

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption of New)	NOTICE OF ADOPTION,
Rules I through IX, the amendment of)	AMENDMENT, AND REPEAL
ARM 37.110.201, 37.110.238,)	
37.110.239, 37.110.243, and the)	
repeal of ARM 37.110.202,)	
37.110.203, 37.110.204, 37.110.206,)	
37.110.207, 37.110.208, 37.110.209,)	
37.110.210, 37.110.212, 37.110.213,)	
37.110.214, 37.110.215, 37.110.216,)	
37.110.217, 37.110.218, 37.110.219,)	
37.110.220, 37.110.221, 37.110.222,)	
37.110.223, 37.110.225, 37.110.226,)	
37.110.227, 37.110.228, 37.110.229,)	
37.110.230, 37.110.231, 37.110.232,)	
37.110.236, 37.110.240, 37.110.241,)	
37.110.242, 37.110.252, 37.110.253,)	
37.110.254, 37.110.255, 37.110.256,)	
37.110.257, 37.110.258, and)	
37.110.259 pertaining to updating the)	
Montana retail food establishment)	
rules)	

TO: All Concerned Persons

1. On June 26, 2014, the Department of Public Health and Human Services published MAR Notice No. 37-680 pertaining to the public hearing on the proposed adoption, amendment, and repeal of the above-stated rules at page 1364 of the 2014 Montana Administrative Register, Issue Number 12.

2. The department has adopted New Rule VIII (37.110.269) and New Rule IX (37.110.272) as proposed.

3. The department has amended ARM 37.110.201, 37.110.238, 37.110.239, and 37.110.243 and repealed ARM 37.110.202, 37.110.203, 37.110.204, 37.110.206, 37.110.207, 37.110.208, 37.110.209, 37.110.210, 37.110.212, 37.110.213, 37.110.214, 37.110.215, 37.110.216, 37.110.217, 37.110.218, 37.110.219, 37.110.220, 37.110.221, 37.110.222, 37.110.223, 37.110.225, 37.110.226, 37.110.227, 37.110.228, 37.110.229, 37.110.230, 37.110.231, 37.110.232, 37.110.236, 37.110.240, 37.110.241, 37.110.242, 37.110.252, 37.110.253, 37.110.254, 37.110.255, 37.110.256, 37.110.257, 37.110.258, and 37.110.259 as proposed.

4. The department has adopted the following rules as proposed with the following changes from the original proposal. Matter to be added is underlined. Matter to be deleted is interlined.

NEW RULE I (37.110.260) INCORPORATION BY REFERENCE (1) The Department of Public Health and Human Services (department), except as otherwise provided in this chapter, adopts and incorporates by reference the following publication: "Food Code, 2013, Recommendations of the United States Public Health Service, Food and Drug Administration" published by National Technical Information Service, Publication PB2013-110462, ISBN 978-1-935239-02-4, November 3, 2013. This publication may be reviewed online at: <http://www.fda.gov/Food/GuidanceRegulation/RetailFoodProtection/FoodCode/ucm374275.htm>; or by contacting DPHHS-FCSS, 1400 Broadway Street, Helena, MT 59620. This publication is being adopted with modifications and additions as described in [New Rule I through IX].

(a) and (b) remain as proposed.

(c) Chapter 3: Food. ~~This chapter has been adopted with no modifications.~~ Modifications have been made to this chapter as described in [New Rule IV].

(d) Chapter 4: Equipment, Utensils, and Linens. ~~This chapter has been adopted with no modifications.~~ An addition has been made to this chapter as described in [New Rule V].

(e) through (2) remain as proposed.

AUTH: 50-50-103, MCA

IMP: 50-50-102, 50-50-103, 50-50-105, 50-50-107, 50-50-201, 50-50-301, 50-50-302, 50-50-304, MCA

NEW RULE II (37.110.261) CHAPTER 1: PURPOSE AND DEFINITIONS

The terms defined in this section are modifications or additions to the definitions described in this chapter of the 2013 Food Code:

(1) and (2) remain as proposed.

