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Legislative Environmental Policy Office

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February 5, 2010

TO: Economic Affairs Interim Committee

FROM: Todd Everts, LSD Legal Staff

RE: Requested Staff Legal Opinion on the Application of MEPA to the Department of Livestock's Designated Surveillance Area for Brucellosis Official Order

At the January 21, 2010, Economic Affairs Interim Committee (EAIC) meeting, it is my understanding that the Committee/Committee Staff requested a legal opinion from Legislative Services Division legal staff as to whether the Department of Livestock's (DOL) Designated Surveillance Area for Brucellosis Official Order 10-01-D (January 13, 2010) is an action that is subject to the environmental review provisions of the Montana Environmental Policy Act (MEPA) (75-1-101, MCA, et seq.).

The legal basis for the EAIC's request regarding this issue is that the EAIC has legislative statutory oversight functions for the DOL and the entities attached to the DOL including the Board of Livestock (5-5-223, MCA). Those legislative oversight functions include administrative rule review, draft legislation review, program evaluation, and monitoring functions (5-5-223, MCA).

Before I begin this analysis, a couple of qualifiers are necessary here. First, due to this little thing called "separation of powers", a legal opinion given by a legislative branch attorney is not binding on an executive branch agency or board. Second, this legal opinion does not reflect any opinion or action on the part of the EAIC. So much for the qualifiers, let the analysis begin.

QUESTION: Is the DOL's Designated Surveillance for Brucellosis Official Order 10-01-D (January 13, 2010) an action that should have been subject to the MEPA review process?¹

SHORT ANSWER: Probably, yes. The DOL is not a state agency that is exempted from MEPA. The DOL Order is an action that is defined under MEPA and the DOL's administrative rules and the DOL Order likely is not exempted or excluded from MEPA review.

LEGAL ANALYSIS:

The confluence of DOL's statutory and regulatory authority, MEPA statutory requirements, the DOL's administrative rules implementing MEPA, MEPA case law, provisions of the Montana constitution, dictates whether the DOL's Order is subject to MEPA review.

¹ The term "MEPA review", as used throughout this legal opinion, means any environmental assessment, environmental impact statement, or other written analysis required under MEPA by a state agency of a proposed action to determine, examine, or document the effects and impacts of the proposed action on the quality of the human and physical environment as required under MEPA (see 75-1-220(4), MCA).

DOL Authority

Pursuant to 81-1-102(1), MCA, the DOL is required to "protect the livestock interests of the state from theft and disease". The Board of Livestock and the State Veterinarian are responsible for the administration of the animal health laws (81-1-301 through 81-1-302, MCA) and the DOL is responsible for the administration of the disease control laws (81-2-101 through 81-2-303, MCA). In Order to promote and protect the livestock industry in the state, the DOL has broad powers under 81-2-102 to investigate, prevent, extirpate, and control diseases. Specifically, as it relates to the DOL brucellosis surveillance Order, the DOL has the statutory authority to:

adopt rules and Orders that it considers necessary or proper to prevent the introduction or spreading of infectious, contagious, communicable, or dangerous diseases affecting livestock and alternative livestock in this state and to this end may adopt rules and Orders necessary or proper governing inspections and tests of livestock and alternative livestock intended for importation into this state before it may be imported into this state (81-2-102(1)(d), MCA).

The DOL's administrative rules require that an owner or person in control of an animal exposed or being suspected of being exposed to brucellosis to submit to any tests or treatments required by the DOL (32.3.103, 32.3.104, and 32.3.105, ARM). An outbreak of brucellosis may require quarantine (32.3.105 through 32.3.111, ARM). The State Veterinarian may, upon deciding that there is an outbreak of brucellosis, declare any area of the state an epizootic area (i.e., an area in which there is an epidemic outbreak of a disease affecting an animal population) (32.3.111, ARM).

