



The FOAMLINE

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FISHING OUTFITTERS ASSOCIATION OF MONTANA

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FOAM's LEGAL CHALLENGE OF BEAVERHEAD, BIG HOLE BIENNIAL RULE IN EQC's HANDS

EQC Asks FWP to Review Rulemaking Process for Flaws; FOAM Questions Department's Authority to Make River Rules

The Environmental Quality Council, an interim committee responsible for review of FWP rulemaking, voted in May to ask for a formal review of FWP's Beaverhead and Big Hole Biennial Rule. FOAM had asked for this review, challenging the Department's authority to make any such rule and questioning why they choose to use a rulemaking process that didn't require justification for each restriction. Rep. Christopher Harris (D, Bozeman), chairman of the EQC's Oversight Committee, requested that FWP review their rule and show why they didn't have to follow the requirements of the Montana Administrative Procedures Act (MAPA) when adopting the current rule. FWP had until July 17 to respond, but the Department asked EQC Chair Rep. Bea McCarthy, (R, Anaconda) for additional time, extending their response deadline until Aug. 17.

Their response was a rehash of their original argument, noting that most of the restrictions were seasonal or related only to fishing, and properly fit the exception to MAPA's stringent requirements. FOAM questions several aspects of the rule, including justification for the continued moratorium, surely not a seasonal restriction since it's been in place since June of 1999, and seeks an explanation of how fishing regulations could affect commercial guiding, since guides or outfitters don't fish while providing services. Several other questions remain, and Rep. Harris will make some recommendations from the Oversight Committee's point of view, then see what the balance of the EQC members think about the situation. A formal review of FWP's legislative authority to make the rule is still possible.

FOAM's argument is simple: If FWP wants to make these rules, they should be required to show cause for each regulation or restriction. During the 18-month process of building recommendations for the Beaverhead and Big Hole rivers based on statistics hastily gathered for selected periods of 1999 and 2000, FOAM recognized the need for outfitter and nonresident use controls on the Beaverhead, but saw insufficient evidence to warrant controls on the Big Hole. Indeed, outfitted use dropped in 2000 and this summer's low flows and high water temperatures will surely take their toll on client days. Nonresident use of the Big Hole has consistently been less than resident use, except for one year when use was split 50-50. Nonetheless, the local

public, including some outfitters, sought controls to "distribute" use via a weekly rotating schedule of river stretches that couldn't be used by outfitters or nonresidents fishing from boats.

Local outfitters and guides, including members of the Beaverhead, Big Hole Outfitters and Guides Association (BBHOGA), prefer a moratorium for a variety of reasons and argued for it when dealing with the proposed rule. However, without justifying statistics, a moratorium on use or a redistribution of use sets a poor precedent for the next rivers that may face local opposition to outfitters and our clients. Similarly, FWP's use of a "streamlined" rulemaking process that allows public opinion or the preferences of commissioners to fill in for hard facts is the wrong way to regulate river recreation. Hence, our challenge.

If the EQC decides that FWP must "redo" this rule, FOAM is prepared to help get the facts straight and consider a model set of regulations that fit the needs of the Big Hole river. Meanwhile, the larger question of FWP's authority to make the rule in the first place looms in the background. Stemming from 1999's House Bill 626 sponsored by now retired Rep. Hal Harper (D, Helena), FWP claims they gained the ability, based on "public welfare," to regulate recreational use on the state's rivers, ignoring the fact that the bill was aimed squarely at jetskis and other personal watercraft. Rep. Harper, when a guest at FOAM's annual meeting in the fall of '99, was asked by FOAM member Todd Wester if he intended HB626 to authorize FWP to regulate river use other

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than PWC's, and responded with a clear "No." However, during testimony at the May EQC meeting, Harper was asked by EQC member Sen. Jon Tester (D, Big Sandy) if he intended the bill to give FWP this authority, and Harper replied, "Yes," then, after explaining why he thought this authority was necessary, qualified his answer by stating he never meant for FWP to regulate as they did on the Beaverhead and Big Hole by restricting whole classes of users, including outfitters and nonresidents. Unfortunately, the EQC members may only remember his "Yes," not his qualifying statements. To his credit, in previous newspaper statements, Harper made it clear he favored additional legislation to control and direct this authority.

You may remember that the Governor's office

backed FOAM's request for a review, and, while dealing with many other more pressing issues, is still concerned about getting this river management process correct.

