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## BY ELECTRONIC AND OVERNIGHT MAIL

Bison Quarantine EA  
Montana Fish, Wildlife, and Parks  
PO Box 200701  
Helena, MT 59620-0701

To Whom it May Concern:

On behalf of the 8 million members and supporters of The Humane Society of the United States (HSUS), I submit the following comments in response to the scoping notice for phases II and III of the bison quarantine feasibility study.

The HSUS remains unalterably opposed to the bison quarantine feasibility study and the potential use of a quarantine process, as proposed, in the long-term management of Yellowstone bison. Removing sero-negative bison calves – animals whom the agencies could release back into the wild under the terms of the Interagency Bison Management Plan (IBMP) – and forcing them to endure a drawn out quarantine process with no guarantee that any will survive and a questionable fate for those who do, is unacceptable. If the agencies – as they should – reevaluate and revamp their proposal by eliminating quarantine and, instead, establishing an experimental treatment program whereby seropositive bison – animals whom are sent to slaughter under the terms of the plan – are treated for exposure to Brucella abortus with the intent of developing a “cure” and returning all “cured” bison to Yellowstone National Park, such a plan, though perhaps not without objectionable components, would reflect a profound change in management strategy whereby protection, not persecution, of bison becomes the underlying motivation. Such a treatment option would also reflect a non-traditional, non-cattle management, an “out of the box” idea that, frankly, has largely been absent from the over 20-year debate over Yellowstone bison management.

While the agencies involved in implementing the Interagency Bison Management Plan (IBMP) attempt to whitewash the significance of this project by claiming that it may benefit individual bison (by saving bison who otherwise would go to slaughter) and bison as a species (by potentially providing “disease-free” bison for bison population restoration and conservation projects) the

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reality is that the agencies are attempting to ascertain if quarantine is another tool to use to exploit, harass, degrade, and domesticate Yellowstone's majestic bison. This so-called study along with the myriad of other tools being used by the agencies to persecute Yellowstone's bison (i.e., a proposed hunt; capture, test, and slaughter; shooting) are all in response to the perceived threat -- a threat that has been significantly exaggerated and magnified by livestock industry interests -- of bison transmitting Brucella abortus to domestic cattle when, in fact, there has never been a documented case of such transmission occurring under natural conditions and even though all of the evidence, as the agencies concede, demonstrates that the risk of transmission -- even among pregnant bison (the only animals who could theoretically transmit the bacterium) -- is extraordinarily low.

In implementing Phase I of the feasibility study, the agencies -- primarily the Montana Fish, Wildlife, and Parks (MFWP) and the United States Department of Agriculture/Animal and Plant Health Inspection Service (USDA/APHIS) -- have abused the Montana Environmental Policy Act (MEPA) and National Environmental Policy Act (NEPA) processes. Specifically, as delineated in the November 24, 2004 comments of The Fund for Animals and The HSUS (Attachment 1), the agencies have: 1) relied on the 2000 Environmental Impact Statement on the IBMP as providing justification for the establishment of a quarantine program when said EIS failed to fully evaluate the merits, justification, precedent-setting impacts, and full-range of environmental impacts of quarantine on bison and other wildlife; 2) failed to subject the Phase I study proposal and foreseeable future actions to an appropriate level of environmental impact analysis in an EIS; 3) improperly segmented the analysis of the Phase I portion of the study from impacts inherent to Phase II, Phase III, and the implementation of a permanent quarantine program; and, 4) failed to prepare a supplement to the 2000 EIS evaluating all of the significant changes to Yellowstone bison management that have been implemented and/or will be implemented that collectively have substantially altered the environmental impacts of bison management. The current scoping notice demonstrates that the agencies continue to erroneously believe that their actions are consistent with MEPA/NEPA.

Notwithstanding the broader concerns about the agencies failure to properly evaluate the environmental impacts of quarantine and other changes in bison management strategies in a legally sufficient environmental document, the decisions relevant to the quarantine feasibility study itself also are troubling, illogical, and in violation of state and federal law. Specifically, as evidenced by the MFWP's decision notice on Phase I of the feasibility study, the agencies: 1) can't decide who (MFWP or USDA/APHIS) is the lead agency on this project preferring to alternate leads as needed to comply with relevant state/federal laws; and, 2) have prematurely initiated scoping on Phases II and III of the feasibility study despite having only recently started Phase I of the study. This comment letter will discuss both of these concerns as well as identify issues that the agencies must consider in any future environmental analysis of the environmental impacts of Phases II and III of the feasibility study.