If there is an outbreak of brucellosis, the State Veterinarian must promulgate and enforce any rule or Order deemed necessary to prevent the introduction of the disease and to control and eradicate the disease (32.3.116(2), ARM). The DOL, at any time, may Order the official testing or retesting of animals for the presence of brucellosis if the department considers those tests necessary to prevent the introduction or spreading of brucellosis (32.3.407(1), ARM).

Under the authority outlined above, the DOL initiated a series of actions within the Greater Yellowstone Area (GYA) of Montana in response to two cases of brucellosis being detected in cattle herds in Carbon and Park counties in May and June of 2008. In September 2008, Montana lost its brucellosis Class-Free status. On May 15, 2009, the state of Montana, through the DOL, implemented a short-term Brucellosis Action Plan that outlined a series of mitigation and testing activities designed to regain brucellosis Class-Free status as quickly as possible. Class-Free status was officially restored in Montana on July 10, 2009. Six months after the Class-Free status re-designation, most of the Brucellosis Action Plan requirements expired. On January 13, 2010, the DOL issued the Designated Surveillance for Brucellosis Order that establishes certain surveillance and mitigation requirements and defines and establishes a designated surveillance geographical area along the GYA within Beaverhead, Madison, Gallatin, Park, Sweet Grass, Stillwater, and Carbon Counties.

DOL's stated rationale for issuing the Order is:

Brucellosis infected wild ungulates including elk and bison pose a real and continuing risk of transmission of *Brucella abortus* to livestock in Montana. Surveillance for brucellosis in livestock in the high risk area has been successful in detecting previous

transmissions. It is imperative that surveillance and risk mitigation activities including brucellosis vaccination continue in this area to rapidly detect disease and to enable the continued marketability of Montana's livestock (DOL Designated Surveillance for Brucellosis Official Order 10-01-D, January 13, 2010).

Other than the Interagency Bison Management Plan, my research indicates that the DOL has not conducted any MEPA review prior to taking any of the actions noted above. The question at issue here is whether the DOL was required to conduct a MEPA review specifically as it relates to the DOL Order.

MEPA Statutory Directives

The articulated legislative intent of MEPA is as follows:

The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Montana Environmental Policy Act. The Montana Environmental Policy Act is procedural, and it is the legislature's intent that the requirements of [MEPA] provide for the adequate review of state actions in Order to ensure that environmental attributes are fully considered (75-1-102(1), MCA).

The expressed purpose of MEPA is to:

declare a state policy that will encourage productive and enjoyable harmony between humans and their environment, to protect the right to use and enjoy private property free of undue government regulation, to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans, to enrich the understanding of the ecological systems and natural resources important to the state . . . (75-1-102(2), MCA).

Part of MEPA's policy declaration states that:

it is the continuing policy of the state of Montana, in cooperation with the federal government, local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which humans and nature can coexist in productive harmony, to recognize the right to use and enjoy private property free of undue government regulation, and to fulfill the social, economic, and other requirements of present and future generations of Montanans (75-1-103, MCA).

MEPA also states that the "policies and goals set forth in [MEPA] are supplementary to those set forth in existing authorizations of all boards, commissions, and agencies of the state" (75-1-105, MCA).

The pertinent action-forcing mechanisms of MEPA require that all agencies of the state, except the legislature and the Public Service Commission (PSC), shall:

- ⇒ to the fullest extent possible, use a systematic, interdisciplinary approach that will ensure:
 - ✓ the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking that may have an impact on the human environment (75-1-201(1)(b)(i)(A), MCA); and

- ✓ that in any environmental review that is not subject to environmental impact statement requirements, any alternative analysis must comply with the alternative analysis requirements statutorily provided (75-1-201(1)(b)(i)(B), MCA);
- ⇒ identify and develop methods and procedures that will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking, along with economic and technical considerations (75-1-201(1)(b)(ii), MCA);
- ⇒ identify and develop methods and procedures that will ensure that state government actions that may impact the human environment are evaluated for regulatory restrictions on private property (75-1-201(1)(b)(iii), MCA); and
- ⇒ include in each recommendation or report on proposals for projects, programs, and other major actions of state government significantly affecting the quality of the human environment a detailed statement (75-1-201(1)(b)(iv), MCA).