(3) "Catering kitchen" means the activity of providing food wholly or in part owned by the caterer for a specific event at a location other than the ~~licensed food establishment or food service establishment~~, as defined in 50-50-102~~(7)~~(4)(a) and ~~(b)~~, MCA, on a contractual, prearranged basis to a specific subset of the public, such as invited guests to a wedding or similar celebration, or to participants in an organized group or activity. A catering kitchen is not the same activity as a contract cook.

(4) through (6) remain as proposed.

(7) "Food establishment" means the following:

(a) includes in section 1-201.10~~(4)~~(B) of the Food Code, any and all licensable establishments stated in Title 50, chapter 50, MCA;

(b) does not include in section 1-201.10~~(3)~~(B) of the Food Code, any and all food provider exclusions stated in Title 50, chapter 50, MCA;

(c) in section 1-201.10~~(3)~~(f)(B) of the Food Code, the term "small family day-care provider" actually means a day-care provider not required to be licensed by the department as a day-care center, under 52-2-721(1)(a), MCA; and

(d) in section 1-201.10~~(3)(f)(B)~~ of the Food Code; a bed-and-breakfast operation actually means a bed-and-breakfast establishment that meets the definition in 50-51-102(1), MCA. Bed-and-breakfast establishments must meet food safety rules required in ARM 37.111.312 through 37.111.334.

(8) through (13) remain as proposed.

(14) "Meat ~~shop~~ market" means the same as 50-50-102(10), MCA, but is the processing or packaging of meat or poultry for sales or service to the public.

(15) "Mobile food establishment" means:

(a) A food establishment where food is served or sold from a motor vehicle, ~~portable structure~~, nonmotorized cart, movable vehicle such as a push cart, trailer, or boat that periodically or continuously changes location and requires a servicing area to accommodate the unit for cleaning, inspection, and maintenance, as specified in ~~paragraphs~~ sections 5-402.14, 6-101.11, and 6-202.18.

(b) remains as proposed.

(16) "Perishable food" means ~~fruits, vegetables, and~~ foods that require time/temperature control for safety (formerly known as potentially hazardous foods).

(17) "Perishable food dealer" means the same as 50-50-102(12), MCA, which is an operation that is in the business of purchasing and selling ~~fruits, vegetables, and~~ foods that require time/temperature control for safety (formerly known as potentially hazardous foods).

(18) and (19) remain as proposed.

(20) "Produce" means fruits, vegetables, or grains sold directly to consumers in their natural or ~~processed~~ unprocessed states.

(21) remains as proposed.

(22) "School" means a building or structure or portion thereof occupied or used at least 180 days per year for the teaching of individuals, the curriculum of which satisfies the basic instructional program approved by the board of public education for pupils in any combination of kindergarten through grade 12, ~~but excludes home schools as that term is defined in 20-5-102(2)(e), MCA~~ This term does not include home schools. For purposes of this licensing subtype, in general, a school is also a learning institution that participates in the federal National School Lunch Program, under 7 CFR 210 of the Code of Federal Regulations.

(23) remains as proposed.

(24) "Temporary food establishment" means a food establishment that operates at a fixed location for a period of no more than ~~44 consecutive~~ 21 days in a licensing year in conjunction with a single event or celebration, instead of the "Temporary food establishment" definition in section 1-201.10 of the Food Code.

(25) remains as proposed.

AUTH: 50-50-103, MCA

IMP: 20-5-102, 50-50-102, 50-50-103, 50-50-104, 50-50-201, MCA

NEW RULE III (37.110.262) CHAPTER 2: MANAGEMENT AND PERSONNEL (1) The following additions have been made to section 2-102.12 of Chapter 2.

(a) and (b) remain as proposed.

(c) After the one-year, phase-in period, existing legal licensees required to have a Certified Food Protection Manager must have a Certified Food Protection Manager within ~~30~~ 45 days of losing their Certified Food Protection Manager.

(2) The following additions have been made to 2-102.12(B) of Chapter 2.