While the sufficiency of such an analysis as a stand-alone document cannot be assessed at the present time, for reasons previously identified, the agencies will continue to operate in violation of MEPA/NEPA until and unless they fully evaluate all impacts relevant to bison

quarantine and other recent changes in bison management strategies (i.e., a proposed hunt, the use of the florescence polarization assay, new scientific evidence on the diversity and uniqueness of the genetics of Yellowstone bison, ongoing cattle occupation of Royal Teton Ranch lands, failure of agencies to implement adaptive management policy) in a legally sufficient EIS. To address these broader deficiencies, the agencies must begin by terminating Phase I of the feasibility study and return any bison currently maintained in the quarantine facility to Yellowstone National Park thereby creating a clean slate prior to initiating a comprehensive evaluation of quarantine in the context of a more substantive analysis of all relevant and recent changes and modifications to bison management practices and policies.

The remainder of this comment letter will address specific concerns associated with Phases II and III of the feasibility study in light of the decision made on Phase I of the study and will delineate specific issues that the agencies must consider in their future environmental impact analysis.

1. The agencies have failed to make clear who is the lead agency in regard to the planning and implementation of the bison quarantine feasibility study:

The Decision Notice on Phase I of the proposed research was signed by a MDFWP representative and was based on an Environmental Assessment prepared by the MFWP pursuant to the MEPA. In the DN, the MFWP claims that it has the "authority to conduct research projects for the purpose of improving wildlife management" pursuant to the MFWP's powers and duties as defined in 87-1-201 M.C.A. (DN at 31). In response to an allegation – made by The Fund/The HSUS in their November 24, 2004 comments on the Preliminary Environmental Assessment on the Feasibility Study of Bison Quarantine – Phase I -- that the study could not be implemented because the MDFWP was not a registered research facility under the terms of the Animal Welfare Act and that it had failed to comply with other provisions of the AWA, the DN claims that the USDA/APHIS is the lead agency for the feasibility study. Specifically, the DN claims that: 1) "the research facility is not managed by MFWP and is currently leased by USDA/APHIS so is registered with the Secretary;" 2) "USDA/APHIS is the lead agency with primary authority and responsibility for the research facility including the oversight of the research by a USDA Institutional Animal Care and use Committee...;" 3) "USDA/APHIS is the primary agency governing the animal welfare act. MFWP's role will be to support this research cooperatively by providing transportation, technical counsel, manpower, equipment, and funding;" and, 4) "MFWP does not propose to manage, control or lease the research facility but proposed to cooperate with USDA/APHIS as stated in the EA." DN at 19. The MFWP neglected to include any of these facts in its original EA thereby purposefully deceiving the public to believe that it was the lead agency when, in fact, that role fell to the USDA/APHIS. Despite the incontrovertible evidence that the USDA/APHIS is the lead agency in this "study," in regard to NEPA compliance, the USDA/APHIS "determined that its decision to participate in the feasibility research is categorically excluded from environmental review under NEPA..." DN at 23. The agencies cannot have it both ways. They cannot choose who will be the lead agency depending on whim and/or on whatever law may be in question.

Considering the role of the USDA/APHIS in the project – it is leasing the facility, it is the lead agency with primary authority and responsibility for the research facility, it is the primary agency governing the AWA, and that MFWP is participating in the project in a support role only – the USDA/APHIS is clearly the lead agency. As such, it, not the MFWP is responsible for performing the required environmental compliance pursuant to NEPA, not MEPA. While NEPA and MEPA are similar in content, they are not identical. Moreover, the USDA/APHIS has never made a determination that the EA prepared on Phase I of the feasibility study by the MFWP fully met the legal requirements of NEPA and/or determined that the EA satisfied the USDA/APHIS environmental compliance responsibilities. Indeed, as previously stated, the USDA/APHIS erroneously concluded that its “participation” in the study was categorically excluded from NEPA review. This game of deception has not only allowed the agencies to engage in environmental review pursuant to MEPA instead of NEPA but, in so doing, the agencies have, perhaps purposefully, impacted the potential legal claims against the plan and, in particular, the venue in which such legal claims could be pursued.

As it is now clear that the USDA/APHIS is the lead agency for the feasibility study, the original EA – prepared pursuant to MEPA – must be withdrawn, the bison currently in the quarantine facility must be returned to Yellowstone National Park, and, if the agencies desire to continue to pursue quarantine, they must prepare an EA or, preferably, an EIS pursuant to NEPA.

