

Senate Bill 155  
January 22, 2013  
Presented by Becky Jakes Dockter  
Senate Fish and Game Committee

Mr. Chairman and members of the committee, I am Becky Jakes Dockter, Chief Legal Counsel for Montana Department of Fish, Wildlife and Parks (FWP). I rise today in opposition to SB 155.

Fish, Wildlife & Parks has completed a number of land acquisitions in recent years. Many have been broadly supported by the public; a few have generated controversy between constituents. I believe the impetus for SB 155 is in response to one or two recent controversial ones.

FWP has always used its environmental assessments (EAs) on proposed land acquisitions as the vehicle for providing the opportunity for extensive public input. Because land acquisitions by FWP are always "agency decisions that are of significant interest to the public," FWP is required by the public participation statutes to provide an opportunity for public participation and comment. See, MCA 2-3-103. This requirement must be and is met for EAs as well as EISs. In fact Montana's Constitution in Article II, Section 8 (Right of participation), demands nothing less. The public comment FWP provides is a 30-day public comment period, a hearing in the area of the land acquisition and an opportunity to submit written and emailed public comments.

FWP's EAs only differ from an EIS in the scope and depth of analysis and strict timelines for completing the analysis, but does not typically provide more public input opportunities than what FWP already provides. According to the Legislative Environmental Policy Office, Guide to MEPA: "The only substantive differences between an EA and EIS lie in the scope and depth of analysis. Although an EIS is more complex than an EA, the substantive requirements for both types of documents are similar." While the public input requirements for an EIS are in law, putting those requirements for an EIS for these land transactions into place would not provide more public input opportunities than FWP already allows, but would rather, require more bureaucracy on an already-complete analysis of depth and scope of the issues. Although not required, FWP already provides the same amount of public comment as the EIS requires.

With all due respect to Senator Vincent, the Department does not believe that adding additional required process will achieve the outcome that some may desire--a different decision. The Legislature has established in statute a decision-making process that has an inherent social and political component. The law places the responsibility for approving FWP's land acquisitions on a Governor-appointed FWP Commission, and with the Land Board, which is made up of the top five statewide elected officials. Just as legislators do on bills, FWP Commissioners and Land Board members must weigh a host of considerations into how they vote on each decision, including but not limited to programmatic goals, finances and funding sources, public comment, and social, economic and legal considerations. Without a doubt, political philosophy, social considerations and economic matters factor into this calculus.

FWP and all other state agencies already adhere to a legal standard for making the determination of when an agency's level of environmental review should be an environmental assessment, or EA, and when it should be an Environmental Impact Statement, or EIS. Section 2(8) of SB 155 makes this an arbitrary, one-size-fits-all decision that has no relationship to the geographic scope, context or anticipated impacts of the proposed project.

Under administrative rule an agency must conduct an EIS if the impacts from a project are deemed "significant," a term that is also defined in administrative rule. There are seven criteria for this determination which include severity, duration, extent and frequency of the impacts; the probability that they will occur; whether they are growth inducing or inhibiting; the quantity and quality of the resources affected and potential conflicts with local, state or federal laws, requirements or formal plans.

One of the legally required components of an EA is to determine whether the impacts of a project are significant, and if so, FWP must conduct an EIS. To my knowledge, every EA on an FWP land acquisition has complied with this requirement, and, as Chief Legal Counsel, I have reviewed most of them. Further, the determination on whether or not to conduct an EIS is the easiest, most common and most successful basis for a lawsuit – and FWP has never been challenged successfully in court on this issue. There currently is litigation over a land acquisition the Department was involved in, and the Department's determination to conduct an EA is not one of the things being challenged. I can only assume that reflects the Department does the appropriate level of environmental review.

SB 155 singles out FWP land acquisitions as the only action by any state agency that automatically requires an EIS, even when it is not necessary or required to improve the decision making process, which is the intent of MEPA.

Mr. Chairman and members of the committee, we know there is frustration among some about FWP land acquisitions, but we do not believe that adding additional and unneeded process will somehow lead to less frustration as the law allows the Commission and Land Board the land acquisition decision-making authority that more process will not counteract.

Thank you for the opportunity to testify today and I urge a "Do Not Pass" for SB 155.