CR 90-74

CERTIFICATE

STATE OF WISCONSIN))SS DEPARTMENT OF HEALTH AND SOCIAL SERVICES)

I, Patricia A. Goodrich, Secretary of the Department of Health and Social Services and custodian of the official records of the Department, do hereby certify that the annexed rules relating to long-term care facility bed additions and capital expenditures review were duly approved and adopted by this Department on November 27, 1990.

I further certify that this copy has been compared by me with the original on file in the Department and that this copy is a true copy of the original, and of the whole of the original.

> IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Department at the State Office Building, 1 W. Wilson Street, in the city of Madison, this 27th day of November 1990.

Patricia A. Goodrich, Secretary Department of Health and Social Services



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ORDER OF

THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES

REPEALING, RENUMBERING, AMENDING,

REPEALING AND RECREATING AND CREATING RULES

To repeal HSS 122.03(16) and (23) and 122.04(1)(a)2, 122.05(1)(b)3, 122.06(6)(a) and (c) and 122.09(3)(b)2; to renumber HSS 122.03(17), (17m) (24) and (25), 122.04(1)(a)3 and 122.09(3)(b)1(intro) a to c; to renumber and amend HSS 122.04(1)(a)4, 122.05(1)(b)4, 122.06(5) and 122.06(6)(b); to amend HSS 122.03(1)(d), (11) and (15), 122.04(3), 122.05(1)(a)(intro), 3 and 7 and (b)2 (intro.) and (2)(a), 122.06(1)(a)1a to d, (3), (4) title, (a), (b) and Note, (c) (intro.) and (d)1(intro), 2 and 5 and Note, and (7)(a), (8), (9)(a), and (10)(a) (intro.), (b), (d) 1 (intro.) and (g), 122.07(1) (d)3 Note and (f), (2)(a)4 (intro.) and (c), 122.08(1), (2), (3)(f)1, 2c, and 9 and (5), and 122.09(3)(c)1 and (5)(a) 1 and (c); to repeal and recreate HSS 122.06(2) and (10)(e) and HSS 122 Appendix A; and to create HSS 122.03(25), 122.04(2)(f), 122.06(1)(c)3 to 6, (4m), and (5)(b) and (c) and 122.07(1)(1), relating to prior review of long term care facility bed additions and capital expenditures.

Analysis Prepared by the Department of Health and Social Services

The Department's rules for long-term care facility bed additions and capital expenditures review, ch. HSS 122, are revised by this order to make technical corrections in the rules, clarify certain requirements, make procedural changes based on experience with the rules since the last time they were revised, and implement changes to ch. 150, Stats., made by 1987 Wisconsin Acts 27 and 399.

Specifically, the order modifies ch. HSS 122 to delete references to Health Systems Agency (HSA) and the Department's Bureau of Planning and Development, which no longer exist, and ch. HSS 123, which is not operative and will soon be repealed; to add a definition for "statewide bed limit" and procedures for temporary conversion of a distinct part of a nursing home to be an FDD; and to clarify the application process for state centers for the developmentally disabled and other applicants.

The Department's authority to repeal, renumber, amend and create these rules is found in s. 150.03, Stats. The rules interpret ch. 150, Stats.

SECTION 1. HSS 122.03(1)(d), (11) and (15) are amended to read:

HSS 122.03(1)(d) The-HSA in the area in which the nursing home project under review is or will be located, and other <u>Local</u> planning agencies, including area agencies on aging and zoning authorities;

(11) "Date of notification" means the date on which the department publishes in a newspaper of general circulation and in the department's bureau of planning and development <u>office of management and policy ch. 150</u> newsletter notice of receipt of and the proposed period for review of all applications being reviewed.

(15) "Health service planning area" or "planning area" means one of the areas of the state designated pursuant to 42 USC 300L for health planning purposes, with the boundaries indicated in Appendix A<u>, except that in</u> reference to centers for the developmentally disabled "health planning area" or "planning area" means the entire state.

SECTION 2. HSS 122.03(16) is repealed.

SECTION 3. HSS 122.03(17) and (17m) are renumbered HSS 122.03(16) and (17).

SECTION 4. HSS 122.03(23) is repealed.

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SECTION 5. HSS 122.03(24) and (25) are renumbered HSS 122.03(23) and (24).