2. The initiation of scoping and preparation of an environmental analysis on Phases II and III of the feasibility study is premature:

The decision to proceed with scoping on Phases II and III of the feasibility study is blatantly premature considering that Phase I of the study has only recently been initiated and is nowhere near completion. Again, the DN on Phase I of the “study” makes it clear that Phases II and III of the “study” are not to begin and/or are not to be subject to environmental impact review until the results of Phase I of the study are known. Phase I of the study involves capturing and retaining up to 200 sero-negative bison calves, dividing these calves into control and test groups, holding these calves for one year in the quarantine facility, and periodically testing all calves to screen for brucellosis. As of April 11<sup>th</sup>, the agencies had captured and retained fewer than 12 bison calves in quarantine and Phase I of the study still has nearly a year to go before being complete. Despite these facts, the agencies are proceeding with their environmental impact analysis of Phases II and III providing additional evidence that this entire process is a makework exercise since the agencies have already predetermined the outcome of the process.

Statements in the DN provide ample evidence that the agencies are acting prematurely in soliciting scoping comments and initiating preparation of environmental compliance documents on Phases II and III of the feasibility study. For example, the agencies claim that:

- “A decision to proceed to Phase II is contingent upon a successful outcome during Phase I.” DN at 20.
- “There are no decisions regarding Phase I that will obligate MFWP to move forward

with Phase II or III.” Id.

- “The EA explains that a decision to proceed with the next research step depends on success in Phase I and results of the impact analysis associated with a decision to conduct Phase II and III.” DN at 21.
- “The environmental compliance produced to evaluate a scientific method for a research project is hypothesis driven and meaningful environmental reviews for Phase II and Phase III are dependent upon the results of hypotheses tested during Phase I.” Id.
- “It is essential that data from Phase I of this study be considered in the analysis of the environmental effects of future actions.” DN at 23.

Though the agencies claim that they must await the results of Phase I of the “study” before making decisions about Phases II and III, their actions demonstrate that they have already decided to proceed with Phases II and III even though no meaningful data have been collected in Phase I and despite the fact that Phase I will not be completed until late winter/early spring of 2006. Such actions serve only to prove that the agencies have already predetermined the outcome of the process and now are simply attempting to comply with the relevant laws to achieve this desired outcome. Such actions are squarely in violation of both MEPA and NEPA.

While soliciting scoping comments on Phases II and III may not be inconsistent with the law, such comments would be far more meaningful if some data from Phase I of the study had been collected and disclosed to the public for their consideration in assessing the value of, and need for, Phases II and III. Should the agencies proceed with the preparation and publication of a draft environmental document on Phases II and III of the feasibility study without first completing Phase I then they will be clearly violating the law and acting in a manner inconsistent with their own statements and assertions.

3. Relevant issues and concerns that must be addressed in any subsequent environmental impact analysis prepared on Phases II and III of the feasibility study:

Notwithstanding the claims, as previously articulated, that the agencies must prepare an EIS evaluating all changes and modifications to bison management strategies, including the proposed quarantine option, to be in compliance with federal law, the following list identifies specific issues and concerns that must be addressed in whatever environmental compliance document is prepared on Phases II and III of the feasibility study. Such an analysis, for reasons previously given and as argued in Attachment 1, must be in the form of an EIS as an EA does not provide a sufficient level of impact analysis for such a controversial project.

- Identify and discuss how the proposed Phase II breeding and maintenance facility within the Dome Mountain Wildlife Management Area will impact other wildlife, wildlife migratory routes, public recreational activities in the area, and the aesthetic beauty of the area;
- Provide specific details as to the location of the Phase II facility, its dimensions, how it will be constructed, how it will be operated, and how bison will be transported from the

Phase I to the Phase II facility;

