

**Council Senate Members**  
TOM BECK - CHAIRMAN  
B.F. "CHRIS" CHRISTIAENS  
VICKI COCCHIARELLA  
MACK COLE  
STEVE DOHERTY  
FRED THOMAS



**Council House Members**  
KIM GILLAN - VICE  
CHAIRMAN  
GEORGE GOLIE  
DANIEL MCGEE  
DOUG MOOD  
BRAD NEWMAN  
MARK NOENNIG

**Executive Director**  
LOIS MENZIES

**Legislative Environmental Analyst**  
TODD EVERTS

Montana Legislative  
Services Division  
Legislative Environmental Policy Office  
PO BOX 201704  
Helena, Montana 59620-1704  
(406) 444-3742  
FAX (406) 444-3971

**Resource Policy Analysts**  
KRISTA LEE EVANS  
LARRY MITCHELL  
MARY VANDENBOSCH

**Staff Assistant**  
MAUREEN THEISEN

July 24, 2002

Representative Debby Barrett  
17600 MT Highway 324  
Dillon, MT 59725

Dear Representative Barrett:

You have requested a legal opinion on generally what agency actions are subject to MEPA review and specifically whether certain actions taken by the Department of Fish, Wildlife, and Parks (DFWP) triggered provisions of the Montana Environmental Policy Act (MEPA). Before I begin this analysis, a couple of qualifiers are necessary. 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. Second, this legal opinion does not reflect any opinion or action on the part of the Environmental Quality Council. So much for the qualifiers, let the analysis begin.

1. **QUESTION:** Generally, what state agency actions are subject to MEPA review? Specifically, would the DFWP trigger the provisions of MEPA when:
- ⇒ DFWP entered into three Memorandums of Understanding (MOUs) on sage grouse conservation;
  - ⇒ DFWP developed a sage grouse management plan; and
  - ⇒ DFWP promulgated river distribution of recreation use rules for the Big Hole/Beaverhead Rivers?

## **2. ANALYSIS:**

### **(a) *STATE ACTIONS SUBJECT TO MEPA REVIEW:***

A state action is subject to MEPA review if:

- ⇒ **Step #1:** the action is defined as an "action" under MEPA and the agency's MEPA administrative rules;
- ⇒ **Step #2:** the action is not exempt or excluded from MEPA review; and
- ⇒ **Step #3:** the action may impact the human environment.

#### **Step #1**

MEPA and an agency's MEPA administrative rules do not require that the action taken by the agency be significant before MEPA's environmental review process is legally triggered. The degree and intensity of impacts determine the type of environmental review that should be conducted. However, the degree and/or intensity of the potential impact is irrelevant in determining whether an environmental review must be conducted.

The term "action" as defined by the MEPA Model Agency Rules (also in DFWP administrative rules) is very broad. If an agency 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.

#### **Step #2**

Almost any agency activity fits the broad definition of action. However, a MEPA review is not required for all agency actions. The following categories of actions under an agency's administrative rules do not require any review under MEPA:

- ⇒ 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 agency exercises no discretion and only acts upon a given set of facts in a prescribed manner, e.g., a decision by the DFWP to issue a fishing license);
- ⇒ 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.

In addition, there are specific actions that have been statutorily exempted by the Legislature from MEPA review. Those actions include:

- ⇒ Public Service Commission actions;
- ⇒ legislation;
- ⇒ certain emergency timber sale situations (fire, fungus, insect, parasite, blowdown, etc.) or time-dependent access situations involving timber. The Department of Natural Resources and Conservation (DNRC) is exempt from MEPA review to the extent that DNRC's compliance with MEPA is precluded by limited time.
- ⇒ 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);
- ⇒ the transfer of permits for portable emission sources;
- ⇒ a qualified exemption for reciprocal access agreements on state land. 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.

- ⇒ 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.
- ⇒ DNRC's issuance of lease renewals;
- ⇒ 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.
- ⇒ actions taken by DNRC and the Board of Land Commissioners, including preparing plans or proposals in relation to and in compliance with certain local government actions.

### **Step #3**

If an agency action is defined as an action and is neither exempt or excluded, the final question in the analysis is whether the action impacts the human environment. The human environment encompasses the biological, physical, social, economic, cultural, and aesthetic factors that interrelate to form the environment. Obviously, this is a very broad definition and almost any action taken by a state agency would likely (but not always) have an impact on the human environment.