The entire legal challenge will take quite a while to reach decision points, both in the EQC and, if necessary, in court. In the meantime, FOAM is working to replace the original FWP Commission policy regarding river recreation management plans with a more suitable, step-by-step process that applies use-survey data to help create a balance between what people want, what a given river can reasonably carry in number and types of use, and how this carrying capacity is distributed. While FOAM has advocated for free-market solutions involving recreationist distribution by way of rationing, any solution employing service provider allocation must address such commercial questions as how to distribute outfitters and whether their opportunity to operate will be transferable to persons other than immediate family members. FOAM will also have to take a final stand on the moratorium issue, both locally and statewide, before any other rivers are selected for scrutiny and regulation. The Blackfoot is being considered already, and many local, non-commercial river recreationists from around the state are calling on FWP to regulate traffic on their rivers, too. The precedent set by the Beaverhead and Big Hole Biennial Rule will have repercussions throughout Montana, and FOAM will continue to challenge the authority and framework for rulemaking to make sure that the process of building and implementing recreation management plans is fact-driven, equitable, and unbiased.

FWP SEEKS NEW RIVER RECREATION GROUP

Governor's Office Reviewing Aims of Proposed Committee

The FWP Commission, at the urging of the Department, sent a letter in May to Gov. Martz asking her to create, by Executive Order, a 15-member, two-year Governor's River Recreation Mgt. Advisory Council "to address statewide issues," including carrying capacity, displacement of resident anglers, transferability of commercial businesses, and the rate of increase of resident and nonresident use. Members would include private citizens, sportspeople, outfitters, conservation interests and affected gov't. agencies. FWP would pay the costs for staff and operating funds.

FOAM suggested to the Gov's Office that our legal challenge should run its course before any such group meets. We also noted that, to our knowledge, FWP is not spending any time or effort gathering river use statistics to show the "effectiveness" of the current biennial rule. The Department shouldn't rush on to other, possibly statewide decisions until the authority for and effects and defects of the current local rule are evaluated and corrected.

We agree that many issues remain unresolved and this would be an excellent chance for FOAM to present its ideas and suggestions for a more appropriate process for dealing with river recreation management. FOAM is ready to help, once this "trial" process is adjusted and, as suggested by Rep. Harper, FWP is granted correct, limited legal authority by the legislature to proceed with rules for any Montana rivers.

BOARD OF OUTFITTERS CHANGES AGENCIES; REVIEWS ADMINISTRATIVE RULES; SETS GOALS

Legislation Moves MBO from Dept. of Commerce to Dept. of Labor & Industry; Change Needs Monitoring

Another Senate Bill 445 has affected outfitters. This one moves the MBO from the Dept. of Commerce (DoC) over to the Dept. of Labor and Industry (DL&I), part of a general revision of state government dealing with the economic future of Montana. Gov. Martz suggested this rearrangement as part of her attempt to stimulate the state's lagging economy.

The MBO has expected this move since the middle of the legislative session, but is unsure what effects the move will have on administration, costs, and authority. While the board's offices will remain in the Federal Building at the top of Last Chance Gulch, DL&I internal policies may have an unsettling effect on day-to-day business. FOAM has monitored this change and requested that the MBO Budget Committee talk with DL&I administrators to make sure they understand that board costs are borne by licensees through

fees, rather than having the state's general fund pay for everything. The MBO must keep DL&I from raising fees to cover agency expenses unrelated to board activities.

The MBO is taking advantage of this change to review and revise their rules. When administration moves from one agency to another, old repealed rules can be dumped, poor language altered for clarity, and the entire body of rules generally overhauled for simplicity and effectiveness.

FOAM members may be groaning "WHAT, not again," after adjusting to seemingly incessant tinkering with rules affecting our businesses. To make this transition and new rulemaking more understandable, here's a review of the proposed changes MBO subcommittee members, including a FOAM representative, suggested:

1. Replace DoC with DL&I throughout the rules.
2. Ditch the

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repealed rules. 3. Change “inspections” to “compliance checks.” 4. Replace “license tag” with “watercraft ID.” 5. Rearrange the categories of outfitter licenses to include “boat or other floating craft or motorized watercraft.” 6. Drop experience acquired as an outfitter or guide in another state and replace it with “verified experience as a licensed outfitter in another state guiding clients in pursuing the types of game and using methods for which licensure is sought, subject to approval by the Board.” 7. Consider a reciprocity agreement with neighboring states for experience qualifications. 8. Note that applicants must make a 75% grade in the general test and all other categories (hunting, fishing, birding, etc.) applied for to pass the Outfitter exam and allow licensure in those categories passed and retesting in those failed. 9. Once again require a COPY of your first aid card (NOT C.P.R.!) along with your reapplication for a license instead of the affidavit required now. Apparently, too many people were signing the affidavit, but spacing out or just plain not renewing their cards. This will also mean you won’t have to carry your card with you in the field, and the Board is considering noting on your license itself the expiration date of your card. 10. Require listing the name and license number of the guide serving clients on the log form. 11. Use two different log forms for hunting and fishing (more about this later). 12. Require only 30 days instead of 90 days for first-time guides to get a first aid card. 13. Consider removing the 50-day experience waiver for persons buying an outfitter’s business. 14. Add exceeding Net Client Hunting Use (NCHU) to the misconduct list. 15. Require a form designating an agent to collect and/or distribute fees for outfitters (more about this later, too). 16. Insert a new rule stating that “guides are subject to a penalty for practicing as a guide without a first aid card if a card is not acquired within 30 days.” 17. Consider misconduct status if a licensee fails to respond to a Board notice or request. 18. Consider rules outlining just what is transferable in NCHU.

There may be other suggestions made at the upcoming MBO meeting on Aug. 28, and FOAM will be there to comment on these changes.

Along with revised rules, the Board is taking a look at their long-term goals. In May, board members listed the following as areas of concern:

- 1) Unrenewed first aid cards.
2. Independent Contractors working as unlicensed outfitters.
3. Forms to designate agents for outfitters.
4. Better control over FWP wardens issuing citations for MBO violations and setting a standardized penalty schedule for them to follow instead of FWP’s own, in some cases more expensive schedule of fines for violations.
5. Improved tally sheets and specialized tally sheets for fishing outfitters on regulated streams.
6. Seeking legislation to drop the conservation license requirement for outfitter and guide licensure.
7. Controlling review of historical use data available to the public and determine the MBO’s stand on transferability of use on rivers.
8. Try to stop unnecessary escalation of fines when dealing with licensees and federal agency violations. Often, an outfitter or guide will be cited for violating a federal agency guideline, then face a stiff penalty or probation from the MBO as an admin-

istrative or misconduct violation which, in turn, brings a higher penalty from the feds, etc. Board member Mel Montgomery wants to get some inter-agency agreement in place to stop this seesaw escalation of charges and fines. 9. Concentrate on unlicensed outfitters. The Board has the ability to lodge an injunction, a type of “cease and desist” order, against unlicensed practitioners on very simple evidentiary grounds, but needs to work with the agency legal people to get this in place, including having MBO investigators sworn to write citations in the field and earmarking fine monies to come back to the Board for further investigation resources. 10. Defining annual goals for the MBO. 11. Consider expanding the activities requiring a license, such as whitewater rafting, possibly following the Idaho model. 12. Standardize the MBO outfitter test and coordinate the test to fit other state’s standards, though there are few other states with tests. 13. Send a Board representative to monitor the Private Lands, Public Wildlife Advisory Council. FOAM would expect the same MBO representation if the River Mgt. Advisory Council were formed.

NEW FOAM FISHING OUTFITTER LOG USED

More Accurately Reflects Fishing Outfitter Use Patterns

FOAM has persuaded the MBO to use an entirely new, more spacious, and relevant log form for fishing outfitters. Outfitters will find a sample form enclosed in this FOAMLINE. The space for client name, address, and ZIP are larger; guide’s name and number are placed right along with the client’s name; the space for designating the river and portion of river used is larger, too.

This river and section-used info will be vital as FOAM compares outfitter use with angler statistics for consideration of distribution on other rivers that may come under FWP regulatory schemes. As mentioned earlier, special tally sheets will be developed to help chronicle how, where, and how much outfitters used the regulated rivers, including number of boats per stretch, boats per day, etc. Since we’re keeping records anyway, FOAM thought it wise to get useful data that can reflect our use patterns accurately. If future river management plans involve some balance of public controls and commercial activity, their success can only benefit from accurate statistics.

FOAM CREATES AGENT AGREEMENT FORM

Outfitter Protection and Simplicity Key to Successful Use

Because many outfitters are using agents to handle their business, FOAM has created a generic “Agent Agreement” form. A copy for outfitter review is enclosed in this issue, too. It spells out in plain language the terms, conditions, fees, and other points of agreement between an outfitter and a prospective agent. Because agents may misrepresent an outfitter’s capabilities and specialties and the MBO holds the outfitter responsible, the form allows outfitters to make absolutely clear what they will and won’t tolerate from agents and provides language that holds the agent responsible for misrepresentation. MBO counsel is reviewing the document, and the FOAM board will review any suggestions he, or you, as FOAM outfitters, may have.