- Assess the ecological impact of the Phase II facility on the soil permeability, soil stability, soil compaction, soil productivity, potential for erosion, hydrology, vegetation, riparian areas, non-target wildlife species, threatened and endangered species (floral and faunal, state and federal), and how bison manure will be collected and discarded;
- Identify the source of bison bulls to be used for breeding and discuss the impact of their removal from their source populations;
- Identify how many bison, pregnant or non-pregnant, will be killed for experimental purposes during Phase II of the feasibility study;
- Provide specific details on how bison mating will be “carefully monitored” and “constructed to maximize genetic diversity in the quarantine population;” (Scoping Notice at 1)
- Describe the specific testing procedures to be used to assess pregnancy status and engage in periodic sampling of bison held in the Phase II facility;
- Provide analysis of how a bison quarantine operation in concert with other bison management activities could or will reduce the prevalence of or eliminate entirely Brucella abortus in Yellowstone bison considering the existing prevalence of the bacteria in feedground and non-feedground elk in the Greater Yellowstone Ecosystem;
- Provide a detailed cost/benefit analysis to weigh the direct and indirect financial costs of operating the Phase II facility against the alleged benefits of the quarantine process and the prospect of creating “disease-free” bison;
- Provide a detailed assessment of the alleged risk of Brucella abortus transmission from bison to cattle under natural conditions to assist the public in determining if continuing with the quarantine feasibility study is justified;
- Evaluate a range of reasonable alternatives including terminating the feasibility study and returning all quarantined bison to Yellowstone National Park, continuing the feasibility study with the intent of returning any bison who ultimately get through the process back to Yellowstone National Park, and terminating the current feasibility study in favor of developing and implementing a sero-positive bison treatment plan in an attempt to “cure” bison who would otherwise go to slaughter of any evidence of Brucella abortus exposure or infection;
- Provide a detailed description of the location of the Phase III facility, how it will be constructed, its operating procedures, its dimensions, and how bison will be transported from the Phase II to the Phase III facility;
- Identify and discuss how the proposed Phase III calving and maintenance facility will impact other wildlife, wildlife migratory routes, public recreational activities in the area, and the aesthetic beauty of the area;
- Assess the ecological impact of the Phase III facility on the soil permeability, soil stability, soil compaction, soil productivity, potential for erosion, hydrology, vegetation, riparian areas, non-target wildlife species, threatened and endangered species (floral and faunal, state and federal), and how bison manure will be collected and discarded;
- Identify how many pregnant bison, bison with calves, and/or calves will be killed for

- experimental purposes during the course of the Phase III portion of the feasibility study;
- Describe the specific testing procedures to be used on pregnant bison, bison with calves, and calves in the Phase III facility;
  - Provide a detailed cost/benefit analysis to weigh the direct and indirect financial costs of operating the Phase III facility against the alleged benefits of the quarantine process and the prospect of creating “disease-free” bison;
  - Attach the study proposal or proposals for any and all Phases of the feasibility study to the environmental document;
  - Provide specific examples of other wildlife species subject to living in quarantine for several years that have been restored to the wild, of animals held in captivity being successfully released back into the wild, (See DN at 11), and of wildlife held in the public trust being made available to private parties for unknown uses;
  - Provide a detailed analysis of where any bison who survive all three Phases of the feasibility study could be sent, what terms, if any, would be required of those receiving bison, whether tribal organizations who raise bison for the commercial meat industry and/or to provide hunting opportunities for a fee would be eligible to receive any bison, whether commercial bison ranchers could acquire any bison, whether bison would be available to zoos, menageries, canned hunting operations, game farms, or other establishments that are engaged in for-profit activities, and/or whether private parties would be eligible to receive bison regardless of their intended use for the bison;
  - Provide a detailed discussion of why the agencies do not believe – if it is their position – that the preparation of a supplemental EIS evaluating all changes, modifications, and/or new information/evidence relevant to Yellowstone bison management is not warranted or legally required at this time;
  - Provide a detailed explanation for why, should the agencies elect to prepare an EA on the impacts of Phases II and III of the feasibility study, an EIS is not necessary.

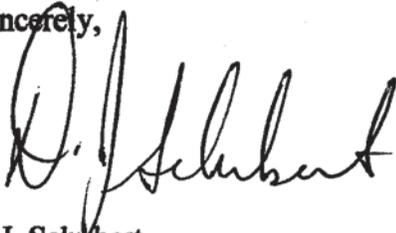
## **CONCLUSION:**

The HSUS remains opposed to the use of quarantine as a management tool for bison and, therefore, believes that the entire quarantine feasibility study is unnecessary and wasteful. It is astonishing that after 20 years of significant debate over the management of Yellowstone bison, the agencies are unable to remove themselves from the cattle mindset and refuse to consider the best available scientific evidence when developing and implementing bison management practices and policies. Bison are not cattle, they must not be managed like cattle, and they should not be managed by livestock agencies. Yellowstone’s bison are held in the public trust to be managed in a manner consistent with the interests of the public, not the livestock industry. The agencies refuse to acknowledge that the overwhelming preponderance of the scientific evidence demonstrates that the risk of Brucella abortus transmission from bison to cattle is limited to only pregnant bison and, even then, is so low as to be immeasurable. Nor are the agencies apparently capable of thinking outside the box – continuing to use cattle techniques and tools in their management, handling, and treatment of Yellowstone’s bison.

