

BEFORE THE FISH AND WILDLIFE COMMISSION
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF AMENDMENT AND
ARM 12.11.501 and the adoption of) ADOPTION
NEW RULES I through XVI pertaining)
to recreational use on the Madison)
River)

TO: All Concerned Persons

1. On September 25, 2020, the Fish and Wildlife Commission (commission) published MAR Notice No. 12-531 pertaining to the public hearing on the proposed amendment and adoption of the above-stated rules at page 1722 of the 2020 Montana Administrative Register, Issue Number 18.

2. The commission has not adopted the following proposed rules:

NEW RULE V MADISON RIVER WALK/WADE SECTIONS

NEW RULE VI MANAGEMENT OF LIMITED COMMERCIAL USERS

NEW RULE VII TRANSFERRED PERMITS

NEW RULE VIII FLEX TRIPS

NEW RULE IX TRANSFER OF GUIDED TRIPS

NEW RULE X MANDATORY GUIDED TRIP REDUCTIONS

NEW RULE XI PERMIT APPLICATION AND FEES

NEW RULE XII REPORTING AND USE FEES

NEW RULE XV MADISON RIVER SPECIAL RECREATIONAL USE PERMIT
TRIP DISTRIBUTION POOL

NEW RULE XVI MADISON RIVER USE STAMP

REASON: The commission did not approve proposed NEW RULES V through XII and XV and XVI because they are too complex and raised questions of fairness. Instead, the commission opted to create a work group that would consider the complexities and fairness and suggest an allocation system for the commission to consider at a later time. These rules collectively make up the allocation system for guided trips as proposed in the rulemaking petition from the Fishing Outfitters Association of Montana (FOAM). Comments received on the allocation system stated that it was too complicated or that it favored large or existing outfitters at the

expense of small or aspiring outfitters. The commission understands the complexities involved with establishing an allocation system and appreciates concerns raised over fairness. The commission adopted NEW RULE XIV (12.11.6710) establishing the Madison River Work Group to develop an allocation system which would later be brought to the commission for consideration.

The commission did not adopt NEW RULE VII because the rule depended upon the allowance of an individual river use day to be transferred by an outfitter or guide that was allotted those river use days on a limited use river in exchange for money. The transfer of individual river use days by outfitters and guides for pay is currently not allowed by law unless a business is transferred in its entirety pursuant to 47-37-310(4), MCA. Additionally, the Bureau of Land Management, which co-administers the current special recreation permit system on the Madison River, stated that the transfer of river use days is prohibited by their policy.

The commission did not adopt NEW RULE XVI because it created more questions about how to administer it. Instead the commission opted for a better administrative way to address the same intent of the proposed stamp. The commission acknowledges that the stamp proposed in NEW RULE XVI has raised several concerns from the public. The Department of Fish, Wildlife and Parks (department) has also indicated concerns in relation to administration, licensing, and enforcement. The intent of the stamp proposal was to facilitate the collection of information related to use on the river by noncommercial users. This information could later be used to inform any rules related to allocation of noncommercial river use. The commission recognizes that uncontrolled growth of the noncommercial use of the Madison River will increase issues related to crowding, conflict, displacement of river users, and changes in use patterns. Currently, there is a lack of information on the noncommercial use of the river which is necessary to establish a well-informed noncommercial use cap and allocation system. In response to the concerns raised about the stamp the commission did not adopt the proposed rule for the stamp and to instead require mandatory reporting by noncommercial users in a manner prescribed by the department. The department is considering several options on how the intent of gathering the necessary information on noncommercial use can be gathered without the issuance of a stamp. The rule allows for mandatory reporting as prescribed by the department. The department is urged to develop an effective system that is also efficient and minimizes enforceability concerns.

3. The commission has amended ARM 12.11.501 as proposed.

4. The commission has adopted new rule language not proposed in the original proposal.

NEW RULE XVII (12.11.6701) MADISON RIVER REPORTING REQUIREMENTS (1) All persons recreating on the Madison River must provide the required information in the manner prescribed by the department. Each year, information gathered will be reported to the Madison River Work Group and commission.

