BEFORE THE DEPARTMENT OF LIVESTOCK
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 32.3.139 appointment as deputy state veterinarian, 32.3.202 requirements for importation, 32.3.206 official health certificate, 32.3.207 permits, 32.3.2001 brands and earmarks, and the repeal of ARM 32.3.204 permit required for livestock, game, furbearing animals, wild animals, embryos, and semen	)	NOTICE OF AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On February 26, 2015, the Department of Livestock published MAR Notice No. 32-15-260 regarding the proposed amendment and repeal of the above-stated rules at page 208 of the 2015 Montana Administrative Register, Issue Number 4.

2. On April 30, 2015, the Department of Livestock published MAR Notice No. 32-15-260 regarding a public hearing on the proposed amendment and repeal of the above-stated rules at page 423 of the 2015 Montana Administrative Register, Issue Number 8.

3. On May 21, 2015, at 10:00 a.m., the department held a public hearing at the Scott Hart Building, 302 N. Roberts at Helena, Montana, to consider the proposed amendment and repeal of the above-stated rules. There were eight attendees at the hearing, all of whom gave testimony. Twelve members of the public submitted written comments prior to the close of the comment period.

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

<u>32.3.139 APPOINTMENT AS DEPUTY STATE VETERINARIAN</u> (1) The department is authorized to deputize a veterinarian when it determines that such veterinarian:

(a) is licensed to practice veterinary medicine in Montana;

(b) is a current USDA accredited category I or category II veterinarian pursuant to 9 CFR, Chapter 1, Part 161;

(c) has made formal application for deputization upon forms provided by the department;

(d) has been recommended by the state veterinarian; and

(e) has attended the department deputy state veterinarian training.

(2) The state veterinarian may ~~issue~~ <u>approve</u> a<u>n individual</u> provisional ~~deputy state veterinarian~~ status ~~on a case-by-case basis if the requesting veterinarian can~~

~~document sufficient need exists~~ prior to completion of the required training ~~as listed~~ in (1)(e). Provisional status is valid until the next available training or another date set by the state veterinarian.

5. The department has amended ARM 32.3.202, 32.3.206, 32.3.207 and 32.3.2001 as proposed.

6. The department has repealed ARM 32.3.204 as proposed.

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

ARM 32.3.139 APPOINTMENT AS DEPUTY STATE VETERINARIAN

COMMENT #1: One commenter expressed concern over the lack of training the brand division staff and local brand inspectors have, and that concern is highlighted regarding our deputy state veterinarians. They feel that we have to be careful of appointing people that are not properly trained or have the awareness of the regulations and instructions. This action would be moving the Animal Health Division in the wrong direction by not ensuring adequate training and knowledge. The commenter suggested a definition for the word "provisional" be added to our rules by which the "provisional deputy veterinarian" would be expected to complete the education in (1)(e) within a certain time frame thus the waiver requirements not be so open ended.

RESPONSE #1: Thank you for your comment. MDOL agrees about the importance of vetting provisionally appointed deputy state veterinarians to ensure they are able to uphold their responsibilities. MDOL also agrees that provisionally appointed deputy state veterinarians need to attend training in a timely manner.

Adding a "provisional deputy veterinarian" to the proposed rule and adding a deadline for completion of deputy accreditation training is appropriate to address these priorities.

ARM 32.3.202 Requirements for Importation
ARM 32.3.204 Permit Required for Livestock, Game, Furbearing Animals, Wild Animals, Embryos, and Semen (Repeal)

COMMENT #2: Several commenters were concerned about the repeal of ARM 32.3.204 and the language that states: "This requirement applies regardless of species, breed, sex, class, age, point of origin, place of destination, or purpose of the movement of the livestock entering the state." They believe that leaving that language in rule would be a clarifying phrase – a comforting phrase, rather than making the language redundant.