SECTION 6. HSS 122.03(25) is created to read:

HSS 122.03(25) "Statewide bed limit" means the maximum number of nursing home beds or FDD beds allowed to be licensed under ch. 50, Stats., as set out in s. 150.31(1), Stats., with any adjustments made by the department under s. 150.31(2) to (6), Stats.

SECTION 7. HSS 122.04(1)(a)2 is repealed.

SECTION 8. HSS 122.04(1)(a)3 is renumbered HSS 122.04(1)(a)2.

SECTION 9. HSS 122.04(1)(a)4 is renumbered HSS 122.04(1)(a)3 and HSS 122.04(1)(a)3 as renumbered is amended to read:

HSS 122.04(1)(a)4. An allotment for new beds which shall be derived by dividing medical assistance reimbursement funds available for new beds as proposed in the following biennial budget by an estimated medical assistance allowable skilled care per diem rate. The resulting patient days shall be divided by the most recent available 3-year average percentage ratio of medical assistance residents to total residents. The patient days shall then be divided by the number of days in the year. This figure is the new allotment. Separate allotments shall be developed for nursing homes exclusive of FDDs. The new bed allotment in shall be the maximum number of new nursing

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home beds exclusive of FDDs which may be approved during the biennium for which the new bed limit is approved by the legislature.

SECTION 10. HSS 122.04(2)(f) is created to read:

HSS 122.04(2)f) <u>Conversion of nursing homes and FDDs</u>. The department shall adjust the statewide bed limits to account for the partial or total conversion of nursing homes to facilities primarily serving the developmentally disabled or of facilities primarily serving the developmentally disabled to nursing homes that have received approval under this chapter.

SECTION 11. HSS 122.04(3) is amended to read:

HSS 122.04(3) PUBLICATION OF ADJUSTMENTS. The department shall publish any adjustments to the statewide bed limit in the <u>ch. 150</u> newsletter of the department's bureau of planning and development <u>office of management and</u> <u>policy</u> and in a newspaper of general circulation. This publication shall occur by the 20th day of the month following the adjustment date.

SECTION 12. HSS 122.05(1)(a)(intro.), 3 and 7 and (b)2 (intro.) are amended to read:

HSS 122.05(1)(a)(intro.) <u>Distribution of the statewide allotment of new</u> <u>beds</u>. In distributing among planning areas new nursing home beds exclusive of FDD beds from the allotment under s. HSS 122.04(1)(b)4(a)3, the department

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shall proceed as follows:

3. Ascertain the statewide nursing home utilization percentage for each of the age cohorts in subd. 1 and multiply these by the new bed allotment for nursing homes exclusive of FDDs calculated pursuant to s. HSS 122.04(1)(a)43 to get the statewide allotment for each age cohort;

7. Increase the unadjusted allotment for the remaining planning areas proportionately so that the total new bed allotments for all planning areas equal the total statewide new bed allotment calculated pursuant to s. HSS $122.04(1)\frac{b}{4}(a)3$. The result shall be the maximum new bed allotments for these planning areas.

(b) 2. (intro.) Except as provided in subd. 3, only Only applicants whose projects would be located in counties which meet both of the following conditions are eligible to compete for new beds:

SECTION 13. HSS 122.05(1)(b)3 is repealed.

SECTION 14. HSS 122.05(1)(b)4 is renumbered HSS 122.05(1)(b)3 and HSS 122.05(1)(b)3a, as renumbered, is amended to read:

HSS 122.05(1)(b)3a. The department shall review the methodology under subds. 1 and 2 every 3 years in consultation with the HSAs, the area agencies on aging, the county social service or human service departments and representatives of the nursing home industry.

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SECTION 15. HSS 122.05(2)(a) is amended to read:

HSS 122.05(2) FDD BEDS. (a) The department shall not approve the addition of new beds to a state center for the developmentally disabled or other FDD licensed under subch. I of ch. 50, Stats., unless the beds are needed to serve persons who cannot adequately be served in an existing FDD, another nursing home or in a less costly or less restrictive setting. Need for the beds shall be determined by the department through an objective analysis of the developmentally disabled population in the planning area after consultation with the appropriate HSA.