DOL MEPA Administrative Rules

In Order to implement MEPA's statutory requirements, a number of state agencies have adopted MEPA administrative rules. The DOL has adopted its MEPA administrative rules in ARM Title 32, chapter 2, part 2. The DOL MEPA rules provide detailed legal requirements on what constitutes a DOL action that is subject to MEPA review.

MEPA Case Law

Over MEPA's 39-year history, provisions of MEPA have been litigated and resolved in 55 cases before the Montana courts. When Montana courts review MEPA issues, the courts first look to the laws and regulations governing the MEPA process. See *North Fork Preservation Ass'n v. Dept. of State Lands*, 238 Mont. 451 (1989), and *Ravalli Co. Fish and Game Ass'n, Inc. v. Dept. of State Lands*, 273 Mont. 371 (1995). The Montana courts, without fail, also look to previous MEPA case law for direction. The Montana courts have also found it appropriate, because MEPA is modeled after the National Environmental Policy Act (NEPA), to look to federal case law for guidance. See *Kadillak v. Anaconda Co.*, 184 Mont. 127, 137 (1979); *Montana Wilderness Ass'n v. Board of Natural Resources and Conservation*, 200 Mont. 11 (1982); *North Fork Preservation Ass'n v. Dept. of State Lands*, 238 Mont. 451 (1989); *Ravalli Co. Fish and Game Ass'n, Inc. v. Dept. of State Lands*, 273 Mont. 371 (1995); and *Montana Environmental Information Center v. Dept. of Transportation*, 2000 MT 5, 298 Mont. 1 (2000).

Montana Constitutional Considerations

"The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Montana Environmental Policy Act" (75-1-102(1), MCA). This statement in MEPA by the legislature is important because it provides a constitutional backdrop to MEPA as a statutory mechanism to assist the legislature and state agencies in fulfilling their constitutional obligations to:

- ⇒ administer and enforce the constitutional duty that the state and each person maintain and improve a clean and healthful environment (Article IX, section 1(1) and (2), of the Montana constitution);

- ⇒ provide "adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources" (Article IX, section 1(3), of the Montana constitution); and
- ⇒ protect Montanans' inalienable rights, including "the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways" (Article II, section 3, of the Montana constitution).

In addition, MEPA requires that state agencies open up government decisions for public scrutiny and it ensures that people are allowed to participate in the agency's decision-making process. These MEPA requirements help the legislature and state agencies to fulfill constitutional obligations under the Right to Participate and Right to Know provisions of the Montana Constitution (Article II, section 8, and Article II, section 9, of the Montana Constitution).

Three-Step Analysis

Having provided the overarching legal context in which to address the question raised by EAIC, there are three specific statutory and administrative legal requirements that are dispositive regarding MEPA review and the DOL Order. The DOL's Order is an action that is subject to MEPA review if the:

- ⇒ **Step #1:** DOL is an agency of state government that is not statutorily exempted from MEPA;
- ⇒ **Step #2:** action being taken by DOL is defined as an "action" under the DOL's MEPA administrative rules; and
- ⇒ **Step #3:** action is not exempt or excluded from MEPA review.

Step #1 *Is DOL an agency of state government that exempted from MEPA?*

Legal Conclusion: No

The DOL is an agency of state government that is subject to the provisions of MEPA. The only state agencies that are statutorily exempted from MEPA are the legislature and the Public Service Commission.

Step #2 *Is the DOL's Order defined as an "action" under DOL's MEPA administrative rules?*

Legal Conclusion: Yes

The term "action" as defined by the DOL administrative rules is very broad. If a DOL project, program, or activity falls within the following definition of the term "action", then it is potentially subject to MEPA review:

- ⇒ A project, program, or activity directly undertaken by an agency;

- ⇒ A project or activity supported through contract, grant, subsidy, loan, or other form of funding assistance from the agency, either singly or in combination with one or more other state agencies; or
- ⇒ A project or activity involving the issuance of a lease, permit, license, certificate, or other entitlement for use or permission to act by the agency, either singly or in combination with other state agencies (ARM 32.2.222).

