the location of the proposed long-term care facility;

(b) through (d) remain the same.

(3) A discussion of planning and environmental considerations, including the following information:

(a) an explanation of how the proposed service or facility is compatible with the current state ~~health~~ long-term care facilities plan (a copy of which may be obtained from the Department of Public Health and Human Services, ~~Health Policy Services Division, Health Systems Bureau, 1400 Broadway~~ Office of Inspector General, Certificate of Need Program, 2401 Colonial Drive, P.O. Box 202954 202953, Helena, MT 59620-2954 2953). If it is not compatible, an explanation of why it should be approved must be included;

(b) through (12) remain the same.

AUTH: 2-4-201, 50-5-302, MCA

IMP: 50-5-302, MCA

37.106.137 ANNUAL OPERATIONAL REPORTS BY HOSPITALS AND CRITICAL ACCESS HOSPITALS

(1) Every hospital and critical access hospital shall submit an annual report to the department on a form provided by the department ~~and no later than~~ by the deadline specified on the form. The annual reports must be signed by the hospital administrator and must include whichever of the following information is requested on the form:

(a) whether the hospital has received JCAH accreditation, and if so, for what period;

(b) through (e) remain the same.

(f) newborn nursery statistics, including:

(i) and (ii) remain the same.

(iii) total ~~new born~~ newborn days;

(iv) through (p) remain the same.

(2) Any facility failing to timely report such information to the department may be subject to corrective action.

AUTH: 2-4-201, 50-5-103, 50-5-302, MCA

IMP: 50-5-106, 50-5-302, MCA

37.106.138 ANNUAL FINANCIAL REPORTS BY HOSPITALS AND CRITICAL ACCESS HOSPITALS

(1) Every hospital and critical access hospital shall submit an annual financial report to the department on a form provided by the department ~~and no later than~~ by the deadline specified on the form. The annual financial report must be signed by the hospital administrator and must include whichever of the following information is requested on the form:

(a) through (g) remain the same.

(h)(i) remains the same but is renumbered (h).

(ii) remains the same but is renumbered (i).

(iii) remains the same but is renumbered (j).

(2) Any facility failing to timely report such information to the department may be subject to corrective action.

AUTH: 2-4-201, 50-5-103, 50-5-302, MCA

IMP: 50-5-106, 50-5-302, MCA

37.106.139 ANNUAL REPORTS BY LONG-TERM CARE AND PERSONAL CARE FACILITIES

(1) Every long-term care ~~and personal care~~ facility shall submit an annual report to the department on a form provided by the department ~~and no later than~~ by the deadline specified on the form. The annual report must be signed by the facility administrator and must include whichever of the following information is requested on the form:

(a) through (g) remain the same.

(2) Any facility failing to timely report such information to the department may be subject to corrective action.

AUTH: 2-4-201, 50-5-103, 50-5-302, MCA

IMP: 50-5-106, 50-5-302, MCA

37.106.1401 MINIMUM STANDARDS FOR CHEMICAL DEPENDENCY FACILITIES (1) remains the same.

(2) An inpatient chemical dependency treatment center which is established in a general acute-care hospital does not require separate licensure. ~~However, the certificate of need requirements of Title 50, chapter 5, subchapter 3, MCA, may apply.~~

(3) and (4) remain the same.

(5) The department ~~hereby~~ adopts and incorporates by reference ARM Title 37, chapter 27, subchapter 1, with the exception of ~~the following: ARM 37.27.101, and 37.27.106, 37.27.128(6)(a), 37.27.129(5)(a), 37.27.130(5)(a) and 37.27.135(5)(a).~~ ARM Title 37, chapter 27, subchapter 1 are rules which have been adopted by the Department of Public Health and Human Services setting forth program requirements for alcohol and drug abuse facilities to receive approval from the Department of Public Health and Human Services. Copies of these rules are available from the Department of Public Health and Human Services, Quality Assurance Division Office of Inspector General, 2401 Colonial Drive, P.O. Box 202953, Helena, MT 59620-2953.

AUTH: 50-5-103, MCA

IMP: 50-5-201, 50-8-101, 50-8-102, 50-8-105, MCA

4. STATEMENT OF REASONABLE NECESSITY

The Department of Public Health and Human Services (department) proposes to amend ARM 37.5.119, 37.27.106, 37.106.101, 37.106.106, 37.106.107, 37.106.113, 37.106.126, 37.106.133, 37.106.134, 37.106.137, 37.106.138, 37.106.139, and 37.106.1401. It is necessary to amend the referenced rules to meet the changes from House Bill (HB) 231, eliminate references to repealed rules, clarify language, and bring rules into compliance with current statutes, update terminology, update references to federal regulations (CFR), and update department agency names and addresses.

ARM 37.5.119 and 37.106.113

The department proposes amending the term "health" to "long-term" consistent with changes made by HB 231.

ARM 37.27.106

The department proposes removing the reference to certificate of need (CON) consistent with changes made by HB 231. The department also proposes certain changes to clarify language and to remove outdated application requirements.

ARM 37.106.101

The department proposes adding and removing some definitions, updating wording consistent with changes to 50-5-101 and 50-5-301, MCA, and updating a reference to the CFR.

ARM 37.106.106

The department proposes adding and removing wording consistent with changes to 50-5-301, MCA, amending the term "health" to "long-term" consistent with changes made by HB 231, updating internal cross references, and adding the mailing address of the Office of Inspector General.

ARM 37.106.107

The department proposes changing the number of copies from six to two to reflect previous changes made to this requirement.

ARM 37.106.126

The department proposes adding "critical access hospital" because this facility type has swing-beds and updating a cross reference to the MCA.

ARM 37.106.133

The department proposes changing "Quality Assurance Division" to "Office of Inspector General" to reflect changes in the agency name. The department also proposes changing the number of copies needed from six to two. This change will eliminate unnecessary duplication of documents and reduce waste.

ARM 37.106.134

The department proposes inserting "long-term care" where needed and amending "health" to "long-term care facilities" consistent with changes made by HB 231, and updating the name and mailing address of the agency.

ARM 37.106.137 and 37.106.138

The department proposes adding "critical access hospital" and possible penalties for failure to timely report and removing outdated terminology. These changes will clarify the intent of the rules and make them easier to understand.

ARM 37.106.139

The department proposes removing "personal care facilities" because reports are not required by these types of facilities and adding possible penalties for failure to timely report. These changes will clarify the intent of the rules and make them easier to understand.

ARM 37.106.1401

The department proposes removing the CON requirement because it no longer applies to chemical dependency facilities and removing references to repealed rules. These changes will clarify the rule and make it easier to understand. The department also proposes changing "Quality Assurance Division" to "Office of Inspector General" to reflect changes in the agency name.

Fiscal Impact

The department anticipates no administrative costs or cost savings associated with the proposed rule amendments.

The proposed rulemaking is estimated to affect primarily home health agencies as an increase in home health applications is expected. Ambulatory surgical centers, long-term care facilities, hospitals, and critical access hospitals may be affected, as well as an undetermined number of patients needing those services.

The department intends for the proposed amendments to be effective retroactively to October 1, 2021.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Heidi Clark, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail dphhslegal@mt.gov, and must be received no later than 5:00 p.m., December 17, 2021.

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

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

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was notified by phone and email on November 3, 2021.

9. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

/s/ Heidi Sanders
Heidi Sanders
Rule Reviewer

/s/ Adam Meier
Adam Meier, Director
Public Health and Human Services

Certified to the Secretary of State November 9, 2021.