AUTH: 87-1-303, MCA

IMP: 87-1-303, MCA

REASON: In response to the concerns raised about NEW RULE XVI but understanding the comments received that expressed the need to collect information regarding the use of noncommercial users, the commission adopted ARM 12.11.6701 requiring mandatory reporting by noncommercial users in a manner prescribed by the department. The department is considering several options on how the intent of gathering the necessary information on noncommercial use and will develop an effective system that is also efficient and minimizes enforceability concerns.

5. The commission has adopted the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

NEW RULE I (12.11.6705) MADISON RIVER COMMERCIAL USE CAP

~~(1) The number of commercial use trips are limited to 13,909 per year.~~

(1) Fishing outfitters and guides may only operate on the Madison River as long as they have a Madison River Special Recreation Permit and trips allotted them as provided by these rules.

(2) The total number of fishing outfitting and guided trips per individual outfitter and guide is capped at the number of trips reported in 2019 or 2020, whichever is higher.

(3) ARM 12.11.6705 will be implemented January 1, 2022.

(4) The commission will review ARM 12.11.6705 in 2023 as prescribed by ARM 12.11.6711.

AUTH: 87-1-303, MCA

IMP: 87-1-303, MCA

NEW RULE II (12.11.6706) REST/ROTATION OF MADISON RIVER COMMERCIAL USE

(1) Fishing outfitters and guides are prohibited from conducting business ~~Commercial use is prohibited~~ from June 15 to September 30 as follows:

(a) from Lyons Bridge Fishing Access Site to Palisades Day Use Area on Sundays; and

(b) from ~~Varney Bridge~~ Raynolds Pass Fishing Access Site to ~~Ennis Lyons Bridge~~ Fishing Access Site on Saturdays.

(2) ARM 12.11.6706 will be implemented as a trial program January 1, 2022, unless adjusted by the work group as prescribed in ARM 12.11.6710.

(3) The commission will review ARM 12.11.6706 in 2023 as prescribed by ARM 12.11.6711.

AUTH: 87-1-303, MCA

IMP: 87-1-303, MCA

NEW RULE III (12.11.6702) WALK/WADE SECTIONS OF MADISON RIVER

~~(1) On Fridays, Saturdays, and Sundays from June 15 to September 30 no watercraft or flotation device can be used to access fishing:~~

- ~~(a) from the outlet of Quake Lake to Lyons Bridge Fishing Access Site; and~~
- ~~(b) from Ennis Fishing Access Site to Ennis Reservoir.~~

~~(2) On Mondays, Tuesdays, Wednesdays, and Thursdays from June 15 to September 30 watercraft or flotation device may be used to access fishing but no fishing can occur from watercraft or flotation devices:~~

- ~~(a) from the outlet of Quake Lake to Lyons Bridge Fishing Access Site; and~~
- ~~(b) from Ennis Fishing Access Site to Ennis Reservoir.~~

(1) Fishing from a boat or vessel is prohibited from Ennis Fishing Access Site to Ennis Reservoir.

(2) Fishing from a boat or vessel is prohibited from the outlet of Quake Lake to Reynolds Pass Fishing Access Site.

(3) Fishing from a boat or vessel is prohibited from Reynolds Pass Fishing Access Site to Lyons Bridge Fishing Access Site except on Saturdays and Sunday from June 15 to September 30.

(4) ARM 12.11.6702 will be implemented as a trial program in January 1, 2022 unless adjusted by the work group as prescribed in ARM 12.11.6710.

(5) The commission will review ARM 12.11.6702 in 2023 as prescribed by ARM 12.11.6711.