SECTION 16. HSS 122.06(1)(a)1a to d are amended to read:

HSS 122.06(1)(a)1a. In January for all counties located in health service planning area #2;

b. In April for all counties located in health service planning area #1;
c. In July for all counties located in health service planning areas #3,
4, and 7; and

d. In October for all counties located in health service planning areas
 #5 and 6.

SECTION 17. HSS 122.06(1)(c)3 to 6 are created to read:

HSS 122.06(1)(c)3. Upon application to the department, the department may approve the operation of a distinct part of a nursing home as an FDD for a period of time not to exceed 4 years. Renewal of an approval initially granted under this subsection may be granted for a period of time not to exceed 4 years and only if all of the following conditions are met by the applicant:

a. Continued operation of the FDD meets the review criteria and standards under s. HSS 122.07(1) and (1m);

b. There is continued need, as determined by the department, for the FDD in the health planning area in which the facility is located; and

c. Community-based services, including services developed under s. 46.278, Stats., are inappropriate for the individuals served in the FDD.

4. The department may require that a nursing home seeking approval or an FDD seeking renewal under subd. 3 agree to reduce the size of the FDD under a plan submitted by the facility and approved by the department, during the approval or renewal period, in order to reflect reduced service need or increased availability of community-based long-term care services.

5. Notwithstanding s. HSS 122.07(1m)(e), the department may waive the minimum size limits established under s. HSS 122.07(1m)(e) for a facility with

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an approved plan under subd. 4.

6. Notwithstanding s. 150.29, Stats., if initial approval of an FDD is not renewed under subd. 3 or if approval or renewal is conditioned upon the requirement of subd. 4, reconversion of these beds to nursing home beds does not require approval under s. HSS 122.04.

SECTION 18. HSS 122.06(2) is repealed and recreated to read:

HSS 122.06(2) OTHER APPLICATIONS. Any person intending to engage in activities subject to this subchapter that are not specified under sub. (1) or (3) shall notify the department in writing of this intent at least 30 days prior to submitting an application for review. An application expires unless the department declares the application complete within 365 days after the date the department receives notice of the applicant's intent to engage in the activity.

SECTION 19. HSS 122.06(3) and (4)(title), (a), (b) and Note, (c) (intro.) and (d)1(intro.) 2 and 5 and Note are amended to read:

HSS 122.06(3) CENTERS. The After a change in the statewide bed limit. the department shall annually solicit applications from the state centers for the developmentally disabled to relocate beds, renovate or replace beds or a facility, increase bed capacity or construct a new facility, or undertake a capital expenditure exceeding \$600,000. The schedule for submitting applications shall be determined cach year by the department.

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(4) (title) PROCESS FOR APPLICATIONS FOR BEDS AND APPLICATIONS FROM CENTERS.

(a) <u>Notice requesting applications</u>. The request for applications <u>for</u> <u>beds under sub. (1) and from centers under sub. (3)</u> shall be published in a major daily newspaper in each affected planning area on the first and second working days of the month during which requests are to be made. The notice shall state the deadline by which all applications are to be received.

(b) <u>Application forms</u>. All applications shall be submitted on forms prescribed by the department. A prospective applicant may obtain the forms from the <u>HSA serving the project's planning area or, if the project will be</u> <u>located outside the service area of any HSA, from the</u> department.

<u>Note:</u> For copies of the application forms, contact: Office of Management and Policy, Division of Health, P.O. Box 1808, Madison, Wisconsin 53701-1808.

(c) <u>Period for accepting applications</u>. (intro.) The department shall accept applications submitted within 60 days following publication of the request for applications, <u>except-as-provided in sub. (10)</u>. <u>All-applications</u> shall be submitted concurrently to the department and the appropriate HSA. The department shall return any application which:

(d) <u>Review for completeness</u>. 1.(intro.) Each application submitted under subs. <u>sub.</u> (1), (2) or (3) shall be reviewed by the department for completeness. An application shall be deemed incomplete if the applicant:

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2. The department, in consultation with the HSA, shall notify the applicant of the may request additional information requirements from the applicant within 10 working days following receipt of the application by the department or by the applicable HSA, whichever date of receipt is later.