FOAM AND FUND WEBSITES IN THE WORKS

Sites Emphasize Member Referrals, Fund Accomplishments

Catching up to the digital world, FOAM is working on websites for both the business association and the Outfitters Conservation Fund. Each division of FOAM will have a different face and purpose in their respective site.

The FOAM site will build on three basic areas: 1) Member services like application for membership, insurance information, and MBO laws and regulations; 2) An outfitter referral service using a dynamic database tied to major areas and/or rivers throughout Montana and keyed to six or so specific services a member may offer, including, but not requiring, their website address, and 3) a forum service, with the FOAMLINE online, archived past issues in PDF format, and a listing of legislative or legal developments of interest to members. The site will include a homepage with our origin and mission and links to other pages of the site, a Board page with BoD members pictures and biographies, a membership page where you can sign up and get MBO info, the outfitter referral service page(s), and the forum and newsletter page. Please note: the outfitter referral page will deliver names of outfitters based on their listed services, whether or not they have a website. FOAM wants all members to know that this service will be unbiased and as democratic as possible within a database format. All FOAM members will have an equal chance to attract clientele.

During September, outfitters will receive a form they can use to list their services, website address, and other pertinent information to help refer clientele to them. Please fill out the form carefully and LEGIBLY! FOAM can't be responsible for typos or misspellings.

The Conservation Fund site will be less active, but will show, again, the Fund's origin and mission statement, a BoD page with bio's and pictures, a "current projects" page with photos reviewing our latest efforts, a newsletter page, and, in the future, a membership solicitation page including a sign-up form and online credit card services.

Thanks to all those members who responded to FOAM's email request for website host and builder recommendations. As you know, this takes time and will cost some money, but FOAM wants both sites to be simple, attractive, and functional - that is, fast loading with quick database results and useful information for both members and curious future or past clientele.

ANNUAL MEETING SLATED FOR NOVEMBER

Membership Meeting Will Focus on River Regulations

Bozeman will be the site for FOAM's annual membership meeting on Saturday, November 3rd. River recreation regulation will be featured covering current and anticipated regulations, statistical surveys and advisory processes, and techniques for social management. The Board of Directors will be looking for opinions on each aspect, and your suggestions will help develop formal resolutions we can use to guide the eventual process when and where it is needed.

Speakers invited include Gov. Martz's Natural Resource Advisor, Todd O'Hair, FWP Commissioners Rich Lane (Missoula) and Tim Mulligan (Whitehall), several U. of

Montana research and recreational use advisors, and others. We'll try to tackle a series of questions to help FOAM build a solid understanding of the policies and procedures available, then develop ways to get the job done right.

Of course, there will be the usual raffle and lunch, then we'll wind up with post-meeting snacks and drinks courtesy of Fred Wardinsky, our Montana International Insurance agent. Nominations will be taken for five board members whose terms expire in December: Tim Linehan (Region 1), Matt Greemore (Region 4), Matson Rogers (Region 6), Todd Wester (Region 7), and Guide-at-Large, Jerry Wilkerson.

CONSERVATION FUND PROGRESS, NEWS

Wolfe Creek Project a Success; Y'stone Bank Rehab Done

The new Wolfe Creek fish ladder constructed with Fund donations was completed this spring and helped Rainbows get upstream to their spawning areas. A lengthy stretch of the Yellowstone near Emigrant was planted with some 2,400 willow, rosebush and dogwood seedlings to help complete rehab after a local canal company removed dredged materials they left when deepening the channel for their canal headgate. Thanks to John Greene for his help planting.

The Fund board will be considering new projects, including aiding in the purchase of land on the upper Madison to keep access open to that water. Led by River Network, the project needs backing now, and we're willing to help.

FOAM

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In This Issue

- FOAM Legal Challenge Before EQC for Decision
- FWP Seeks New River Recreation Advisory Group
- MBO Changes Agencies, Reviews Rules, Sets Goals
- FOAM Rebuilds Log Forms, Presents Agent Agreement
- FOAM, Fund Websites in the works
- Annual Meeting Set for November in Bozeman
- Conservation Fund Progress, News