RESPONSE #2: Please note 2-4-305, MCA, clearly states that in rulemaking, rule language should not merely repeat statutory language. Section 81-2-703, MCA, is an authorizing statute for ARM 32.3.202. Since the language in 81-2-703, MCA, already states ". . . regardless of species, breed, sex, class, age, point of origin, place of destination, or purpose of movement," putting that phrase in rule is unnecessary and violates the purpose of rulemaking.

ARM 32.3.206 Official Health Certificate

COMMENT #3: One organization believes ARM 32.3.206 as written is "a bit short sighted" and provides too much flexibility. They stated that one wrong determination has the ability to devastate the livestock industry in Montana.

RESPONSE #3: The department disagrees. The flexibility to grant waivers already exists through the authority of 81-2-703(7), MCA, which states, "A waiver of the requirement for a health certificate or a permit must be based upon evidence that there will be no significant danger to the public health if the exemption is granted."

This handling of exemptions is also consistent with other states. Based on a survey of other states' handling of exemption requests (43 responses): (a) Over 75% (31/41) of the states have the ability to evaluate requests based on special circumstances. (b) For those 31 states with such authority, in over 80% (25/31) of cases the discretion lies with the state veterinarian's office. (c) Finally, regarding the timeliness of consideration, 56% (15/27) of the states considered the requests the same day. An additional 37% (10/27) considered requests within a week. Therefore, only 7% of responding states took more than a week with a majority taking action the same day. Of interest is that all of Montana's neighboring states of Idaho, North Dakota, Oregon, South Dakota, Washington and Wyoming, 1) allow exemptions, 2) the authority lies with the state veterinarian's office, 3) requests are considered the same day or within a week.

Additionally, prior state veterinarians at Montana Department of Livestock going back to 1984 (Drs. Linfield, Gertonson, Siroky, Ferlicka) have confirmed that they exercised discretionary authority to grant exemptions on a case-by-case basis if the waiver did not create a threat of disease.

The Board of Livestock works in conjunction with the state veterinarian in carrying out the vital mission of the department. When necessary, the board defers to the expertise of the state veterinarian (81-1-303, MCA), and the state veterinarian is responsible to the board for the administration of the laws in relation to animal health (81-1-301, MCA). This set of checks and balances ensures statutory intent to foster, promote, and protect the livestock industry of this state, per 81-2-102(1)(b), MCA.

COMMENT #4: Several commenters support that the proposed amendment in ARM 32.3.206 creates a legal process to consider rule variance requests. Without the proposed amendment, no specific process for either the Board of Livestock or the state veterinarian exists to address and render a decision on a variance request.

The state veterinarian's duty will be to review each request from a scientific perspective on whether the imported animals pose a risk of disease to livestock. The state veterinarian is required by the qualifications of his position to possess the expertise to review scientific evidence unlike the Board of Livestock, which is largely comprised of lay persons without such scientific expertise. As well, this proposed amendment will allow the BOL to avoid allegations of selective enforcement of rule requirements. The proposed rule amendment will protect the board from an appearance of bias.

RESONSE #4: The department appreciates the support and agrees that the state veterinarian is employed by the department because of expertise in animal health. A system of checks and balances ensures the statutory intent in 81-1-301, 81-1-302, and 81-1-303, MCA.

COMMENT #5: One commenter states full support for the rule change regarding import/export decisions.

REPSONSE #5: The department thanks the commenter for their support. The Animal Health Division believes the ability to grant waivers is important in order to fulfill its obligation to the livestock industry. Recent examples of needed waiver decisions included: (1) A trailer of animals traveling to Idaho from North Dakota that found last-minute room to haul a bull for a registered Angus producer in southwest Montana who was hoping to test for trichomoniasis on arrival. (2) Another was a request to exempt the CAN brand on a Montana animal that strayed into Canada. These case-by-case exemptions recognize the need to promptly respond to industry needs.

COMMENT #6: A commenter expressed support for the Montana State Veterinarian to have the ability to grant waivers, and make quarantine decisions. Other states' veterinarians are trusted to make such decisions.

RESPONSE #6: The department appreciates the commenter's confidence. Please see Response #3 where surrounding states overwhelmingly have the discretional authority to grant exemptions on a case-by-case basis.