The recently initiated feasibility study is violates NEPA and MEPA. Continuing to tier environmental reviews of the feasibility study to the 2000 EIS is illegal as the 2000 EIS only authorized the agencies to send captured, sero-negative bison to quarantine but did not actually evaluate the merits of, justification for, or precedent-setting nature of quarantine. Furthermore, not only have the agencies failed to subject the "study" to the proper level of environmental review, but they haven't even properly identified the lead agency and/or performed the environmental impact analysis pursuant to the correct law (NEPA versus MEPA). Furthermore, their rush in completing the environmental analysis for Phases II and III when Phase I is in its infancy, demonstrates that the entire decision-making and impact assessment process is a sham and that the agencies already know precisely what the outcome will be during each step in the process. More broadly, the agencies have ignored the indisputable legal requirement that they must engage in a supplemental impact analysis for the entire bison management plan given the significant changes and new information that have occurred and/or come to light since the original EIS and Record of Decision were completed in 2000. Until and unless the agencies engage in such an analysis, they will be continuing to operate and act in violation of federal law.

Thank you in advance for considering these comments.

Sincerely,



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November 24, 2004

BY ELECTRONIC AND OVERNIGHT MAIL

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Dr. Jack Rhyan  
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Dear Drs. Aune and Rhyan:

On behalf of the combined nationwide membership of The Fund for Animals (The Fund) and The Humane Society of the United States (The HSUS), I submit the following comments on the Preliminary Environmental Assessment on the Feasibility Study of Bison Quarantine – Phase I (hereafter referred to as the “PEA”).

The Fund and The HSUS are unalterably opposed to the proposed action because it is an unnecessary and wasteful expenditure of tax payer dollars, establishes a new precedent in the management of “publicly-owned” wildlife, is illegal under both state and federal statutes, regulations, policies, and is inconsistent with the terms of the Interim Bison Management Plan. We support Alternative 1 – the no-action alternative.

The Montana Department of Fish, Wildlife, and Parks (MDFWP) and the United States Department of Agriculture/Animal and Plant Health Inspection Service (APHIS) characterize the proposal as “research” and use that distinction in an attempt to avoid fully complying with all relevant laws including the National Environmental Policy Act and the Animal Welfare Act. Regardless of whether the proposed project constitutes legitimate “research,” it indisputably represents the initiation of a Yellowstone bison

ATTACHMENT 1

an objective analysis of the best available scientific evidence including a comprehensive analysis of transmission risk, and admit that bison are not domestic cattle and that the pathology and epidemiology of brucellosis is different in bison than cattle, the better off the agencies, the advocates, the public, and the bison will be.

The remainder of this letter will focus on specific deficiencies in the PEA and discuss other legal and scientific inadequacies inherent in the proposed project.

1. The proposed “research” project violates the Animal Welfare Act.

The Animal Welfare Act (AWA) is the primary federal law governing the use of animals in research, entertainment, and whose use affects interstate commerce. 7 U.S.C. §2131 et seq. In promulgating the AWA, Congress held that “it is essential to regulate ... the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organization engaged in using them for research or experimental purposes...” *Id.* at §2131. Furthermore, Congress declared that one purpose of the AWA is “to insure that animals intended for use in research facilities ... are provided humane care and treatment.” *Id.*

The term “research facility” is defined to mean “any school, institution, or organization, or person that uses or intends to use live animals in research, tests, or experiments, and that (1) purchases or transports live animals in commerce, or (2) receives funds under a grant, award, loan, or contract from a department, agency, or instrumentality of the United States for the purpose of carrying out research, tests, or experiments.” 7 U.S.C. §2132(e) and 9 C.F.R. §1.1.<sup>2</sup> A “federal research facility” refers to “each department, agency, or instrumentality of the United States which uses live animals for research or experimentation.” *Id.* at §2132(o) and 9 C.F.R. §1.1.