#### **(b) *SPECIFIC DFWP ACTIONS***

You have requested that I analyze whether the following actions taken by DFWP would be subject to MEPA review:

- ⇒ Did DFWP trigger the MEPA review process when it entered into two Memorandums of Understanding (MOUs) on sage grouse conservation as a signatory and one MOU on sage grouse conservation as an association member but not a direct signatory?
- ⇒ Does the development by DFWP of a conservation plan for sage grouse trigger the MEPA review process?
- ⇒ Does agency rulemaking in general trigger the MEPA review process? Specifically, in adopting the Big Hole/Beaverhead Rivers distribution of recreation use rules, did DFWP trigger the MEPA review process?

**(i) Did DFWP trigger the MEPA review process when it entered into two Memorandums of Understanding (MOUs) on sage grouse conservation as a signatory and one MOU on sage grouse conservation as an association member but not a direct signatory?**

Some historical background is necessary here. In 1995, DFWP entered into an MOU (1995 MOU) among members of the Western Association of Fish and Wildlife Agencies (WAFWA) for the purpose of providing guidance for conservation and management of sage grouse and sagebrush. The signatories of the 1995 MOU agreed that cooperative efforts are necessary to collect and analyze data on sage grouse and their habitat. The 1995 MOU also provided for suggested actions to be taken including data collection, preparation of conservation plans, and development of cooperative partnerships. The 1995 MOU also directed that the signatories had responsibilities to collect data within the constraints of each signatory's budget and to work cooperatively to maintain and enhance sage grouse and their habitats.

In 1999, DFWP entered into a second MOU (1999 MOU) among members of WAFWA for a purpose very similar to that of the 1995 MOU, which was to provide guidance for conservation and management of sage grouse and sagebrush within fiscal realities of member agencies. The 1999 MOU sets out objectives to maintain and increase, where possible, the present distribution of sage grouse, maintain and increase, where possible, the present abundance of sage grouse, develop strategies using cooperative partnerships, conduct management experiments, and collect and analyze population and habitat data. The 1999 MOU sets out specific actions that signatories should take to sustain and enhance the distribution of sage grouse through responsible collective management programs. Those actions include general collection of data, continuation of development of conservation plans based on a local working group concept, validation of habitat evaluation models, completion of genetic analyses, development of cooperative partnerships, and support and implementation of revised sage grouse population and habitat management guidelines. The 1999 MOU also directed that the signatories had responsibilities to collect data within the constraints of each signatory's budget and to work cooperatively to maintain and enhance sage grouse and their habitats.

In 2000, WAFWA, of which DFWP is a member, entered into an MOU (2000 MOU) with the U.S. Department of Agriculture, Forest Service; the U.S. Department of Interior, Bureau of Land Management; and the U.S. Department of Interior, Fish and Wildlife Service. DFWP was not an actual signatory to this MOU, and it is not clear that all of the necessary federal government signatories have signed the MOU. The 2000 MOU sets out many of the same objectives and actions that are in the 1995 and 1999 MOUs. In addition, the 2000 MOU requires that states will convene working groups and develop state or local conservation plans for sage grouse. The 2000 MOU also states that each state conservation plan will provide recommendations to protect and improve important

sage grouse sagebrush habitats, to actively manage to improve degraded sagebrush ecosystems, to reduce fragmentation and isolation of sagebrush habitats, to address nonhabitat issues, and for desired population levels, distribution, and habitat conditions.

An MOU is generally a signed agreement that agencies enter into in order to achieve some common goal or objective. There are binding MOUs and nonbinding MOUs. Generally, an MOU is legally binding (i.e., creates an obligation on the part of an agency to do something) if the signatories to the MOU provide some type of consideration (money or some other value) in exchange for signing or being bound by the MOU. If there is no consideration, then generally the MOU is not binding on the agency. The critical question in this MEPA analysis is whether the 1995, 1999, and 2000 MOUs were binding on DFWP or merely nonbinding statements of mutual cooperation. After reviewing the 1995 and 1999 MOUs, it is not clear to me that any value or consideration was exchanged among the signatories. The 1995 and 1999 MOUs seem to be nonbinding statements of unified cooperation.