AUTH: 87-1-303, MCA

IMP: 87-1-303, MCA

NEW RULE IV (12.11.6715) LIMIT DEVELOPMENT ON MADISON RIVER

~~(1) Any department acquisition for a fishing access site New access acquisitions below Greycliff Fishing Access Site made after January 2, 2021, will be designated as carry-in only without boat ramp development will have limited development to maintain the primitive nature by limiting vessel or float tube access to carry-in only.~~

AUTH: 87-1-303, MCA

IMP: 87-1-303, MCA

NEW RULE XIII (12.11.6711) PLAN EVALUATION REVIEW OF RECREATION RULES FOR MADISON RIVER ~~(1) The Madison River Recreation Management Plan will be quantitatively evaluated by section or reach and across time immediately following the first year of implementation.~~

~~(2) Following the first year evaluation, similar quantitative evaluations will be conducted every three years.~~

~~(3) Annual reports will be generated by the department that contain quantitative use data by river section and time as well as financial data.~~

~~(4) The annual reports will evaluate:~~

- ~~(a) river use from Madison River Special Recreational Use Permit holders;~~

~~(b) satisfaction of Madison River Special Recreational Use Permit holders and generate use data annually; and~~

~~(c) the effectiveness of allowing fishing from a boat or vessel for four days per week within this reach.~~

~~(5) The no-cost, no-limit stamp will be evaluated pursuant to [NEW RULE XVI].~~

~~(1) The commission shall review:~~

~~(a) ARM 12.11.6702, 12.11.6705, and 12.11.6706 in 2023; and~~

~~(b) the rules governing recreational use on the Madison River every five years beginning in 2024.~~

AUTH: 87-1-303, MCA

IMP: 87-1-303, MCA

NEW RULE XIV (12.11.6710) COMMERCIAL USE MADISON RIVER WORKING GROUP ~~(1) The Madison River Commercial Use Working Group is under the authority of the Region 3 River Recreation Manager.~~

~~(2) The Commercial Use Working Group will be comprised of the Region 3 Recreation Manager, a member of the Fish and Wildlife Commission, and at least three Madison River outfitters holding a current valid Madison River Special Recreational Use Permit.~~

~~(3) The Commercial Use Working Group will establish an appeal process for conflicts and complaints.~~

~~(4) The Commercial Use Working Group may award guided trips to eligible outfitters from the Madison River Special Recreational Use Permit trip distribution pool via lottery.~~

~~(5) The Commercial Use Working Group will review total use and:~~

~~(a) adjust guided trip allocations as needed if Madison River Special Recreational Use Permit holder use declines;~~

~~(b) review guided trip additions to the Madison River Special Recreational Use Permit trip distribution pool; and~~

~~(c) review the annual number of flex trips eligible for outfitter use. If the total use of guided trips and flex trips exceeds the combined use levels of 2019 and 2020, the annual number of flex trips available to Madison River Special Recreational Use Permit holders may be reduced.~~

~~(6) The Commercial Use Working Group may assign a fixed number of new permits to be issued. New permits will be awarded to qualified licensed Montana outfitters that have applied for a new permit via a lottery.~~

(1) The commission shall develop the membership of and appoint a Madison River Work Group. The work group will consist of:

(a) three commercial outfitters with a current Madison River Special Recreational Use Permit;

(b) three non-commercial Madison River users;

(c) two individuals with a Madison Valley business interest not connected to commercial outfitting;

(d) one member trained in natural resources management and not currently working for the Department of Fish, Wildlife and Parks;

- (e) one representative from the Fish and Wildlife Commission;
- (f) one representative from the Bureau of Land Management; and
- (g) one at-large member whose selected qualities are largely outside the above descriptions for other work group members.
- (2) The members of the working group shall be appointed for three years.
- (3) The work group will be staffed by department employees.
- (4) The work group may develop recommendations to the commission for approval regarding:
 - (a) the allocation of commercial use trips to outfitters;
 - (b) a process to permit new outfitters on the Madison River;
 - (c) rule language to address all recreational use on the Madison River, including walk/wade sections and rest rotation proposals to replace those in ARM 12.11.6702 and 12.11.6706; and
 - (d) consequences of permit violations.

AUTH: 87-1-303, MCA

IMP: 87-1-303, MCA

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

COMMENT 1: The commission received comments stating that use of the Madison River needed to be managed and supported the development and adoption of rules.

RESPONSE 1: The commission appreciates the public's involvement in the development and adoption of the rules regarding recreational use of the Madison River.

