

BEFORE THE DEPARTMENT OF FISH, WILDLIFE AND PARKS  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF AMENDMENT AND  
ARM 12.9.602, 12.9.604, 12.9.606, ) ADOPTION  
12.9.615, 12.9.701, 12.9.702, 12.9.703, )  
12.9.704, 12.9.705 and 12.9.706, and )  
adoption of NEW RULE I (ARM )  
12.9.707) regarding upland game bird )  
release and habitat enhancement )  
programs )

TO: All Concerned Persons

1. On March 8, 2012, the Department of Fish, Wildlife and Parks (department) published MAR Notice No. 12-375 regarding a notice of public hearing on the proposed amendment and adoption of the above-stated rules at page 463, 2012 Montana Administrative Register, issue number 5.

2. The department has amended ARM 12.9.602, 12.9.604, 12.9.606, 12.9.615, 12.9.701, 12.9.702, 12.9.703, 12.9.704, and 12.9.706, and adopted NEW RULE I (ARM 12.9.707) as proposed. The department has amended ARM 12.9.705 as proposed, but with the following changes, stricken matter interlined, new matter underlined:

12.9.705 PAYMENT BY DEPARTMENT (1) through (3) remain as proposed.  
~~(4) For qualified upland game bird habitat enhancement projects sponsored by volunteer organizations, the department may reimburse for up to 110% of additional project material costs to encourage program participation.~~  
(5) and (6) remain as proposed but are renumbered (4) and (5).

AUTH: 87-1-249, MCA  
IMP: 87-1-248, MCA

3. The department has thoroughly considered the comments and testimony received. Seventeen people submitted comments during the comment period. A summary of the comments received and the department's responses are as follows:

Comment 1: The department received 13 comments in support of the rule proposal.

Response 1: The department appreciates the interest and participation in the rulemaking process.

Comment 2: Six people did not support funding the pheasant release program.

Response 2: The department is required by statute to fund pheasant releases.

Comment 3: One person supported the proposal if up to 33% of the land used for the Upland Game Bird Enhancement Program (UGBEP) project is set aside for public hunting.

Response 3: All lands actively enrolled in the UGBEP require a reasonable amount of free public upland game bird hunting. Each UGBEP contract defines the areas open to public hunting. Generally the amount of land open to public hunting is much greater than just the project area where the enhancement occurs.

Comment 4: One person expressed disappointment that the UGBEP is not implemented on small acreages.

Response 4: ARM 12.9.702(b) states that lands smaller than 100 acres may be considered if land with guaranteed public access is within the project area of influence.

Comment 5: One person provided clarification that the Natural Resources Conservation Service's cost list contains the actual average cost for practices and components.

Response 5: This clarification is acknowledged by the department and will be considered when developing cost share agreements.

Comment 6: One person stated that the rule addressing percentage of birds to be released should be deleted because studies conducted by USDA and MSU show the ideal ratio of hens and cocks is ten to one.

Response 6: The ratio stated in this comment may be ideal in pen-reared conditions or game farms. Spring sex ratios for wild pheasant populations generally average 2.5 hens per rooster, which is similar to current release ratio defined in current rule.

Comment 7: One person recommended that pheasant release dates be eliminated or modified.

Response 7: The purpose of pheasant releases is to establish pheasant populations. The department maintains that pheasant releases occurring between August 1 and September 15 have the greatest potential to help establish or augment populations.

Comment 8: One person commented that the department should determine the number of pheasants to be purchased at an earlier date.

Response 8: The change to ARM 12.9.602(d), changing the application deadline from May 15 to January 15, will allow the department to make the determination at an earlier date.

Comment 9: One person recommended that pheasant releases be allowed in Fergus, Richland, or Roosevelt counties.

Response 9: The department has not proposed to add Fergus, Richland, or Roosevelt counties into the pheasant release program in order to compare harvest statistics between counties that are stocked vs. not stocked, and to maintain control sites for possible future studies.

Comment 10: One person stated that the department should modify or establish study criteria to evaluate the success of the pheasant release program.

Response 10: The department has established study criteria; however, the department does not feel that it is necessary to conduct a study at this time.

Comment 11: One person commented ARM 12.9.602(p) pertaining to pen-reared pheasant health assessments, that the department should change "may be assessed" to "will be assessed." The same person commented that department staff should assess health at the production facility.

Response 11: Department staff always performs an ocular assessment of overall pheasant health and condition at the time of releases. If warranted, protocols identified by the Department of Agriculture-APHIS or similar regulating agency may be used by the department's wildlife veterinarian to determine pheasant health and condition.

Comment 12: One person was not comfortable with wording that eliminates department employee and allows a department representative to verify pheasant releases unless there is a requirement that the department representative be trained.

Response 12: A department representative may be an employee or contractor hired by the department. Contracted assistance for pheasant releases does include training to assure accurate counting and effective bird health assessments.

Comment 13: One person recommended that the department establish a priority system for funding pheasant releases based on habitat quality and prior release data.