The AWA requires that “every research facility ... shall register with the Secretary...” *Id.* at §2136. Furthermore, each “research facility” must establish a committee (referred to as an Institutional Animal Care and Use Committee) that oversees and evaluates research done at the “research facility.” *Id.* at §2143(b). The specific requirements of the committee, including its composition and duties, are detailed at 7 U.S.C. §2143(b) and 9 C.F.R. §2.31 et seq. Some of these requirements include conducting inspections of the “research facility,” reviewing practices intended to minimize pain and suffering of animals used in research, preparing a report detailing all violations of animal care standards and deviations from approved research protocols, *id.* at §2143(3)(A)(B) and (4)(A)(ii), review the research facility’s program for humane care and use of animals, 9 C.F.R. §2.31(c)(1), and otherwise review activities proposed by the research facility. *Id.* at §2.31(d). A “federal research facility” must also establish a “Federal Committee” having the same composition and responsibilities as committees established by “research facilities.”

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<sup>2</sup> The Secretary can exempt any school, institution, organization, or person that does not intend to use live dogs or cats for research purposes, but such an exemption can only be done by regulation (7 U.S.C. 2132(e)) which would require compliance with the provisions of the Administrative Procedures Act, including providing for public notice and comment.

such actions are clearly limited in context and intensity” as activities that can be categorically excluded from NEPA review. 7 C.F.R. §1b.3. The USDA wrongly relies on this provision to categorically exclude the proposed project from NEPA review. See November 9 memorandum (Attachment 5) at 3.

First the provision does not include research involving the quarantine of free-ranging wildlife over which the USDA has no legal authority. The Animal Health Protection Act, for example, when considered in its entirety, can only be interpreted to apply to domestic livestock since those animals are under human control. The frequent reference to “interstate commerce” and “conveyances” clearly demonstrate the inapplicability of the AHPA to free-ranging wildlife. USDA regulations and policies, namely the Uniform Methods and Rules for Brucellosis Eradication, are also not applicable to free-ranging wildlife (See Parker Land and Cattle Co., v. United States, 796 F. Supp. 477 (D.Wyo. 1992), “The UMR was intended to apply only to domestic livestock and cannot be extended to cover wildlife,” and “The regulations contained in Title 9 of the code of Federal Regulations also do not apply to wildlife as it would not be physically possible to regulate wildlife in accordance with these directives.”).<sup>3</sup> Second, this provision can only be used to justify a categorical exclusion if the action is “clearly limited in context and intensity.” As explained below, the impacts of the proposed project will be significant in regard to their intensity.

The USDA then asserts that NEPA implementing regulations promulgated by APHIS also justify the categorical exclusion of the proposed action. Specifically, the USDA cites to the following categories of action as normally categorically excluded from NEPA review (See November 9 memorandum (Attachment 5) at 3 and 7 C.F.R. §372.5 (c)(1)(2) and (4)):

- A. Routine measures such as identification, inspections, surveys, sampling..., testing, seizures, quarantines and monitoring ...;
- B. Activities that are carried out in laboratories, facilities, or other areas designed to eliminate the potential for harmful environmental effects;
- C. Rehabilitation of existing laboratories and other APHIS facilities...

While the rehabilitation of existing laboratories may legally be grounds for the use of a categorical exclusion, this project is far more than simply repairing and building fences and other equipment at the Brogan research facility. Consequently, while the proposed repairs may be categorically excluded from NEPA review, the remaining components of the proposed project cannot be excluded from review.

First, since the USDA has no statutory or regulatory authority over free-ranging wildlife, including Yellowstone bison, its list of actions categorically excluded from NEPA review cannot be applied to wildlife. In other words, while the USDA’s

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<sup>3</sup> While the UM&R was amended in the late 1990s to add a section authorizing the development of quarantine facilities for Yellowstone bison, this amendment to the UM&R – a document which clearly constitutes a rule and not a policy – was never subject to the rulemaking requirements of the Administrative Procedures Act and, therefore, is illegal.

proposed "research" is to determine if this "untried" methodology, strategy, or technique would be a viable option for the future management of Yellowstone bison. Consequently, there can be no question that APHIS's own regulations require that an EIS be prepared in this case.