COMMENT 2: The commission received multiple comments regarding NEW RULES I (12.11.6705) and VI which addressed capping the number of trips. Comments received in support generally stated that commercial growth needed to be controlled because the river was too crowded. Comments received in opposition of the proposal stated concerns that the 2019 and 2020 levels were too high, and others in opposition stated that the cap discriminates against currently operating outfitters whose volume of business was greater in years prior to 2019.

RESPONSE 2: The highest year of commercial activity on the Madison River is 2019. Reducing commercial trip levels to some number below what it was in 2019 would be arbitrary, because there is no consensus on how to equate such reductions to a "carrying capacity" or acceptable limit for the river. The commission chose to adopt the levels specified in NEW RULE VI(1), which allow for either 2019 or 2020 numbers, whichever is higher, after gaining some understanding from department staff that this would amount to no more than 14,500 trips once the 2020 reports are received. Outfitters who have not guided on the Madison River in 2019 or 2020 would have an opportunity for future allocation because one of the issues the Madison River Work Group, established by NEW RULE XIV (12.11.6710), will

address is developing a process to permit new outfitters on the Madison River. This should provide a mechanism for outfitters who have not operated on the Madison River in the past two years to gain entry in the future.

COMMENT 3: The commission received comments both in support and opposition to NEW RULE II (12.11.6706). Comments in opposition stated the rule would lead to more crowding by congregating use in certain stretches of river on certain days and the Madison River will not allow for enough float sections for guided trips because it is not long enough.

RESPONSE 3: The commission adopted NEW RULE II (12.11.6706) with changes to address the comments received. With regard to the concern that this rule will increase crowding in the rested sections, it is important to consider that creel survey data collected in the popular float reach of the Madison River from Lyons Bridge Fishing Access Site to Ennis Bridge Fishing Access Site show that year-round commercial use is on average 50 percent of total use throughout the reach. Approximately 70 percent of total use between Lyons Bridge Fishing Access Site and Windy Point Boat Launch from May through October is commercial and, on some days, it is close to 100 percent of the use. Given these statistics the proposed rest/rotation days would reduce crowding in the reaches on those days. However, if more non-commercial anglers start using the two rest/rotation sections, there may not be a noticeable change in the number of anglers and boats. There is also a chance that population growth in Bozeman and surrounding areas could result in high numbers of noncommercial anglers using these sections in future years.

Those who have concern that this rule will make the river too short for commercial outfitting should consider that the proposed rules were to be limited to only two days per week (Saturday and Sunday) from June 15th through September 30th, with Sundays historically having the lowest commercial traffic. The float reach of the Madison River, which starts at Lyons Bridge Fishing Access Site and ends at the Ennis Fishing Access Site, consists of 37.25 miles of floatable water. The upper rest/rotation section, Lyons Bridge Fishing Access Site to Palisades Day Use Site, represents approximately 8.5 miles of river or 27% of the floatable area on Sunday for the seasonal period. The proposed lower rest rotation section, Varney Bridge Fishing Access Site to Ennis Fishing Access Site, represents approximately 8.7 miles or 23% of the floatable area for Saturdays for the seasonal period. While the proposed rule was not clear with regard to the legality of commercial launches at the lower site for each section, it is the department's assumption that commercial users would be able to launch from Palisades Day Use Area on Sundays and Ennis Fishing Access Site on Saturdays through the seasonal period. Evaluating these restrictions on a weekly basis there are 260.75 miles of floatable river available per week during the seasonal restriction period. The proposed rest rotation sections would account for 3.8% and 3.3% of the weekly available floating opportunities for the upper and lower proposed rest/rotation sections, respectively for the rest/rotation season.

The rest/rotation system adopted by the commission rested the Raynolds Pass Fishing Access Site to Lyons Bridge Fishing Access Site on Saturday and Lyons Bridge Fishing Access Site to Palisades Day Use Area on Sunday. Overall this is similar in length to the miles in the proposed rule; however, the impact of this on commercial outfitters was lessened by NEW RULE III (12.11.6702) by opening up of the Raynolds Pass Fishing Access Site to Lyons Bridge Fishing Access Site to boats on Sundays, essentially giving the outfitters a new, alternative section to float that was previously unavailable. This new section is also of similar mileage to the Lyons Bridge to Palisades section, thereby maintaining the float opportunities.