The 2000 MOU is much more specific in mapping out actions that will be taken by the signatories, including the requirement that states "will" develop state or local conservation plans, specifying the makeup of working groups, and specifying that the working groups developing these plans will convene within 60 days of the effective date of the agreement. The 2000 MOU is also very specific on directing each state conservation plan to provide recommendations on certain subjects related to sage grouse and sagebrush conservation. Again, it is not entirely clear that any consideration was exchanged in the 2000 MOU. An argument could be made that the federal agencies did agree to provide for habitat protection, conservation, and restoration as appropriate and, in doing so, agreed to consider the WAFWA Guidelines for Management of Sage Grouse Populations and Habitats, State and Local Conservation Plans, and other appropriate information in each of the federal agencies' planning processes. There is some value for Montana in having its voice heard in the federal agency planning processes for sage grouse conservation. But again, it is not clear what value or consideration WAFWA has given in exchange to the federal agencies.

In addition, the 2000 MOU does state that the MOU is neither a fiscal nor a funds obligation document. It also states that "any party to this MOU may withdraw with a 60-day written notice". As I have noted previously, DFWP is not a formal signatory to the 2000 MOU, but WAFWA (of which DFWP is a member) was the formal signatory on the MOU. Also, the 2000 MOU may not have been signed by all of the necessary signatories. When it is all said and done, the 2000 MOU does not seem to be a binding document on DFWP.

So if the MOUs are potentially not binding on DFWP, then how does that play out in determining whether DFWP triggered the MEPA review process or not when entering

into the MOUs? An MOU entered into by DFWP is clearly a "project, program, or activity directly undertaken" by the DFWP and thus constitutes an action under DFWP's MEPA rules (ARM 12.2.429(1)). The action of entering into an MOU is not exempted from MEPA review pursuant to ARM 12.2.430(5)(b) through (5)(f) nor is entering into an MOU listed as being categorically excluded from MEPA review pursuant to ARM 12.2.454. In order for the DFWP to categorically exclude the action of entering into an MOU, it must do so through administrative rulemaking (which is subject to MEPA review) or through programmatic environmental review. To my knowledge, the DFWP has not undertaken either activity with respect to entering into MOUs.

Many of the actions set out in the two MOUs that are targeted toward investigation and data collection are exempt from MEPA review under 12.2.430(5)(d). However, the MOUs also direct the agencies to develop a sage grouse conservation plan and set action items for those plans such as maintaining and improving sage grouse populations and habitat and reducing fragmentation and isolation of sagebrush habitats. Those objectives and actions are not activities that would be exempted or excluded from MEPA review.

The real and interesting question is whether DFWP, by entering into 1995, 1999, and 2000 MOUs, is taking an action that may have some impact on the human environment. If the MOUs are nonbinding and do not commit DFWP to any specific action, but only identify a potential problem and possible approaches to addressing the problem of regional sage grouse population decline, then there would be no impact on the human environment. The subsequent conservation plan developed by DFWP (if any) and the implementation of that plan would be actions that may impact the human environment, not necessarily the MOUs (see analysis below). However, if the MOUs are binding documents on DFWP, the very act of committing to do a plan as opposed to not doing a plan may have an impact on the human environment. Also by agreeing to objectives and actions in the MOUs that direct that specific activities take place within the conservation plan, and by extension, on the ground, the action of entering into the MOUs could be construed as an action that "may" impact the biological, physical, social, economic, cultural, and aesthetic factors that form the human environment and thus trigger the MEPA review process.

It is my conclusion that MEPA review is not triggered if the MOUs are not legally binding and enforceable on DFWP. If DFWP is bound by the MOUs and DFWP has committed within the MOUs to specific objectives and actions regarding sage grouse conservation and management, then the MEPA review process would be triggered. Finally, no one has suggested, nor does a review of the facts imply, that entering into MOUs constituted an emergency action under MEPA.