COMMENT #7: One commenter suggested that while the board may be able to "delegate" the functions/authority, they are not able to rid themselves of the accountability for the decisions made. A prime example could be made by the budget issues at the Department of Livestock. By giving the authority to waive rules pertaining to animal importation to an employee, the board is not upholding their responsibility to the livestock industry and weakening their ability to foster, promote and protect the livestock industry of this state.

RESPONSE #7: The department thanks the commenter for their participation in this process. While the Board of Livestock has oversight for fiscal operations as well as Animal Health operations, the transfer of livestock in a manner that is time sensitive and yet doesn't compromise animal health is different than budgetary deliberations.

The department disagrees with this commenter's opinion that the board's position is weakened in delegating certain areas of expertise to the state veterinarian. The state veterinarian's qualifications are fully vetted upon employment, complying with statutory intent per 81-1-301, MCA, which states: "(1) The board shall appoint a person to be directly responsible to it for the administration of the laws relating to animal health. (2) The person must have a doctor of veterinary medicine degree from an accredited college or school and must be licensed to practice veterinary medicine in this state." Further delegation of authority is stated in 81-1-303, MCA: "In any action taken by the board in 81-2-102 and 81-20-101, the board shall ask for and consider the expertise and judgment of the administrator of the laws relating to animal health."

Finally, 81-1-302, MCA, clearly provides board oversight and review: "The administrator, subject to the rules of the board, may act for and perform the duties imposed by law on the board when the board is not in session, but any order or regulation promulgated by the administrator is subject to review, modification, or annulment by the board." This collaboration between the Board of Livestock and the state veterinarian fosters, promotes, and protects the livestock industry of this state.

COMMENT #8: Another commenter spoke in favor of the proposed amendment to ARM 32.3.206. On occasion, the immediate transport of livestock is required for animal welfare. State veterinarians of Montana are the most versed to provide real-time and rational risk-based assessments of livestock movements which can expedite and facilitate livestock movement into Montana.

RESPONSE #8: The department thanks the commenter and agrees. Please see Responses #3 and #5.

COMMENT #9: One practicing veterinarian commented: "I have always felt the regulatory aspect of veterinary medicine was to provide for the efficient movement of animals without compromising the animal health of the industry. This discretionary authority would allow the veterinary staff of the state to facilitate the movement in cases where the animal health of the industry is not at risk. I think this authority makes good sense for Montana."

RESPONSE #9: The department thanks the commenter for their support. Please see Response #5. In addition, the department believes this discretionary authority is consistent with 81-2-102(1), MCA: "The department may . . . perform any other acts and things as may be necessary or proper in the fostering, promotion, or protection of the livestock industry."

COMMENT #10: A representative from one organization states that argument can be made that Dr. Zaluski has educational background to make science-based decisions. But there can also be a point made that this change gives the authority to the state veterinarian and we cannot know who will hold that position in the future. We also make the argument that the import requirements are in place because there is risk; so that waiving them would create a threat automatically.

RESPONSE #10: Thank you for your comment and the recognition that Dr. Zaluski is well-qualified to make science-based decisions which we concur uphold the mission of the department. Be informed, however, that the proposed amendment does not give the department waiver authority; the rule merely promulgates that which has already been given by law. Please see 81-2-703, MCA

Please see Response #7 for qualifications of the state veterinarian and board oversight. The checks and balances ensure statutory intent to foster, promote, and protect the livestock industry of this state.

Please see Response #3 regarding the statutory authority in 81-2-703(7), MCA, to grant waivers. This authority is consistent with the department's stated objective in 81-2-102(1)(b), MCA, to foster, promote, and protect the livestock industry of this state.

COMMENT #11: Another commenter referred to the Core-Mark case as a case-in-point in which the producers' wishes were upheld and the board did not waive the "sell-by" date. This decision was upheld by the Montana Supreme Court in July of 2014. The commenter questioned: "What if there had been waivers granted in this case? What if that was not what the consumer and dairy industry wanted?"