Even if an EIS is not required in this case, an EA clearly is. APHIS regulations specify that EAs represent the proper level of review for actions related to a discrete program component, limited in scope, occurring at a particular site, involving a specific species, where the individuals and systems that may be affected can be identified. 7 C.F.R. §372.5(b). For EAs, methodologies, strategies, and techniques are seldom new or untested and alternative means of dealing with the issue are available. *Id.* In particular, actions that involve the "development of program plans that seek to adopt strategies, methods, and techniques as the means of dealing with particular animal and plant health risks that may arise in the future" must be subject to evaluation in an EA. *Id.* at 372.5(b)(1)(i). Again, at a minimum, the proposed project clearly qualifies for an analysis in an EA since its entire purpose is to identify strategies, methods, and techniques to deal with an alleged animal health risk that is, at least in the opinion of the USDA, some state veterinarians, and the livestock industry, is an issue now and in the future.

While an EA should clearly be prepared in this case, the proper level of environmental review, as made clear in APHIS regulations and federal regulations implementing NEPA, is an EIS. Under the federal regulations, the significance of the impacts of an action refers to both the context in which the action takes place and the severity of the impacts. 40 C.F.R. §1508.27(a) and (b). The regulations identify 10 different intensity factors that federal agencies must evaluate when considering what level of environmental review is appropriate for a particular action. In this case, the proposed project clearly satisfies 8 of the 10 factors as specified below.

First, the impacts of the action may be both beneficial and adverse. 40 C.F.R. §1508.27(b)(1). The USDA would suggest the impacts are beneficial if the "research" is successful and leads to the implementation of a formal quarantine facility for bison. The Fund and The HSUS, however, believe that the proposed project poses adverse impacts to bison because it will result in removing free-ranging bison from the Yellowstone ecosystem, subjecting them to a year or more of confinement and testing, eventually resulting in their slaughter, and potentially opening the door to the initiation of a long-term quarantine project with significant adverse impacts to bison, wildlife in general, and the public.

Second, the proposed project may affect public health or safety (40 C.F.R. §1508.27(b)(2), if the bison calves do seroconvert potentially exposing researchers to the bacterium and/or if other diseases become established in the population due to their high density confinement that may be transmissible to the public and/or free-ranging wildlife. Even the PEA indicates that the proposed action, if implemented, will create a human health hazard or potential hazard. PEA at 25.

of regulatory impacts on private property rights, disclosure of any irreversible and irretrievable commitments of resources, a summary of the beneficial aspects of the project including the economic advantages and disadvantages of the proposal. See MCA §75-1-201 et seq. MEPA, like NEPA, also authorizes the use of categorical exclusions. The MDFWP has adopted regulations implementing MEPA. See ARM §12.2.428 et seq. These rules are very similar to the federal rules implementing NEPA.

The proposed action is clearly inconsistent with the terms of MEPA because: 1) the MDFWP has failed to justify the need for the proposed action; 2) has failed to consider a reasonable range of alternatives; and 3) has failed to evaluate the full range of potential impacts. Moreover, under the MDFWP MEPA implementing regulations, an EIS is clearly required to properly evaluate the full range of impacts inherent to the proposed action.

1) The MDFWP has failed to justify the need for the proposed action:

Though not at all clear in the PEA, it appears the MDFWP attempts to justify the proposed action based on the presumption that bison “may” transmit Brucella abortus to cattle, that such transmission will have a significant adverse effect on Montana livestock operators, that the internal population pressures from a growing bison population must be relieved, and based on a need to develop quarantine protocols. For these alleged needs to be legitimate, the MDFWP must provide evidence demonstrating, among other things, that there is a genuine risk of bacteria transmission from bison to domestic cattle, that such a transmission event will have a significant adverse effect on Montana livestock operators, that there are internal bison population pressures that must be relieved and that quarantine is a legitimate means of providing such relief, and that quarantine protocols are needed. The MDFWP has failed to provide any of this evidence.

The reality is, as all of the agencies involved in this issue admit, the risk of Brucella abortus transmission from bison to cattle under natural conditions is remote, at best, and that such an incident of transmission has never been documented. Moreover, as the agencies are well aware, even if a transmission risk was real, only pregnant female bison pose any theoretical risk yet the agencies routinely slaughter bison bulls, calves, yearlings, and non-pregnant females. Despite this overwhelming evidence, the agencies have never prepared a comprehensive risk assessment perhaps because the results would demonstrate that the ongoing slaughter of bison is without justification.