5. Except as provided in subd. 4, the department shall declare all applications for beds under subs. (1) and (3) complete 60 days after the date of publication of the request for applications, or 90 days from that date if an application under sub. (1), (2) or (3), including any application under sub. (1) undergoing concurrent review, was originally declared incomplete and the additional information requested by the department was received within 30 days following the closing date for accepting applications.

Note: Upon written request, the department will provide technical assistance to any small business, as defined in s. 227.114(1)(a), Stats., or other small organization with fewer than 25 full-time employees or annual revenues of less than \$2,500,000 regarding application materials and procedures. Requests should be sent to the Office of Management and Policy, Division of Health, P.O. Box 1808, Madison, Wisconsin 53701-1808.

SECTION 20. HSS 122.06(4m) is created to read:

HSS 122.06(4m) PROCESS FOR OTHER APPLICATIONS. (a) <u>Application forms</u>. All applications under sub. (2) shall be submitted on forms prescribed by the department. A prospective applicant may obtain the forms from the department.

<u>Note</u>: For copies of the application forms, contact the Office of Management and Policy, Division of Health, P.O. Box 1808, Madison, Wisconsin 53701-1808.

(b) <u>Review for completeness</u>. 1. Each application submitted under sub.
(2) shall be reviewed by the department for completeness. An application

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shall be deemed incomplete if the applicant:

a. Fails to provide all of the requested information;

b. Provides the information in a manner which is illegible or otherwise unusable by the department; or

c. Provides information which contradicts or is not justified by other materials in the application.

2. The department may request additional information from the applicant within 10 working days following receipt of the application by the department.

3. The department shall declare the application complete on the date on which the department receives all the required information.

Note: Upon written request, the department will provide technical assistance to any small business, as defined in s. 227.114(1)(a), Stats., or other small organization with fewer than 25 full-time employees or annual revenues of less than \$2,500,000 regarding application materials and procedures. Requests should be sent to the Office of Management and Policy, Division of Health, P.O. Box 1808, Madison, Wisconsin 53701-1808.

SECTION 21. HSS 122.06(5) is renumbered HSS 122.06(5)(a) and HSS 122.06(5)(a), as renumbered, is amended to read:

HSS 122.06(5) BEGINNING OF REVIEW PERIOD. (a) <u>Beds and centers</u>. The department shall publish in the <u>ch. 150</u> newsletter of the bureau of planning and <u>development</u> <u>office of management and policy</u> and in a major daily newspaper

in each affected planning area a list of all complete applications received under sub. (1), (2) or (3), listing all applicants and describing their applications, within 20 days after the applications are declared complete. The review period for all of these applications shall begin on the publication date of the list. No person submitting an application for new beds may revise the cost or scope of the proposal after a notification of completeness has been made without the written consent of the department.

SECTION 22. HSS 122.06(5)(b) and (c) are created to read:

HSS 122.06(5)(b) Other applications. The department shall publish in the ch. 150 newsletter of the office of management and policy and in a major daily newspaper in each affected planning area a list of all complete applications received under sub. (2) on or before the 20th day of the month following the month in which it declares the applications complete.

(c) <u>Beginning of review period</u>. The review period for applications shall begin on the publication date of the list under either par. (a) or (b).

SECTION 23. HSS 122.06(6)(a) is repealed.

SECTION 24. HSS 122.06(6)(b) is renumbered HSS 122.06(6) and HSS 122.06(6), as renumbered, is amended to read:

HSS 122.06 (6) PUBLIC MEETING. Upon the request of any affected party, the applicable HSA department shall hold a public meeting within 60 days

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following publication of the list of complete projects submitted under sub. (1), (2) or (3). This meeting shall be used to elicit testimony from affected parties about projects applications under review. The applicable HSA department shall maintain minutes or another record of the testimony and shall forward a copy to the department when it submits to the department its formal recommendations under par. (c). In areas not served by an HSA, the department shall conduct the public meeting upon the request of an affected party. All requests for a public meeting shall be received by the HSA, or by the department if there is no HSA within 10 days after publication of the list of complete applications. The public meeting shall be held prior to any formal recommendation by the HSA or an the initial finding by the department.

SECTION 25. HSS 122.06(6)(c) is repealed.