(a) Temporary food establishments engaged in the following activities are exempt from having a certified food protection manager:

(i) serving non-TCS (time/temperature controlled for safety) foods;

(ii) serving nonalcoholic or alcoholic beverages with or without beverage ice;

(iii) serving commercially pre-cooked, pre-packaged ready-to-eat, TCS foods, such as hot dogs, sausages, FDA and United States Department of Agriculture (USDA) registered canned food products, frozen pizzas;

(3) The regulatory authority may require or exempt additional food safety training for temporary food establishments under the authority granted in 8-102.10 of Chapter 8.

(4) The following additions have been made to subpart 2-201 Responsibilities of Permit Holder, Person in Charge, Food Employees, and Conditional Employees of Chapter 2.

(5) Specific communicable disease control measures, outlined in the Food Code, should be followed unless more stringent rules are provided in ARM 37.114.501.

AUTH: 50-50-103, MCA

IMP: 50-50-103, MCA

NEW RULE IV (37.110.265) CHAPTER 3: FOOD (1) This chapter has been adopted with ~~no~~ the following modifications:;

(a) section 3-201.17(A2) will not be adopted;

(b) section 3-201.17(A3) will not be adopted;

(c) section 3-201.17(A4) will not be adopted; and

(d) section 3-201.17(A1cii) will be replaced with the requirements of 81-9-230, 87-4-702, and 87-6-106(1), MCA.

AUTH: 50-50-103, MCA

IMP: 50-50-102, 50-50-103, 50-50-301, 50-50-302, 50-50-303, 50-50-304, MCA

NEW RULE V (37.110.266) CHAPTER 4: EQUIPMENT, UTENSILS, AND LINENS (1) This chapter has been adopted with ~~no modifications.~~ the addition of the following paragraph: 4-301.12(F) A food preparation sink must be provided if food is placed into a sink or sink compartment for the purposes of thawing or cleaning. A food preparation sink must meet the requirements specified in Sections 4-205.10, 5-202.13, and 5-402.11 of the Food Code.

AUTH: 50-50-103, MCA

IMP: 50-50-102, 50-50-103, 50-50-301, 50-50-302, MCA

NEW RULE VI (37.110.267) CHAPTER 5: WATER, PLUMBING, AND WASTE (1) Additions have been made to ~~section~~ paragraph 5-101.11(B) through section 5-103.12 of this chapter for public and nonpublic water systems.

(2) through (4) remain as proposed.

(5) After shock disinfection of the system, ~~and the disinfectant is no longer detected in the system~~, a sample for coliform bacteria must be collected for analysis ~~at least~~ three to five days after the disinfectant is no longer detected in the system.

(6) through (11) remain as proposed.

(12) If an establishment with a public or nonpublic water supply fails to take the required samples following the detection of coliform bacteria, or the laboratory fails to test for fecal coliform bacteria or Escherichia coli in coliform positive samples, the establishment must follow corrective actions as specified in (13).

(13) For nonpublic water systems, appropriate corrective actions must be implemented in a timely manner to eliminate the condition or conditions that resulted in the positive test result(s), which may include, ~~but not be limited to:~~ shock disinfection of the entire water system and replacement or repair of the water system by a date set by the local regulatory authority when:

(a) A a water sample exceeds a maximum contaminant level as specified in ARM Title 17, chapter 38, subchapter 2;

(b) ~~F~~ the water system does not have the capacity to provide the quantity needed for drinking, food processing, personal hygiene, or cleaning;

(c) A after examination of the water system, the local regulatory authority provides a written report to the operator or person-in-charge that the water system is at high risk of contamination;

(d) A a pathogenic microorganism is detected in a sample; or

(e) A a confirmed disease outbreak is linked with the water system.

(14) remains as proposed.

(15) The local regulatory authority ~~shall~~ will issue a restricted-use order to an establishment using a nonpublic water supply when:

(a) ~~F~~ fecal coliform or Escherichia coli is detected in a nonpublic water system sample;

(b) ~~F~~ total nitrate level is greater than 10 milligrams per liter in a nonpublic water system sample;

(c) ~~M~~ maximum contaminant levels exceed parameters specified in ARM Title 17, chapter 38, subchapter 2;

(d) A a pathogenic microorganism is detected; or

(e) A a confirmed disease outbreak is linked with the water system.