Similarly, while the Yellowstone bison population is likely larger than what would exist if the NPS truly complied with its natural regulation mandate (by, for example, prohibiting the packing/grooming of snowmobile roads/routes/trails), the MDFWP has presented no evidence that the current population size is in excess of the carrying capacity of the Yellowstone ecosystem. Perhaps it is and

- 3) The MDFWP has failed to evaluate the full range of environmental impacts inherent to the proposed project:

The analysis of the environmental impacts of any proposed action represents the heart of the evaluation. Without full disclosure of all relevant impacts – as is the case here – both the agency and the public cannot possibly appreciate, evaluate, or otherwise understand the implications of the proposal and/or the significance of the decision to be made. While the MDFWP's analysis is inadequate in several ways, there are three primary deficiencies related to the evaluation of the environmental impacts of the action:

- A. The MDFWP failed to provide any analysis of the economic impact of the proposal or prepare a cost/benefit analysis of the action. This project, whether limited to Phase I or extended to implement other phases, will cost a significant amount of money but will provide very little benefit in return. The public and decisionmakers deserve to understand the economic impact and implications of the proposal.
- B. The MDFWP failed to evaluate the potential for non-brucellosis diseases issues among the captive bison. The fact that the bison will be kept in a confined space at a density far higher than that found naturally leads to a greater potential for the outbreak of a disease (not brucellosis) that may pose a risk to the facility researchers, the public, to domestic animals in the area, and to free-ranging wildlife. The MDFWP must evaluate the potential for a disease outbreak, identify the potential diseases in question, evaluate the risk of the disease threat to all parties, and identify the contingency measures it intends to use to mitigate or minimize this threat.
- C. The MDFWP has illegally segmented the proposed action into separate parts to avoid preparing a more comprehensive EIS to provide a more detailed evaluation of the proposal's impacts. The claim that future study phases may or may not proceed depending on the outcome of Phase I is not a legitimate justification for failing to evaluate all impacts in a single document. The MDFWP must assume that the full study will be implemented, with or without modifications, and evaluate all impacts now instead of in a piecemeal fashion. If the segmentation of an action into multiple parts were permissible under MEPA or NEPA, every agency, state and federal, would constantly fragment every action into unique parts to avoid having to consider the full range of impacts in a single document. To correct this deficiency, the MDFWP has a single option which is to rescind the current PEA and begin anew on a comprehensive EIS evaluating the full range of impacts associated with all phases of the study.

Finally, while the foregoing evidence demonstrates that the PEA is woefully inadequate, the MDFWP MEPA implementing regulations make it clear that an EIS must be prepared in this case. Specifically, those regulations (ARM §12.2.431(1), identify a

Second, APHIS and the MDFWP cannot initiate this proposed "research" without approval from the National Park Service, U.S. Forest Service, and the Montana Department of Livestock. The federal ROD makes it clear that captured bison can only be used for research if said research has been jointly approved. Federal ROD at 27. There is no evidence presented in the PEA that any of the other agencies involved in the development and implementation of the IBMP have approved the proposed "research."

Third, sero-negative bison calves captured outside the western boundary of the park cannot be "removed for jointly approved research" until after May 15 and only if they cannot be hazed back into the park. The Federal ROD clearly states that "after May 15, bison in the West Yellowstone boundary area that cannot be hazed back into the park will be captured and tested (with) seropositives ... sent to slaughter and seronegatives sent to quarantine, if available, and, if not available ... sent to slaughter or be removed for jointly approved research." Federal ROD at 27.

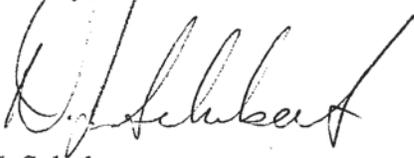
The MDFWP clearly did not consider these logistical issues when preparing the PEA. A new analysis is clearly required not only to more comprehensively evaluate the environmental impacts of the proposed action, but to provide detailed information about when and how bison calves can be removed to be used in the alleged "research."

#### CONCLUSION:

As the foregoing evidence reveals, this proposal cannot go forward as written. The MDFWP cannot participate in this "research" (or any federally funded wildlife research for that matter) without violating the Animal Welfare Act. APHIS cannot proceed with the proposed "research" without complying with the NEPA by preparing an EIS or, at a minimum, an EA since its categorical exclusion is clearly illegal. Even if the MDFWP could legally participate in this research effort, its MEPA analysis is woefully inadequate and does not provide the level of analysis required for a project of this nature. An EIS is clearly required. Finally, even if the agencies were not faced with multiple legal hurdles, they must ensure that the logistics of the proposed project are consistent with the terms of the IBMP and RODs.

Thank you in advance for considering these comments.

Sincerely,



D.J. Schubert  
Wildlife Biologist