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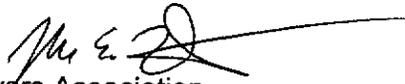
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Memorandum

To: Senator Keith Bales

From: John E. Bloomquist, on behalf of Montana Stockgrowers Association 

Re: SB 320 Fiscal Note/Assumption and Technical Notes of DEQ

Date: February 8, 2005

Senator Bales:

At your request I have reviewed the DEQ Fiscal Note for SB 320. The Assumptions and Technical Notes contain several errors.

Assumptions:

1. "Confined" vs. "Concentrated". This issue of terminology could be easily dealt with by an amendment.
2. The district court ruling only instructed DEQ to prepare a programmatic EIS, something DEQ has to date not done. Until the EIS was completed, DEQ was not to authorize any new CAFOs under the 2000 General Permit (emphasis added). The DEQ was not ordered to operate under individual permits until the EIS was completed as stated in this assumption. DEQ chose to go this route rather than prepare the EIS Judge Honzel ordered.
5. The district court order does not preclude DEQ from implementing a new fee or from the legislature directing the course of the program. The fees in SB 320 are not overridden by the court ruling as indicated in this assumption.
6. The legislature can set the fee for any program. This program and the fees will be codified under SB 320. Therefore 75-5-316 is inapplicable in regards to annual fees as the legislature is prescribing the terms of fee payment for the CAFO permit.
9. Under SB 320, DEQ may still require "small CAFOs" to obtain permit coverage. 40 CFR Part 412, which SB 320 adopts, incorporates the federal regulations set forth in 40 CFR 122.23 which contain the definitions for the federal program, including if and how "small CAFOs" may be regulated. See, 40 CFR 122.23(b)(9) and 122.23(c)(3).

Technical Notes:

1. The legislature is empowered to direct the level of environmental review of any program, in spite of any court order. In fact, the legislature could exempt certain actions from MEPA review.
2. DEQ does not need to prepare a programmatic EIS if the legislature directs the level of review for the CAFO general or an individual CAFO permit. If DEQ needs clarification then an amendment could be added. See, Amendment No. 4 below.
3. See, No. 9 above. 40 CFR, Part 412 incorporates 40 CFR 122.23. As such, DEQ may regulate small CAFOs if they fall under 122.23(b)(9) and 122.23(c)(3).
4. If DEQ wants the term "concentrated" used, it could be an amendment.
5. See, No. 3 above.
6. The definition of "medium" CAFO is from the federal rules at 40 CFR 122.23(b)(6).
7. The definitions in SB 320 are the same as 40 CFR 122.23 as 122.23 is incorporated in 40 CFR 412. As such, the technical note is erroneous.
8. 40 CFR 122.23 is incorporated in Part 412. The technical note is erroneous.
9. Same as No. 8.
10. The legislature may prescribe fees or fee schedules for any program.
11. If DEQ needs specific language that an EIS is not required that could be an amendment.

Suggested Amendments:

1. Change "Confined" to "Concentrated" throughout bill to address DEQ comment on terminology.
2. Page 3, line 11  
after: "department"  
strike: "develop"  
insert: "discovers"
3. Page 3, line 12  
after: "department"  
strike: "may"  
insert: "shall"
4. Page 3, line 21  
after: "assessment."  
insert: "An environmental impact statement is not required for authorizations issued by the department under the general permit pursuant to [section 2]."

Please feel free to share this Memorandum with other committee members, DEQ, or any interested party.