(16) An establishment with a public or nonpublic water supply subject to a restricted-use order must provide and use a temporary source of potable water as described in (17) for consumers and staff for drinking, food processing, personal hygiene and cleaning, or immediately discontinue operations.

(17) With approval from the local regulatory authority, an establishment with a public or nonpublic water supply may provide potable water on a temporary basis using one or more of the following:

(a) ~~B~~ bottled or packaged potable water from a department-licensed wholesale or retail food establishment, if the water is dispensed directly from the original container;

(b) ~~W~~ water from a Department of Environmental Quality (DEQ)-approved public water supply that meets the requirements of ARM Title 17, chapter 38, subchapters 1, 2, 3, and 5, stored in a clean, sanitized, and covered potable water container or holding tank;

(c) ~~W~~ water delivered by a department-licensed potable water hauler;

(d) ~~†~~ if the water is contaminated with fecal coliform bacteria or Escherichia coli, water that has been boiled for at least one minute, and stored and served from a clean, sanitized, and covered container; or

(e) ~~Ø~~ other source approved by the local regulatory authority.

(18) If the local regulatory authority determines that boiling water will not provide adequate potable water, it may require an establishment with a public or nonpublic water supply to use another approved method for supplying water.

(19) An establishment with a public or nonpublic water supply that is subject to a restricted-use order must post an advisory sign or placard regarding the restricted-use order in a conspicuous place for public viewing at each point of entry, or as directed by the local regulatory authority.

(20) A public or nonpublic water supply under a restricted-use order may not be used to make ice for food or beverages.

(21) An establishment with a public or nonpublic water supply that is subject to a restricted-use order may wash, rinse, and sanitize dishes, utensils, and equipment using the affected water system, if using an approved chemical disinfectant or dish machine that reaches 180 degrees Fahrenheit (82 degrees Celsius) during the final rinse cycle, or as directed by the local regulatory authority.

(22) A restricted-use order on a public or nonpublic water supply may be cancelled by the local regulatory authority after:

(a) through (c) remain as proposed.

(23) Additions have been made to section 5-303 of this chapter that may apply to public or nonpublic water supplies.

(24) remains as proposed.

(25) The water storage tank, or tanks, in a mobile food establishment must be of adequate capacity, as required in section 5-103.11 (A), but no smaller than the following:

(a) a mobile food establishment that serves beverages or food or reheats processed foods must have a water storage tank, or tanks, with a capacity of at least 38 liters (10 gallons) for food employee handwashing;

(b) a food pushcart must have a water storage tank, or tanks, with a minimum capacity of 19 liters (5 gallons) for handwashing; and

(c) a mobile food establishment that processes food or beverages must have a water storage tank, or tanks, with a capacity of at least 151 liters (40 gallons) for handwashing, utensil washing, and sanitizing purposes.

AUTH: 50-50-103, MCA

IMP: 50-50-103, MCA

NEW RULE VII (37.110.268) CHAPTER 6: PHYSICAL FACILITIES (1) The following ~~Additions have~~ has been made to section 6-301.14 of this chapter.

~~(2) (a)~~ Food establishment operators may create and post their own signs or posters for the posting requirement.

~~(3) Signs or posters may also be obtained through the regulatory authority.~~

AUTH: 50-50-103, MCA

IMP: 50-50-103, MCA

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

Comment #1: One commenter requested the school definition in New Rule II be clarified.

Response #1: The department agrees with the comment. The adopted rule has been revised and refers to 20-1-101(20), MCA.

Comment #2: One commenter requested clarifications to indirect wastewater plumbing requirements for food equipment.

Response #2: Wastewater plumbing is addressed in Section 5-402.11.

Comment #3: A commenter requested a self-service sneeze shield exemption for elementary schools.

Response #3: The department disagrees. There is no public health justification for eliminating the sneeze shields in elementary schools.