RESPONSE #11: The Core-Mark case is consistent with and supports the current proposed amendment where the Board of Livestock has oversight over the decisions made by its employees. Please see Response #7 regarding board oversight.

COMMENT #12: A few commenters stated that in the Board of Livestock meetings on May 1 and 19, 2015 the state veterinarian brought before the board a request to change the risk dates for grazing in the DSA. The board decided to wait and take no action. John Scully stated that he represents the wishes of the livestock producers which would be to protect their ability to use the grazing allotment of the Forest Service Land. Nina Baucus also questioned the lack of proof that there was a risk and that the dates should be changed. Other board members also expressed concerns for the industry's wishes. Waiving import requirements seems contrary to the defined function of the board or the Animal Health Division if we go to 81-2-102 MCA, and 2-15-112, MCA.

RESPONSE #12: The department thanks the commenter for the specific example used to support your comment. Board participation at the meeting you referenced actually demonstrates that the Board of Livestock continues to exercise its authority for oversight and reviews decisions proposed or made by its employees. The proposed rule does not erode the board's responsibility to continue this oversight or its authority to do so.

COMMENT #13: One commenter supports the change to allow the state veterinarian some flexibility to provide exemption for imports, with one additional requirement that any exemptions are provided in a report at the following meeting of

the BOL. We feel it is important to ensure normal livestock industry business can occur in our state, but it is also important for the board members to be fully informed as these decisions are made.

RESPONSE #13: The department thanks the commenter for their support and agrees that timely decisions are expected if efficient movement of livestock is to be fostered. The department also agrees that records need to be kept of waivers that have been considered. Animal Health compiles a monthly report which will include any exemptions considered and provides this report to the board.

COMMENT #14: Another veterinarian feels it essential that the Montana State Veterinarian has some discretion over the allowed identification and importation of animals. He states: "Sometimes extenuating circumstances exist, and this flexibility may go to great lengths in procuring better business for Montana. As a professional veterinarian and business owner, it is sometimes necessary allow those with expertise to make judgment calls in regard to case-by-case situations. These amendments seem reasonable."

RESPONSE #14: The department thanks the commenter for their support and agrees. Please see Responses #5, #7, and #9.

COMMENT #15: One commenter shared that the veterinarian should have the ability to grant exemptions if and when unforeseen circumstances occur when shipping animals. These issues could only be addressed and handled with the state veterinarian's ability to understand and modify current dogmas concerning these disease issues. The state veterinarian is most qualified to evaluate disease risks of exemptions. Prompt decisions for animal health or humane considerations are needed when a request is made.

RESPONSE #15: The department thanks the commenter and is in full agreement with the commenter's position. As stated in Responses #3 and #5, case-by-case exemptions recognize the need to promptly respond to industry needs, and the overwhelming majority of states places this responsibility on the state veterinarian, a person who is educated and trained to conduct such an assessment.

COMMENT #16: We are in support of the rule change specifically to ARM 32.3.206. This makes good sense to waive the import rule on a case-by-case basis. We have had experience where cattle were delayed for testing or vaccination and these animals in question did not present a disease risk to the state of Montana. These rules have slowed the export process, exposing the animals to further stress prior to being allowed to be shipped to Montana. We feel that this rule change can help to streamline the import process and also smooth out some of the inconsistencies we have seen between states.

RESPONSE #16: The department thanks the commenter and agrees with this commenter's position.

COMMENT #17: One commenter cited the following example: A producer wants to ship his bulls to Montana and Wyoming. Test results are delayed due to circumstances beyond producer's control. This matter is of a time-sensitive nature. Wyoming waives the rules; Montana has no authority to even consider the exemption.

RESPONSE #17: The department thanks the comment for their input. Please see Responses #3 and #5.