COMMENT 4: The commission received comments in support and in opposition to the walk/wade sections proposed in NEW RULE III (12.11.6702) and NEW RULE V. Comments in opposition stated the impacts of boats on wade anglers are exaggerated or they are insignificant, restricting boats will favor rich landowners, "privatizes" stretches of the river, the proposed rule language will concentrate boat use on certain sections of the river, and the proposed rule language is inconsistent with the Stream Access Law.

RESPONSE 4: The commission adopted NEW RULE III (12.11.6702) to address the comments received. Regarding the impacts of boats on wade anglers, the department has not cataloged individual complaints, although many have been logged through the various public feedback processes. Scoping results from an online survey conducted in November 2019 showed that there was a high acceptability score among non-commercial users for development of more walk/wade opportunities. The extent to which these impacts may or may not occur can only be known for sure by direct observations of users of the river as reported pursuant to ARM 12.11.6701. Both of the walk/wade sections present obstacles to wade anglers in terms of staying inside of the high-water mark or simply the long distances from access points which limits use of some remote areas. Landowners in these areas may deem this as preferable if they view the anglers in a negative way and would rather anglers stay away from their properties. To some commenters, this situation is unacceptable and can only be remedied by allowing more boat use so that these areas are more fully accessible. What is missing from this perspective is that of wade anglers who enjoy the opportunity to fish without interference from boats or feel it is an acceptable tradeoff. This sentiment was reflected in the 2016 mail survey and 2019 scoping survey. Maintaining a walk/wade section is consistent with the goal to diversify the angling experience. The commission recognizes the limited access, and although some anglers may prefer the remoteness, that is not a sentiment expressed by most wade anglers. For this reason, the department will pursue additional walk-in access in these reaches. The argument that maintaining these stretches prevents boats from spreading out is true, but there are other ways to reduce boat traffic, such as rest/rotation sections or restrictions on overall use. The claim that the rule language is a violation of or inconsistent with the spirit of the Stream Access Law is not true. The law says nothing about the regulation of types of use, which is what occurs in the walk/wade sections. In addition, the commission has specific statutory authority to propose rules such as this. Access is not being prevented but limited and restricted in some areas.

The new rule language reduces the current restrictions on boats in the current upper walk/wade section by allowing fishing from a boat between Raynolds Pass Fishing Access Site and Lyons Bridge Fishing Access Site on weekends from June 15 to September 30. Also significant was the retention of the ban on fishing from a boat for the vast majority of the walk/wade sections. The restriction remained the same year-round from the outlet of Quake Lake to Raynolds Pass Fishing Access Site and in the lower walk/wade section from Ennis Bridge Fishing Access Site to Ennis Reservoir.

COMMENT 5: The commission received comments both in support and in opposition to NEW RULE IV (12.11.6715) which would restrict the development of new access sites downstream of Greycliff Fishing Access Site to carry-in only for boats and vessels. The commission received more comments in support to keep this section of the river as "primitive" in nature, while those in opposition felt this section of river is not used as much and a rule was unnecessary.

RESPONSE 5: Due to the high level of support and concern over future projected recreational increased use of the Madison River, the commission adopted NEW RULE IV (12.11.6715) with changes for clarification.

COMMENT 6: The commission received comments in support of NEW RULE XIII (12.11.6711) with several comments expressing a need for thorough evaluation of any rules that get implemented. The proposed rule was for evaluation after the first year of implementation and then every three years. Some comments indicated a preference for the first evaluation to be after three years of implementation instead of one year.

RESPONSE 6: The commission adopted language to evaluate the rules after one year of implementation and then every five years.