Comment #4: A commenter requested that welding requirements be specified for food contact surfaces.

Response #4: Construction requirements for food contact surfaces are addressed in Part 4-1 of the Food Code.

Comment #5: Two commenters requested that New Rule III(1)(c), grace period for replacing a certified food manager, be changed from 30 to 45 days.

Response #5: The department agrees that additional time would be helpful to the licensee without posing a public health concern. The adopted rule has been revised to reflect this change.

Comment #6: Three commenters requested that the complexity categories be altered to reflect a point system.

Response #6: Such a substantial change would require sending the rule out for public comment and unnecessarily delay implementation of the rule.

Comment #7: Three commenters requested an effective date of January 1, 2015 to allow sufficient time for compliance with the new rules.

Response #7: The department agrees and will add an effective date of January 1, 2015 to the final notice of adoption.

Comment #8: Two commenters requested specific language be added requiring food preparation sinks, in addition to Section 3-304.11 of the Food Code.

Response #8: The department agrees. Additional language has been added in New Rule V regarding food preparation sinks specified in Paragraph 4-301-12(F).

Comment #9: Twenty-one commenters requested that a change be made to the rule to allow the sale of honey at farmers' markets without a retail license.

Response #9: Such a change is unnecessary. No retail license is needed under 50-50-102(7)(b)(i), MCA for any packaged, nonperishable foods in original containers at any retail venue, not just farmers' markets. Any other restriction related to the sale of honey is in Montana statute and not modifiable in rule.

Comment #10: One commenter requested the certified food manager for schools be a staff member or supervisor.

Response #10: Staff may be certified managers in Section 2-102.12 of the Food Code, if the person has management and supervisory authority over food preparation and service.

Comment #11: One commenter requested that all rulemaking be done by elected officials.

Response #11: Rulemaking authority for retail food is granted to the department by the Montana Legislature in 50-50-103, MCA.

Comment #12: Eight commenters requested that bare-hand contact be explicitly allowed with ready to eat foods.

Response #12: Paragraph 3-301.11(E) specifically addresses this situation and allows bare-hand contact where approval is received from the regulatory authority.

Comment #13: A commenter supports requiring a certified food protection manager for certain establishments.

Response #13: The department agrees and thanks the commenter for the input.

Comment #14: A commenter requested increasing the phase-in period for the certified food protection managers from one to two years.

Response #14: The department disagrees. The department does not anticipate an access problem to certified manager course availability.

Comment #15: A commenter supports the 41 degree Fahrenheit requirement for refrigeration equipment.

Response #15: The department agrees.

Comment #16: A commenter requested that, if an establishment has a refrigerator that can maintain the internal air temperature of the refrigerator at or below 45 degrees Fahrenheit, they not be required to have a refrigerator that can maintain an internal temperature of 41 degrees Fahrenheit for five years after the adoption of the proposed Food Rule.

Response #16: The department disagrees. In 2006 the Conference for Food Protection, a conference where industry, regulatory, academia, consumer, and professional organizations are afforded equal input in the development and modification of food safety guidance, determined that an option for maintaining refrigerators at 45 degrees Fahrenheit was no longer necessary. This recommendation was then adopted by the FDA into the Food Code.

This determination was made based on updates to engineering standards made by NSF International and the American National Standards Institute (ANSI) in 1997 and 1999 that improved compressing unit capacities ensuring refrigerators built to the new NSF International and ANSI standards are able to maintain an internal air temperature of 41 degrees Fahrenheit or less. Additionally, refrigerators with internal air temperatures above 41 degrees Fahrenheit result in increased growth rates of *Listeria monocytogenes*, and are therefore a public health hazard.

Comment #17: A commenter supports the handwashing guidelines and requirements.

Response #17: The department appreciates the comment.

Comment #18: A commenter requested that we specify public events in the catering kitchen definition.

Response #18: The department believes that the proposed wording is sufficient.

Comment #19: Two commenters requested that the definition of "Food Establishment" be clarified.

Response #19: The department agrees. The published citation of Sections 1-201.10(1) and (3)(f) should be Paragraph 1-201.10(B) and has been corrected.

