



**Montana Legislative Services Division**  
**Legislative Environmental Policy Office**

CALL (406) 444-3030

June 1, 2004

Representative Debby Barrett  
17600 MT Highway 324  
Dillon, MT 59725-9657

Dear Representative Barrett:

You have requested a legal opinion on the following issue:

**Does the Department of Fish, Wildlife, and Parks (DFWP) Management Plan and Conservation Strategies for Sage Grouse in Montana Environmental Assessment meet the legal requirements of the Montana Environmental Policy Act (MEPA) and DFWP's MEPA administrative rules?**

Short Answer: No.

Legal Analysis:

MEPA's statutory and administrative rules require the following:

1. that an EA include "a finding of the need for an EIS and, if appropriate, an explanation of the reasons for preparing the EA. If an EIS is not required, the EA must describe the reasons the EA is an appropriate level of analysis" (ARM 12.2.431 and ARM 12.2.432(3)(j));
2. that state governmental actions that "may impact the human environment are evaluated for regulatory restrictions on private property", including "whether alternatives that reduce, minimize, or eliminate the regulation of private property rights have been analyzed" (75-1-201(1)(b)(iii), MCA, and 75-1-201(1)(b)(iv)(D), MCA). The alternative analysis required under 75-1-201(1)(b)(iv)(D), MCA, is not required if proposed action does not involve the regulation of private property rights (75-1-201(1)(b)(iv)(D), MCA).
3. that an EA include an evaluation of the impacts, including cumulative and secondary impacts, on the physical environment and human population in the area to be affected by the proposed action (ARM 12.2.432(3)(d) & (3)(e));
4. that an EA include a description and analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably available and

prudent to consider and a discussion of how the alternative would be implemented (ARM 12.2.432(3)(f));

5. that an EA include "a listing and appropriate evaluation of mitigation, stipulations, and other controls enforceable by the agency or another government agency" (ARM 12.2.432(3)(g)).

Unfortunately, the EA does not meet the requirements listed above. I will individually analyze each requirement and discuss the EA's deficiencies as well as the potential remedies to those deficiencies. My overall recommendation is that the DFWP issue a revised EA and send that revised EA out for a 30-day public comment period.

1. *That an EA include "a finding of the need for an EIS and, if appropriate, an explanation of the reasons for preparing the EA. If an EIS is not required, the EA must describe the reasons the EA is an appropriate level of analysis" (ARM 12.2.431 and ARM 12.2.432(3)(j)).*

*Deficiency:* The EA does not include any discussion of the need for an EIS or why the EA was the appropriate level of environmental review. There is no analysis in the EA as to whether any of the impacts associated with the proposed action are significant or not.

*Remedy:* In order to remedy this deficiency, DFWP would need to include a section in the EA dedicated to determining whether an EIS is needed and, if not, why the EA is the appropriate level of analysis. This would include a discussion of whether the impacts associated with the proposed action are significant or not using the significance criteria in ARM 12.2.431.

2. *That state governmental actions that "may impact the human environment are evaluated for regulatory restrictions on private property", including "whether alternatives that reduce, minimize, or eliminate the regulation of private property rights have been analyzed" (75-1-201(1)(b)(iii), MCA, and 75-1-201(1)(b)(iv)(D), MCA). The alternative analysis required under 75-1-201(1)(b)(iv)(D), MCA, is not required if proposed action does not involve the regulation of private property rights (75-1-201(1)(b)(iv)(D), MCA).*

*Deficiency:* The EA does not include any evaluation of regulatory restrictions on private property. If the proposed action and alternatives do not trigger regulatory restrictions, then the EA should state that this type of analysis is not applicable and discuss the rationale for why it is not applicable.

*Remedy:* Include a section in the EA that either evaluates regulatory restrictions on private property or states the rationale for why a regulatory restriction analysis

is not triggered by the proposed action or alternatives.

3. *That an EA include an evaluation of the impacts, including cumulative and secondary impacts, on the physical environment and human population in the area to be affected by the proposed action (ARM 12.2.432(3)(d) & (3)(e)).*

*Deficiency:* The EA does not include any evaluation of secondary and cumulative impacts on the physical environment and human population.

*Remedy:* Provide an analysis of secondary and cumulative impacts that meets the requirements of ARM 12.2.431 and ARM 12.2.432(3)(d) & (3)(e).

4. *That an EA include a description and analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably available and prudent to consider and a discussion of how the alternative would be implemented (ARM 12.2.432(3)(f)).*

*Deficiency:* Although the EA analyzes three alternatives, two of which include potential hunting limits on sage grouse, it specifically does not analyze the alternative of closing sage grouse hunting. The alternative of closing the hunting season on sage grouse is “reasonably available and prudent to consider” for the following reasons:

⇒ DFWP is required to manage sage grouse in a manner that prevents the need for listing under the Endangered Species Act of 1973 (ESA) and assists in the maintenance or recovery of sage grouse (87-1-201, MCA). This authority includes closing hunting for sage grouse pursuant to 87-1-304(1)(a)(ii), MCA.

⇒ The U.S. Fish and Wildlife Service is contemplating listing sage grouse under the ESA. Sage grouse populations are declining to such an extent that ESA protections may be instituted.

⇒ It is acknowledged in the Management Plan and the EA that DFWP does not have enough information to accurately estimate the abundance, density, and distribution of sage grouse in Montana. Two of the alternatives in the EA would institute a process to gather that information. However, between 1997 and 2001, the statewide hunting harvest of sage grouse averaged 6,800 birds a year. Given that the statewide sage grouse population is unknown, it is therefore unknown whether hunting is significantly impacting long-term sage grouse populations or not. Because of this uncertainty, it is reasonable to analyze a readily available and enforceable management alternative of closing the hunting season on

sage grouse in conjunction with habitat management strategies.

*Remedy:* Include closing sage grouse hunting in a separate alternative in the EA or include closing sage grouse hunting in one of the existing EA alternatives.

5. *That an EA include "a listing and appropriate evaluation of mitigation, stipulations, and other controls enforceable by the agency or another government agency" (ARM 12.2.432(3)(g)).*

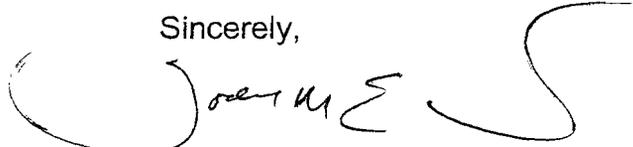
*Deficiency:* The EA does not list mitigation or stipulations nor does it evaluate any mitigation measures, stipulations, or other controls enforceable by DFWP or another governmental agency.

*Remedy:* If there are no mitigation measures, stipulations, or other controls, then the EA should state that there are none; otherwise, the EA should list and evaluate them.

In researching this memorandum, I have contacted DFWP and made it aware of the issues associated with this EA. The DFWP has committed to issuing a revised EA to correct the deficiencies that have been identified.

If you have any questions, do not hesitate to contact me.

Sincerely,



Todd M. Everts

cc: Jeff Hagener, Director of the Department of Fish, Wildlife, and Parks

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