DOL's Order is an "activity directly undertaken" by DOL and therefore is clearly an "action" as defined under the DOL MEPA rules. In addition, the DOL's Order has been characterized by DOL as a "state program" undertaken by the DOL (DOL Responses to Montana Farm Bureau Federation questions on the Designated Surveillance Official Order 10-01-D, January 8, 2010, answer to question 6).

Step #3 Is the DOL's action exempt or excluded from MEPA review?

Legal Conclusion: Probably not.

Almost any DOL activity fits the broad definition of "action" under the DOL MEPA administrative rules. However, a MEPA review is not required for all DOL actions. There are specific actions that have been statutorily or administratively exempted or excluded from MEPA review. The legislature has statutorily exempted the following actions from MEPA review:

- ⇒ Certain actions that involve an amendment to a hard-rock mine operating permit (categorical exclusions, administrative actions, ministerial actions, repair and maintenance actions, investigation and enforcement actions, actions that are primarily economic or social in nature, insignificant boundary changes in the permit area, and changes in an operating plan that was previously permitted) (82-4-342, MCA).
- ⇒ The transfer of permits for portable emission sources (75-2-211(5), MCA).
- ⇒ A qualified exemption for reciprocal access agreements on state land. The Department of Natural Resources and Conservation (DNRC) is not required to analyze or consider potential impacts of activities that may occur on private or federal lands in conjunction with or as a result of granting access (77-1-617, MCA).
- ⇒ A transfer of an ownership interest in a lease, permit, license, certificate, or other entitlement for use or permission to act by an agency, either singly or in combination with other state agencies. This does not trigger review under MEPA if there is not a material change in terms or conditions of the entitlement or unless otherwise provided by law (75-1-201(1)(d), MCA).
- ⇒ Issuance of a historic right of way deed (77-1-130, MCA).
- ⇒ Issuance of any lease or license by the DNRC and the Board of Land Commissioners that expressly states that the lease or license is subject to further permitting under any of the provisions of Title 75 or 82, MCA (77-1-121(2), MCA).
- ⇒ DNRC's issuance of lease renewals (77-1-121(3), MCA).

- ⇒ Nonaction on the part of DNRC or the Board of Land Commissioners. Even though they have the authority to act, this does not trigger MEPA review (77-1-121(3), MCA).
- ⇒ DNRC or Board of Land Commissioner actions, including preparing plans or proposals, in relation to and in compliance with the following local government actions:
 - (a) development or adoption of a growth policy or a neighborhood plan pursuant to Title 76, chapter 1, MCA;
 - (b) development or adoption of zoning regulations;
 - (c) review of a proposed subdivision pursuant to Title 76, chapter 3, MCA;
 - (d) actions related to annexation;
 - (e) development or adoption of plans or reports on extension of services; and
 - (f) other actions that are related to local planning (77-1-121(4), MCA).
- ⇒ Certain emergency timber sale situations (fire, fungus, insect, parasite, blowdown, etc.) or time-dependent access situations involving timber. DNRC is exempt from MEPA review to the extent that DNRC's compliance with MEPA is precluded by limited time (77-5-201, MCA).
- ⇒ DNRC authorizations of historical use of a navigable river bed (77-1-1103(6), MCA).
- ⇒ Small business licenses under the Montana Small Business Licensing Coordination Act (30-16-103(3)(b), MCA).
- ⇒ The DEQ is prohibited from preparing an environmental review under 75-1-201, MCA, for a transfer of mine operating permits unless the department can show that the operation has caused or may cause significant impacts that have not been analyzed previously in an environmental review document prepared pursuant to 75-1-201 (82-4-250(4), MCA).

The DOL's Order does not fit under any of the above statutory exemptions.