Comment #20: Three commenters requested that the definition of a temporary food establishment be changed as follows: the number of days that a temporary establishment may operate in a calendar year be changed from 14 to 21 and the word "continuous" to be removed.

Response #20: The department agrees with the comment and has changed the definition to 21 days. The term "continuous" has been removed. These two changes were needed to address the commenters' concerns. Then changes were also needed to address comments from the public during implementation of House Bill 630. House Bill 630 mandated the department research ways to eliminate inconsistencies and inefficiencies in Montana food laws.

The department found that temporary establishments often need to be able to operate at events such as Farmer's Markets. Events such as Farmer's Markets are not continuous in that they do not operate every day for ten days. Instead they operate every Sunday for a certain number of Sundays, and they may occur more than 14 days in a calendar year. Under the current rule this required relicensure of the establishment even though none of the parameters pertinent to public health, such as the event, the location, the operator, or the menu had changed. This created an undue burden on the operator to pay for the license and the health departments to spend the time to process the new license applications.

Comment #21: A commenter requested that the department not omit from ARM 37.110.238 the language reflecting that a license is not transferable.

Response #21: Section 50-50-206, MCA provides that a license is not transferrable. Keeping the language in rule is unnecessarily duplicative.

Comment #22: A commenter requested that there be a requirement for the health department to reinstate food workers that have Salmonella.

Response #22: The department agrees. Reinstatement of restricted or excluded food workers with Salmonella already requires such approval in Paragraphs 2-201.13(F) and (G).

Comment #23: A commenter stated that asymptomatic food worker stool sample collection is not advisable.

Response #23: The department disagrees. Public health reasoning for Section 2-201.13 may be found in Annex 3, page 385, of the Food Code. The commenter's citations in Subparagraph 2-102(E)(3), (F)(3), and (G)(3) refer to reinstatement of asymptomatic food workers diagnosed with specific pathogens and when they may return to work.

Comment #24: A commenter asked that the rule not restrict asymptomatic food workers who may have been exposed to an illness in Paragraph 2-201.13(J).

Response #24: The department disagrees. Paragraph 2-201.13(J), cited by the commenter, addresses food workers working in establishments serving highly susceptible populations who are at much greater risk of contracting foodborne illnesses.

Comment #25: A commenter stated that three-compartment sinks should be allowed for handwashing under certain conditions in Section 2-301.15.

Response #25: The department agrees. Sections 5-203.11, 5-204.11, and 5-205.11 require a designated handwashing sink, which already could be part of a three-compartment sink, provided the conditions in Sections 5-203.11, 5-204.11 and 5-205.11 are met.

Comment #26: A commenter asked the department to allow unpasteurized juices at the retail level as found in Section 3-202.110.

Response #26: Unpasteurized juices are allowed at the retail level for nonpre-packaged service, but are subject to warning regulations under ARM 37.110.101(1)(j) and 21 CFR 101.17(g). Pre-packaged juices must be pasteurized in accordance with Section 3-202.110.

Comment #27: A commenter is in support of nonbare-hand contact as the standard in Paragraph 3-301.11(B) in the Food Code.

Response #27: The department appreciates the comment.

Comment #28: A commenter requested that the cooking temperature for shelled eggs should be the same as poultry for killing Salmonella.

Response #28: The department disagrees. Cooking temperatures are also based on presumed numbers of bacteria on or in the product, not just the type of bacteria. Public health reasoning for Section 3-401.11 may be found in Annex 3, pages 429-430, of the Food Code.

Comment #29: A commenter requested Section 2-301.15 should allow handwashing at any sink, not just a designated sink. There needs to be a phase-in period.

Response #29: The department disagrees. There are many public health reasons for requiring handwashing to occur at a designated handwashing sink. Among the reasons is the likely probability of recontamination of hands after the handwashing process. The department will work closely with local health jurisdictions to ensure fair application of the new rule.

Comment #30: A commenter requested that an identification process must be provided for wild mushrooms in Section 3-201.16.