SECTION 26. HSS 122.06(7)(a), (8), (9)(a) and (10)(a)(intro.), (b) and (d)1 (intro.) are amended to read:

HSS 122.06(7) DEPARTMENT REVIEW AND INITIAL FINDING. (a) <u>Review</u>. The department shall review applications for their consistency with the criteria in s. HSS 122.07 and shall issue an initial finding to approve or reject an application within 75 days following publication of the complete applications list, unless <u>an applicant asks for an extension or, in the case of competing applications</u>, all applicants undergoing concurrent review agree to an extension or the review cycle is extended under sub. (8). In no case may the initial finding be made prior to receipt by the department of the appropriate HSA's recommendation.

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(8) EXTENSION. The department may extend by 60 days the review cycle of all projects applications undergoing concurrent review under sub. (1), if it finds that completing reviews within the cycle specified in sub. (7) is not feasible due to the volume of applications received from any planning area.

(9) REQUEST FOR HEARING. (a) An adversely affected applicant or HSA may file a written request for a public hearing under s. HSS 122.08 within 10 days after the date of the department's initial findings under sub. (7). <u>A hearing request is filed when it is received by the department.</u> If no request for a hearing is made, or if a request is received after the 10-day limit, the departments's initial finding shall be the department's final decision. Except as provided in par. (b), a timely request for hearing from an applicant undergoing concurrent review shall preclude issuance of an approval for a competing concurrent application until a final decision is issued by the secretary or a designee. Hearings shall be held in the manner prescribed in s. HSS 122.08.

(10) EXPEDITED REVIEW. (a) <u>Conditions for expedited review</u>. (intro.) An application involving a capital expenditure of over 600,000 submitted <u>under sub. (2)</u> is subject to the requirements of this subsection rather than subs. (2) (4m)(b), (5)(b) and (c) and (6) to (9) if:

(b) <u>Timing of application</u>. An application under par. (a) may be submitted at any time on forms prescribed by the department provided that at least 30 days notice has been given to the department and the HSA of a person's intent to submit the application and the applicant has received

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written authorization from the department to submit the application.

(d) <u>Completeness</u>. 1. (intro.) The department, in consultation with the HSAs, shall have 5 working days to determine if the application is complete and, if incomplete, to forward <u>issue</u> a request for additional information to the applicant. An incomplete application is one in which:

SECTION 27. HSS 122.06(10)(e) is repealed and recreated to read:

HSS 122.06(10)(e) No public meeting is required on any project submitted under this subsection.

SECTION 28. HSS 122.06(10)(g) is amended to read:

HSS 122.06(10)(g) <u>Hearing</u>. Any <u>An</u> adversely affected applicant or HSA shall have 10 days after the date of the initial finding to <u>file a written</u> request <u>for</u> a public hearing to challenge the initial finding on an application. Public hearings shall be held in the manner specified in s. HSS 122.08. If no requests for a hearing are made or if they are received after the 10-day limit, the initial finding becomes the department's final action.

SECTION 29. HSS 122.07(1)(d)3 Note and (f) are amended to read:

HSS 122.07(1)(d)3 <u>Note:</u> Copies of the life cycle cost analysis form are included in the application materials. They may be obtained from the Office of Management and Policy, Division of Health, P.O. Box 1808, Madison, Wisconsin 53701-1808.

(f) The project is consistent with local plans for developing communitybased long-term care services. These plans shall include those developed by <u>HSAs and</u> local units of government.

SECTION 30. HSS 122.07(1)(1) is created to read:

HSS 122.07(1)(1) Applications for renovation proposals, replacement facilities and capital expenditures over \$600,000 which do not affect bed capacity and which meet all criteria in sub. (1) shall be approved unless the per diem rates proposed as a result of the project are inconsistent with those of similar FDD or other nursing home projects recently approved by the department.

SECTION 31. HSS 122.07(2)(a)4 (intro) and (c) are amended to read:

HSS 122.07(2)(a)4 (intro.) The department may approve an application proposing a higher per diem rate than others undergoing concurrent review if the applicant can demonstrate that the application would substantially resolve a significant problem identified in the state health plan and the HSA plan with respect to:

(c) In applying pars. (a) and (b), the department shall consider the recommendations of HSAs and the comments of affected parties.

SECTION 32. HSS 122.08(1), (2), (3)(f)1, 2c and 9 and (5) are amended to read:

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HSS 122.08 HEARING PROCESS. (1) RIGHT TO A HEARING. An applicant whose project application is rejected or any adversely affected HSA may request a public hearing to review the department's initial finding.