In addition to the statutory exemptions, the DOL's MEPA administrative rules do not require MEPA review for the following types of DOL actions:

- ⇒ Administrative actions (routine clerical or similar functions, including but not limited to administrative procurement, contracts for consulting services, or personnel actions);
- ⇒ Minor repairs, operations, and maintenance of existing facilities;
- ⇒ Investigation, enforcement, and data collection activities;
- ⇒ Ministerial actions (actions in which the DOL exercises no discretion and only acts upon a given state of facts in a prescribed manner);
- ⇒ Actions that are primarily social or economic in nature and that do not otherwise affect the human environment; and
- ⇒ Actions that qualify for a categorical exclusion (ARM 32.2.223(5)).

I will analyze the applicability of each of the exemptions and the exclusion.

ADMINISTRATIVE ACTIONS AND ACTIONS INVOLVING MINOR REPAIRS AND MAINTENANCE

The DOL's Order is not a mundane administrative action involving routine clerical functions, nor does it constitute minor repairs or operation and maintenance of existing facilities. The DOL's Order sets in motion a broad range of substantive actions that have statewide ramifications.

INVESTIGATIVE, ENFORCEMENT, AND DATA COLLECTION ACTIVITIES

The DOL's Order does involve some elements of investigation, enforcement, and data collection activities. The Order establishes area geographic surveillance area for detecting transmission of brucellosis to livestock and requires livestock producers within the surveillance area to identify and test certain animals for brucellosis and in some cases vaccinate certain animals. In addition, an official herd plan is required for each owner or operator within the designated surveillance area outlining preventative and mitigation measures that include fencing and hazing to ensure no co-mingling between livestock and elk. The Order is subject to annual review by the Board of Livestock. In a nutshell, the DOL's Order on an ongoing programmatic basis, sets out who and what is (or is not) regulated, how they are regulated, to what extent they are regulated, when they are regulated and where they are regulated.

A credible argument can be made that the DOL's Order is merely an enforcement/data collection action pursuant to the DOL's statutory and administrative authority. The DOL's Order is in response to an outbreak of brucellosis within the GYA and the subsequent loss of the State of Montana's Class-Free status. The State Veterinarian is required under rule to promulgate and enforce any Order or rule deemed necessary to prevent the introduction of the disease and to control and eradicate the disease (ARM 32.3.116(2)). The DOL, at any time, may Order the official testing or retesting of animals for the presence of brucellosis if the department considers those tests necessary to prevent the introduction or spreading of brucellosis (ARM 32.3.407(1)). The State Veterinarian has the discretion to declare any area of the state an epizootic area (ARM 32.3.111).

However, an equally credible, if not stronger argument can be made that the Order is an ongoing programmatic regulatory activity beyond just enforcement and data collection and is subject to periodic revision. The Order is not dissimilar in nature to previous DOL brucellosis containment and prevention regulatory activities that necessitated the DOL to conducted MEPA review, including:

- ⇒ January 8, 1992 - DOL preliminary environmental assessment under MEPA for migratory bison from Yellowstone National Park within Park and Gallatin counties.
- ⇒ April 6, 1994 - DOL preliminary environmental assessment under MEPA for rules submitted by DOL for shooting bison migrating from Yellowstone National Park within Park and Gallatin counties.
- ⇒ October 20, 1995 - DOL environmental assessment under MEPA for the interim management of bison migrating from Yellowstone National Park.
- ⇒ December 20, 2000 - Record of decision for final environmental impact statement and Inter-agency Bison Management Plan for the State of Montana and Yellowstone National Park.

In addition, the DOL worked very closely with the Department of Fish, Wildlife, and Parks in developing a programmatic regulatory structure and environmental review process for game farms that has a number of similar characteristics to the DOL Order at issue here (see ARM 32.4.101 et. seq.).