Response #30: The department agrees and will work closely with local health jurisdictions to ensure fair application of the new rule.

Comment #31: A commenter needs a guidance document for food processing chemicals stated in Section 7-204.12.

Response #31: Chemicals safe for use on foods have container labels marked with a United States Environmental Protection Agency (USEPA) registration number.

Comment #32: A commenter requested a change to the definition of "Restrict" in Food Code to allow for exceptions for small businesses.

Response #32: The department disagrees. Paragraphs 2-201.12(A) through (J) address when to apply work restrictions. The size of the firm is irrelevant to protecting consumers from ill or contagious food workers.

Comment #33: A commenter requested the department change Section 3-201.17 for game animals to correspond with specific Montana statute and rules.

Response #33: The department added new text to New Rule IV indicating the modifications to Section 3-201.17 of the Food Code deferring to Montana state law regarding game animals.

Comment #34: A commenter requested the department clarify the definition of "Food service" in New Rule II.

Response #34: The department disagrees and will work with local health jurisdictions to ensure fair application of the new rule.

Comment #35: One commenter recommended that the definition of mobile food omit servicing area requirement.

Response #35: The department disagrees because the servicing area is needed to ensure the ability of sanitarians to routinely inspect the establishment for compliance with the rules.

Comment #36: Two commenters requested that the definition of "Perishable Food" be changed to omit the words "fruits and vegetables" in New Rule II.

Response #36: The department agrees. The definition has been changed to omit the words "fruits and vegetables" because "fruits and vegetables" used in this context are not a TCS food.

Comment #37: A commenter requested that the definition of produce be changed from "processed" to "unprocessed state" in New Rule II.

Response #37: The department agrees and has changed the definition of produce to include the term "unprocessed state" because processing food may be a licensable activity.

Comment #38: A commenter requested that the definition of tavern be clarified.

Response #38: The department disagrees because the definition of tavern is clear in the Food Code. The department will work with local health jurisdictions to ensure fair application of the new rule.

Comment #39: One commenter requested that the 90-day period for certified food managers for new establishments in New Rule III be omitted.

Response #39: The department disagrees. The advisory council required in 50-50-103, MCA indicated 90 days was fair and prudent. Other states have similar time allowances.

Comment #40: One commenter requested that the rule be modified to clarify which establishments need a certified food protection manager.

Response #40: The department agrees. The rule has been modified to specify which temporary establishments need a certified food protection manager. The department will work with local health jurisdictions to ensure fair application of the new rule.

Comment #41: One commenter requested that New Rule VI(3)(b) for nonpublic water requirements regarding sampling schedules be omitted.

Response #41: The department disagrees. Proposed water sampling schedules correspond with existing ARM 37.111.111(1)(b).

Comment #42: One commenter recommended that the rule allow the regulatory agency to proscribe the sampling schedule in New Rule VI(3)(c) for nonpublic water.

Response #42: The department disagrees. Proposed water sampling schedules correspond with existing ARM 37.111.111(1)(b).

Comment #43: One commenter recommended that the rule require plan reviews for failure to renew a license in New Rule IX to enable violation corrections.

Response #43: The department disagrees. 50-50-214 and 50-50-250, MCA already provide authority for the local authority to not validate a license if an applicant has failed to correct rule or statute violations.

Comment #44: A commenter stated that ARM 37.110.201(2) conflicts with ARM 37.110.238(11).

Response #44: The department disagrees because ARM 37.110.201(2) was omitted from the document so there cannot be a conflict.

Comment #45: One commenter recommended that the department retain the complexity categories as provided in the proposed rule.

Response #45: The complexity categories from the proposed rule have not been changed.

Comment #46: One commenter has requested the definition of "Catering Kitchen" be clarified.

Response #46: The department agrees and has altered the definition for clarification and will work with local health jurisdictions to ensure fair application of the new rule.

Comment #47: One commenter requested that the definition of "Food Manufacturing" be changed in New Rule II.

Response #47: The department disagrees because "retail food manufacturing establishment" is defined in 50-50-102(19), MCA.