Response 13: The department authorizes pheasant releases based on meeting minimal habitat requirements, as identified in the rule. Habitats that lack or only have limited characteristics of quality will not qualify for releases or will be assigned a reduced bird release allocation as fitting with those habitat characteristics. Funding options for pheasant releases are met with the three options identified in 12.9.602(3)(a) through (c).

Comment 14: One person did not support the rule to establish costs per ten-week-old pheasants and recommends contacting the commercial pheasant producers to

determine the cost to raise and deliver pheasants in comparison to the reimbursement amount.

Response 14: The department does contact commercial pheasant producers to determine the cost to raise pheasants. The determination for delivery costs are based on the current fiscal year federal mileage reimbursement rate established by the IRS. Polling the small number of pheasant raisers utilized in the pheasant release program to determine average cost has been criticized by some members of the public as a biased approach to obtain pheasant costs.

Comment 15: One person commented that 87-1-248, MCA refers to upland game birds yet proposed changes to ARM 12.9.606 violates this statute because the proposed rule only addresses release of pheasants.

Response 15: Section 87-1-249, MCA states the department shall adopt rules for the administration of the upland game bird enhancement program created in 87-1-246 through 87-1-249, MCA including the number of upland game birds to be released. At this time the department has chosen to only release pheasants but does have an active wild turkey trap and transplant program.

Comment 16: One person recommended no amendment or repealing all of ARM 12.9.606 because the programs are defined in statute.

Response 16: The purpose of the rule is to provide clarification and guidance on implementation of these administrative rules.

Comment 17: One person supported the proposed rule on supplemental feeding. One person did not support changes to the proposed supplemental feeding rule because Region 4 was removed from the eligibility area.

Response 17: The three counties eligible for supplemental feeding were selected due to frequency of extreme winter weather events.

Comment 18: One person did not support changes to the supplemental feeding rule because a portion of the bird release dollars funds the supplemental feeding program.

Response 18: Statute states that at least 15% of the funds collected under 87-1-246, MCA must be set aside each fiscal year for expenditures related to upland game bird releases. Supplemental feeding is considered an activity related to upland game bird releases.

Comment 19: One person did not support changes to the supplemental feeding rule because Roosevelt County is not eligible for pheasant releases yet may receive funding for supplemental feeding.

Response 19: The UGBEP Citizens' Advisory Council identified Sheridan, Daniels, and Roosevelt counties as eligible to receive funding for supplemental feeding after receiving a considerable amount of public review.

Comment 20: Two people stated the wording "will be disqualified" should remain in ARM 12.9.706 and not change to "may be disqualified," as it pertains to contract compliance.

Response 20: Revising the wording provides the department flexibility to maintain the initial terms of the UGBEP contract if unexpected events such as natural disasters, health issues, or other situations occur beyond the cooperator's control that under the current rule will render a contract noncompliant.

Comment 21: Two people support the inclusion of public lands as eligible criteria for the UGBEP funds. One person stated the department should not be entering into habitat contracts with other federal or state agencies.

Response 21: Partnerships with federal and state agencies promote habitat enhancement efforts on public lands that provide unlimited public access.

Comment 22: One person stated the process seemed very fast and the rule changes were not a quick read.

Response 22: Members of the public had 36 days to comment on the proposed adoption and amendments and opportunity to provide comment at eight hearings held across the state. This timeline exceeded the requirements of the Montana Administrative Procedure Act.

Comment 23: Two people stated effective winter cover needs further clarification through examples.

Response 23: Providing specific examples of effective winter cover in rule may constrict the biologists' abilities to conduct habitat assessments in the field. Examples and guidance will be defined in the UGBEP Policy Manual and through less formal means for landowners and department staff.

Comment 24: One person stated that supplemental feeding dates should end in May after winter weather ends.

Response 24: The intent of supplemental feeding is to provide pheasants food when it's inaccessible by deep snow, which is generally over by March. After March, snow cover is reduced and food is accessible.

Comment 25: One person opposed eliminating the language prohibiting the establishment of shelterbelts within 400 feet of an occupied building.

Response 25: The rule language removed is unnecessary because it repeated

statutory language that prohibits the establishment of shelterbelts within 400 feet of occupied buildings or outbuildings used by livestock.

Comment 26: One person commented that the 10% winter cover should be contained in the project area not within a mile of the release site.

Response 26: Winter cover within one mile of the release site may be beneficial to pheasant survival whether located on the project area or on adjoining lands.

Comment 27: One person stated that ARM 12.8.705(4) may violate state procurement laws because the department cannot pay an additional ten percent above actual costs.

Response 27: The department has eliminated the language referring to payment for up to 110% of costs and will only pay up to 100% of actual costs.

Comment 28: One person requested that the department stop ignoring the wolf problem.

Response 28: The comment is outside the scope of this rulemaking authority.

Comment 29: One person recommended that pheasants be released on Canyon Ferry Wildlife Management Area.

Response 29: The comment is outside the scope of this rulemaking authority.

/s/ Joe Maurier  
Joe Maurier, Director  
Department of Fish, Wildlife and Parks

/s/ Rebecca Jakes Dockter  
Rebecca Jakes Dockter  
Rule Reviewer

Certified to the Secretary of State August 27, 2012