COMMENT 7: The commission received many comments stating NEW RULE XIV (12.11.6710) provided the work group with too much authority or that the commission's authority would be inappropriately delegated to the working group. The Bureau of Land Management (BLM) requested that a representative be added as a member to the working group because they are a partner agency in the management of recreation on the Madison River.

RESPONSE 7: In response to the comments the commission chose to create a work group but did not adopt the work group format as proposed. The commission limited the work group's authority and required any recommendations be presented to the commission for approval with no overall authority being retained by the work group. The commission expanded the membership of the work group by adding a commissioner, a BLM representative, three noncommercial river users, a natural resource professional, and two local business owners.

COMMENT 8: The commission received comments that more needs to be done to protect the fishery of the Madison River against hooking mortality by enacting restrictive fishing regulations and against effects of climate change.

RESPONSE 8: This is outside the scope of this rulemaking authority. Regarding the concerns about hooking mortality, harvest on the Madison River has been shown to be minimal in the most recent creel survey completed by the department. There is no scientific evidence that restricting fishing to barbless hooks or dry flies have any effect on hooking mortality. Also, there is no evidence that year-round fishing causes population level impacts. With respect to concerns regarding climate change, warming water temperatures do have the potential to drastically impact trout population in the Madison River and the recreation it supports. At first, warming temperatures may affect growth and decrease tolerance to stressors such as disease and angling. Continued warming could even ultimately lead to fish kills and changes in fish species assemblages. Any of these changes will impact recreational angling. "Hoot-owl" restrictions, 2:00 pm-midnight closure on fishing, during the hottest weeks of the summer may at first be sufficient to reduce stress on the fishery, but as temperature-induced impacts continue or worsen with increasing temperatures, it may become necessary to move to 24-hour restrictions or find ways to reduce river angling usage. The commission appreciates the comments but at this time is not taking any action. The commission will take action if warranted in the future. For example, if hooking mortality or warming water temperatures are determined to be having substantial impacts on the fishery of the Madison River, the commission can adjust fishing regulations or the administrative rules as appropriate and necessary.

COMMENT 9: The commission received several comments stating that indirect impacts of changing regulations on businesses were not properly evaluated in the environmental assessment.

RESPONSE 9: The commission heard from and accepted that the department would conduct an economic small business analysis in the future when it has more concrete information about how the allocation system would be implemented on the river pursuant to the work group recommendations to the commission as prescribed by NEW RULE XIV (12.11.6710). Until then, the economic impacts are hard to assess because there is no way to analyze the impacts of a system that has yet to be developed without speculation. In addition, the secondary or ripple effect of the management approaches (walk/wade, rest/rotation, commercial allocation and cap) on the entire economic activity of the Madison Valley were not evaluated because no study is available that describes the economic relationships between guides and clients and how their money is spent in the community, nor is it required the commission conduct its own independent study. In addition, the commission cannot predict the long-term behavioral change of anglers in response to these management actions. The department has predicted that some anglers may either quit fishing or be drawn to the Madison River due to various alternative actions in the walk/wade sections or those proposed for rest/rotation. These assumptions may be wrong, and anglers may not quit fishing the Madison River or may not find the new

regulations to be an attraction. The economic consequences of both of those scenarios are very different but truly unknown until the responses occur. Therefore, because there is speculation involved with predicting the immediate impacts of the management actions, the magnitude of uncertainty would increase considerably when trying to predict the secondary impacts to the point that results would be unreliable and misleading. The commission is sensitive to issues raised in relation to economic impacts and added two local business owners to the work group. The commission adopted ARM 12.11.6701 related to reporting requirements which means that persons recreating on the river must provide user information as prescribed by the department. Although not specified in the rule language, this will likely include asking users of access sites to fill out questionnaires or participate in on-site interviews, which will include asking them how they plan to respond to the restrictions and how that might affect their spending in the Madison Valley. Such information will help guide future management restrictions and better understand associated economic activity and impacts.

/s/ Rebecca Docker
Rebecca Dockter
Rule Reviewer

/s/ Shane Colton
Shane Colton
Chair
Fish and Wildlife Commission

Certified to the Secretary of State December 15, 2020.