Comment #48: One commenter requested that the definition of "food service" in New Rule II be changed.

Response #48: The department disagrees because the definition of "food service establishment" is defined in 50-50-102(7), MCA.

Comment #49: One commenter requested that the definition of "Legal licensee" be clarified in rule.

Response #49: The department disagrees because the definition of "legal licensee" is already clear in the proposed rule.

Comment #50: One commenter has asked that the definition of "Meat Shop" be clarified.

Response #50: The department agrees and the rule has been changed to correspond with existing state law by changing the term "meat shop" to "meat market."

Comment #51: One commenter requested that the "Mobile Food Establishment" definition be changed to omit the term "portable structure."

Response #51: The department agrees and the proposed rule has been changed because of the need to clarify the difference between a "temporary food establishment" and a "mobile food establishment."

Comment #52: One commenter requested that (a) of the definition of "Mobile Food Establishment" in New Rule II be clarified.

Response #52: The department disagrees because the wording needs no further clarification.

Comment #53: One commenter requested that the definition of "perishable food dealer" be altered to omit the words "fruits and vegetables."

Response #53: The department agrees and the definition has been changed because unprocessed "fruits and vegetables" used in this context are not TCS foods.

Comment #54: One commenter requested that the applicability of New Rule VI(1) be changed to reflect Part 5-1, et seq, of the Food Code for nonpublic water supplies.

Response #54: The department agrees and the proposed rule has been changed to clarify which drinking water systems are subject to this section of the rules.

Comment #55: One commenter requested that New Rule VI(5) be clarified in regards to when to collect water samples after chemical treatment.

Response #55: The department agrees and has clarified this section of the proposed rule because the presence of chemicals after treatment may give false negative results.

Comment #56: One commenter requested that New Rule VI(5), (11), and (15) through (22) also be applied to public water supplies in addition to nonpublic water supplies.

Response #56: The department agrees and the proposed rule has been changed to clarify which drinking water systems are subject to this section of the rules.

Comment #57: One commenter requested that New Rule VI(23) reference Subpart 5-103 of the Food Code for water tanks in mobile establishments.

Response #57: The department disagrees. Water tanks in mobile establishments are already sufficiently covered by other sections of the code.

Comment #58: One commenter requested that New Rule VI(25) be altered to allow for multiple water tanks for mobile units.

Response #58: The department agrees and the proposed new rule has been changed because the installation of multiple potable water tanks will not result in adverse public health consequences.

Comment #59: One commenter requested that ARM 37.110.213(15) should be retained for grandfathering old equipment in Section 4-205.10.

Response #59: The department disagrees because the continued use of equipment that does not meet the requirements in Section 4-205.10 poses an unnecessary and preventable public health risk. The department will work with local health jurisdictions to ensure fair application of the new rule.

Comment #60: One commenter stated that New Rule VII(3) appears to obligate the local health department to provide signs and is unnecessary.

Response #60: The department has removed New Rule VII(3) from the rule because the department determined that this section was unnecessary.

Comment #61: One commenter stated that ARM 37.110.238(13) appears to apply to temporary establishments for complexity categories. The commenter stated this is unnecessary.

Response #61: The department agrees and has provided specific exemption language in the rule for temporary establishments.

Comment #62: One commenter stated that there are conflicts between the Control of Communicable Disease Manual (CCDM) and the proposed rule.

Response #62: The department agrees and has provided new wording to apply the more stringent Food Code or Minimal Control Measures rule to appropriately address specific adverse health conditions found in food workers.

Comment #63: One commenter requested that the department omit the term "fixed location" from the definition of a "temporary food establishment."

Response #63: The department disagrees because the commenter's recommendation conflicts with recommendation from the 2013 Food Study Group.

6. These rule adoptions, amendments, and repeals are effective January 1, 2015.

/s/ Shannon L. McDonald
Shannon L. McDonald, Attorney
Rule Reviewer

/s/ Robert Runkel for
Richard H. Opper, Director
Public Health and Human Services

Certified to the Secretary of State December 1, 2014