MINISTERIAL ACTIONS

The DOL decision to issue the Order and the scope and nature of the Order involves substantial DOL discretion and therefore does not constitute a ministerial action under ARM 32.2.223(5)(e). In the only Montana case to deal with the question of whether an agency action was ministerial or not, the Montana Supreme Court noted that in cases of renewal and assignment of state land grazing leases, permits, and licenses, if the renewal or assignment merely maintains the status quo and that there is no change in use or condition which significantly affects the quality of the human environment, then those actions are ministerial in nature are not subject to MEPA review. See *Ravalli Co. Fish and Game Ass'n, Inc. v. Dept. of State Lands*, 273 Mont. 371 (1995). Obviously, the DOL's Order is quite different from a renewal or assignment of state grazing leases. The proposed DOL Order does not maintain the "status quo". In fact, the Order by its very nature, is designed to upset the status quo by regulating activities that have not necessarily been previously regulated in the manner prescribed by the DOL's Order. So, even under the *Ravalli* test for ministerial actions, a very compelling argument can be made that the DOL's action is not a ministerial action that is exempt from MEPA review.

ACTIONS THAT ARE PRIMARILY SOCIAL OR ECONOMIC AND THAT DO NOT OTHERWISE AFFECT THE HUMAN ENVIRONMENT

A DOL action is exempt from MEPA review if the Order is primarily social or economic in nature and proposed rulemaking does not otherwise affect the human environment (ARM 32.2.223(5)(f)). The human environment encompasses the biological, physical, social, economic, cultural, and aesthetic factors that interrelate to form the environment (ARM 32.2.222(12)). Obviously, this is a very broad definition and almost any DOL action taken would likely (but not always) have an impact on the human environment.

The justification for the DOL Order is because "brucellosis infected wild ungulates including elk and bison pose a real and continuing risk of transmission Brucella abortus to livestock in Montana" (DOL Designated Surveillance for Brucellosis Official Order 10-01-D, January 13, 2010). This DOL statement reflects the fact brucellosis infected bison and elk have an impact on the human environment not limited to the economic impacts that brucellosis has on the livestock industry. Additional potential impacts could include impacts on the physical and biological areas of the environment. Logically, if the DOL's action is doing something to prevent or minimize impacts to certain aspects of the human environment, then by extension, the DOL's action impacts the human environment.

The decision by the DOL on who/what should or should not be regulated under the DOL Order can impact the human environment in a variety of ways. The potential range of alternative regulatory actions that the DOL could impose under its Order may result in different types and levels of impacts on the human environment. The impacts of the DOL Order are not just social and economic in nature but could broadly impact the human environment, and therefore, the DOL mercury emission rulemaking does not fall under this administrative exemption.

CATEGORICAL EXCLUSION

To my knowledge the DOL has not adopted a categorical exclusion either through a programmatic environmental review or administrative rulemaking that excludes any DOL rulemaking activity from MEPA review.

Some Additional MEPA Review Requirements

PROGRAMMATIC MEPA REVIEW REQUIREMENTS

Whenever the DOL is contemplating a series of DOL-initiated actions, programs, or policies "which in part or in total may constitute a major state action significantly affecting the human environment, it shall prepare a programmatic review discussing the impacts of the series of actions" under MEPA (ARM 32.2.237(1)). Given the ongoing programmatic nature of the DOL Order and the fact that the DOL's Order has been characterized by DOL as a "state program" undertaken by the DOL, and that the Order may have impacts on the human environment, a credible argument can be made that the DOL is required to conduct a programmatic review under MEPA (see DOL Responses to Montana Farm Bureau Federation questions on the Designated Surveillance Official Order 10-01-D, January 8, 2010, answer to question 6).

EMERGENCY ACTIONS UNDER MEPA

An agency may take or permit an action in emergency situations without preparing an environmental review (ARM 32.2.239). However, within 30 days following initiation of the action, the agency must notify the governor and the Legislative Environmental Quality Council (EQC) as to the need for the action and the impacts that resulted from the action (ARM 32.2.239). Given the duration and deliberative nature of the adoption process for the DOL's Order it is unlikely that the DOL Order would be considered an emergency action. In addition, the EQC did not receive any notification from the DOL that this was an emergency action.

CONCLUSION:

Based on this unfortunately lengthy but necessary legal analysis, the DOL's Order probably should have been subject to the MEPA review process.

cc: Senator Debby Barrett
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