(2) REQUEST FOR A HEARING. (a) An applicant or HSA desiring a public hearing shall submit <u>file</u> a written request <u>for a public hearing</u> no later than 10 days after the issuance of the initial finding, to both the department's division of health and the department's office of administrative hearings. The request shall identify the writer as an applicant or an adversely affected HSA.

<u>Note:</u> The mailing address of the Department's Division of Health is P.O. Box 1808, Madison, Wisconsin 53701-1808 and the mailing address of the Office of Administrative Hearings is P.O. Box 7875, Madison, Wisconsin 53707.

(b) The applicant or HSA requesting the hearing shall identify the criteria at issue no later than 20 days after the issuance of the finding.

(3)(f) <u>Procedures for conducting the hearing</u>. 1. Issues raised at the hearing shall be limited to the review criteria cited as grounds for disapproval in the initial finding. Criteria not identified in the initial finding are deemed met or not applicable. Evidence may be received which relates to noncontested criteria only to the extent the evidence is relevant to contested criteria. In appeals by the HSA, the issues shall be limited to the those eriteria upon which the HSA's recommendation and the initial finding differ and to the reasons for differences as eited in the initial finding.

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2.c. The record of the public meeting under s. 150.35(2) Stats., and s. HSS 122.06(6), if any, the HSA's recommendations and supporting documents relied upon in making the recommendations; and

9. An applicant whose project is rejected or any adversely affected HSA has the burden of going forward.

(5) BURDEN OF PROOF. Each applicant or adversely affected HSA at any hearing under this section has the burden of proving, by clear and convincing evidence, that the department's initial finding was contrary to the weight of evidence on the record when considered as a whole, arbitrary and capricious, or contrary to law.

SECTION 33. HSS 122.09(3)(b)1 (intro.), a, b and c are renumbered HSS 122.09(3)(b)(intro.) 1, 2 and 3.

SECTION 34. HSS 122.09(3)(b)2 is repealed.

SECTION 35. HSS 122.09(3)(c)1 and (5)(a)1 are amended to read:

HSS 122.09(3)(c)1. The department may not approve a cost overrun-for-a project subject to a forfeiture under pars. <u>par.</u> (a) or (b) until the forfeiture has been paid.

(5) (a) 1. Any person submitting an application under this chapter shall state in the applicating application the medical assistance rates

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anticipated for the first full year of operation following completion of the project or licensure of new beds. These rates shall be the maximum allowable reimbursement granted by the department for the first full year of operation. If the medical assistance <u>facility</u> reimbursement formula generates per diem rates which are less than those stated in the application, the lower rates shall prevail.

SECTION 36. HSS 122 Appendix A is repealed and recreated to read:

APPENDIX A

Designated Health Planning Areas in Wisconsin [HSS 122.03(15)]

Health Planning Area #1

Columbia, Dane, Dodge, Grant, Green, Iowa, Jefferson, Lafayette, Richland, Rock, Sauk counties

Health Planning Area #2

. ...

Kenosha, Milwaukee, Ozaukee, Racine, Walworth, Washington, Waukesha counties

Health Planning Area #3

Calumet, Fond du Lac, Green lake, Marquette, Outagamie, Waupaca, Waushara, Winnebago counties

<u>Health Planning Area #4</u>

Brown, Door, Kewaunee, Manitowoc, Marinette, Menominee, Oconto, Shawano, Sheboygan counties

<u>Health Planning Area #5</u>

Barron, Buffalo, Chippewa, Clark, Crawford, Dunn, Eau Claire, Jackson, La Crosse, Monroe, Pepin, Pierce, Polk, Rusk, St. Croix, Trempealeau, Vernon counties

Health Planning Area #6

Adams, Florence, Forest, Juneau, Langlade, Lincoln, Marathon, Oneida, Portage, Taylor, Vilas, Wood counties

Health Planning Area #7

Ashland, Bayfield, Burnett, Douglas, Iron, Price, Sawyer, Washburn counties

The repeals and rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22(2), Stats.

Wisconsin Department of Health and Social Services

Dated: November 27, 1990

By:

Patricia A. Goodrich Secretary

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