COMMENT #18: One commenter is concerned that prior to this hearing they requested a report of the waivers that had been granted by the State Veterinarian/Animal Health Division in the past 3-5 years. The idea was that by looking at the past need and the outcomes of the waivers, they could determine what authority was truly needed by the state veterinarian in the way of waivers. If the need was mainly health certificates one or two days expired and the occasional request for show cattle to be waived having the CAN brand, then that authority seemed reasonable, but why give authority to waive calfhood brucellosis vaccination or disease testing if it has not been needed in the past. Decisions such as those should have the board's oversight.

The Animal Health Division had not recorded or tracked the waivers in the past. The state veterinarian did bring requests that he thought the board expressed interest in. Animal Health recently started tracking requests. Continuing, the commenter asks: "As we watched last year with Porcine Epidemic Diarrheal virus raged across North American and now we watch as Avian Influenza torments the poultry industry, what risks are we truly willing to take with waivers to the import regulations? What tracking and reporting system is in place to ensure that there hasn't been or will not be effects on the industry?"

RESPONSE #18: The department thanks the commenter for their participation. The need for timely decisions to allow the efficient movement of livestock is a high priority. However, waivers to existing authority should only be granted if the movement does not present a disease risk to the state of Montana. The qualifications of the state veterinarian and the Board of Livestock oversight over the decisions of the state veterinarian provide necessary checks and balances for these decisions.

Board notification is regularly carried out either at meetings, our monthly report, or other means necessary upon board request. Please see Response #13 regarding tracking exemption requests and providing this information to the Board of Livestock.

Department of Livestock, Animal Health Division uses an electronic permit system to track imports of livestock/poultry.

ARM 32.3.207 Permits

COMMENT #19: One commenter stated that the removal of the requirement for information of where the livestock had been in the last six months may weaken the ability to ensure parts of ARM 32.3.224(5). "How can we be sure they have not been exposed to cattle from Mexico if we are not required to know where they have been? The rule as amended does not seem to collect the information needed to ensure compliance with ARM 32.3.224. We would also be interested in what is the industry standard."

RESPONSE #19: An extended six-month travel history on every health certificate would help mitigate disease risk; however, to create travel histories for every animal, at every market, for every producer is excessively burdensome for the industry and far exceeds national standards for interstate movement. The state of Montana has import requirements, which include a health certificate, required testing, brand requirements, declarations of origin and a permitting system which satisfy statutory intent.

ARM 32.3.206 states the criteria for official health certificates issued by accredited veterinarians. If cattle or bison are imports of Mexico or have the M, or Mx brand, the testing requirements are listed in ARM 32.3.212B. You may visit our web site at http://liv.mt.gov/default.mcpx. In keeping with statutory intent, this web site provides detailed information and instruction for the safe movement of livestock into our state.

ARM 32.3.2001 Brands and Earmarks

COMMENT #20: One commenter expresses frustration regarding an exemption request for the CAN brand. I have two registered purebred Black Angus cows with heifer calves at foot. They will be moved to Montana for only 24 hours for breeding. I don't want to CAN brand the cows since they will only be in Montana for 24 hours. Moving these cattle in a timely manner and having to wait for BOL approval is quite frustrating.

RESPONSE #20: The department appreciates the comment. The proposed rule, ARM 32.3.2001, creates an exemption for the CAN brand for exhibition, transport to a bull collection facility, or on a case-by-case basis with Board of Livestock approval. The Board of Livestock has significant concerns over Bovine Spongiform Encephalopathy (BSE) and would like to maintain discretion over exemptions to this requirement. The Department of Livestock will make every effort that CAN brand exemptions are considered in the timeliest manner possible.

COMMENT #21: A commenter would like to see the language in ARM 32.3.2001(1)(c), "on a case-by-case basis with Board of Livestock approval, if the waiver does not create a threat of disease to livestock or to the public, or compromise animal disease traceability" similarly in ARM 32.3.206.

RESPONSE #21: The department appreciates the comment. This suggested duplicate language is not needed in ARM 32.3.206. Please see 81-1-302, MCA.

/s/ Cinda Young-Eichenfels
Cinda Young-Eichenfels
Rule Reviewer

/s/ Christian Mackay
Christian Mackay
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