**(ii) Does the development by DFWP of a conservation plan for sage grouse trigger the MEPA review process?**

The short answer to this question is "yes". A plan is a "project, program, or activity directly undertaken" by the DFWP and therefore constitutes an action under DFWP's MEPA rules (ARM 12.2.429(1)). Development of a plan is not exempted from MEPA review under ARM 12.2.430(5)(b) through (5)(f) nor is development of a plan listed as being categorically excluded from MEPA review pursuant to ARM 12.2.454. If the sage grouse conservation plan sets specific policy objectives and actions that must be taken when implementing the plan on the ground, the plan impacts the human environment. Most (if not all) of the plans that I have reviewed have set policy objectives and actions that an agency must take when implementing the plan. There could be multiple and competing objectives and actions that the agency could adopt in developing a sage grouse conservation plan. The emphasis behind MEPA is that agencies evaluate different objectives and actions (alternatives) and the impacts associated with those different objectives and actions so that the agency and the public are informed of the consequences of the actions to be taken. DFWP has conducted MEPA reviews on species management plans in the past (i.e., Management of Black Bears in Montana and the Management of Mountain Lion in Montana). In reviewing the draft Montana Sage Grouse Conservation Plan document, there are a variety objectives and actions that dictate how management activities are to be carried out on the ground. In conclusion, development of a sage grouse conservation plan is an action that is subject to MEPA review.

**(iii) Does agency rulemaking in general trigger the MEPA review process? Specifically, in adopting the Big Hole/Beaverhead Rivers distribution of recreation use rules, did DFWP trigger the MEPA review process?**

Generally, it has been my legal opinion over the years that agency rulemaking triggers the MEPA review process. I will not repeat the analysis here that is set out in (ii) and (iii) as to why rulemaking is an action subject to MEPA review. Some agencies have sporadically conducted MEPA review on certain rulemaking processes, but for the most part, agencies do not prepare a MEPA review on the promulgation of new administrative rules. The general argument that agencies have raised is that the Montana Administrative Procedure Act (MAPA) process is functionally equivalent to the MEPA review process and, therefore, the agency does not need to conduct a formal MEPA review.

As to the question of whether DFWP triggered the MEPA review process in adopting the Big Hole/Beaverhead Rivers distribution of recreation use rules, the short answer is "maybe". The Big Hole/Beaverhead rulemaking process constitutes an action as defined under the DFWP MEPA rules (ARM 12.2.429(1)). One of the threshold questions is whether the adoption of the distribution of recreation use rules are exempt



from MEPA review because it is an action that is "primarily social or economic in nature", and does not "otherwise affect the human environment" (ARM 12.2.430(5)(f)). The Big Hole/Beaverhead rules exclude outfitters from operating any boats for commercial purposes on either river on Saturdays from the third Saturday in May through Labor Day. The restriction of outfitter use 1-day a week definitely has social and economic impacts and is targeted toward reducing recreational conflict on the rivers. But does this 1-day-a-week restriction "otherwise affect the human environment"? Arguments can be made both ways--limitation of outfitter use either would or would not have an impact on the physical, biological, or aesthetic factors that make up the human environment. It is my conclusion that there are equally legitimate legal arguments that can be made that the Big Hole/Beaverhead rules are either exempt or not exempt from MEPA review.

If it was determined that the Big Hole/Beaverhead rules were not exempt from MEPA review, an argument could be made that the process that DFWP undertook was functionally equivalent to the MEPA process. DFWP did not go through the MAPA process in adopting the Big Hole/Beaverhead rules, but DFWP did conduct an extensive public participation process. In order for the DFWP Big Hole/Beaverhead rulemaking process to be legally and functionally sufficient under MEPA, the process must meet the following requirements:

1. ensure that the agency uses the natural and social sciences and the environmental design arts in planning and decisionmaking;
2. assist in the evaluation of reasonable alternatives and the development of conditions, stipulations, or modifications to be made a part of the proposed action;
3. determine the need to prepare an EIS through an initial evaluation and determination of the significance of impacts associated with a proposed action;
4. ensure the fullest appropriate opportunity for public review and comment on proposed actions, including alternatives and planned mitigation, where the residual impacts do not warrant the preparation of an EIS (ARM 12.2.430(2)(a) through (2)(d)). (See also 12.2.430(3)(b).)

In addition to the above requirements, MEPA has been amended since the promulgation of these rules to include the evaluation of regulatory impacts on private property.

After reviewing the records of the rulemaking process that DFWP went through, the process was insufficient in meeting requirements 2 and 3 above. In addition, it was not

Rep. Barrett  
July 24, 2002  
Page 10

clear from the records that I reviewed, that an evaluation of regulatory impacts on private property was conducted nor was an evaluation of any alternatives to reduce the impacts on private property rights conducted. It is my conclusion that the Big Hole/Beaverhead rulemaking process that DFWP undertook was not functionally equivalent to the MEPA process.

I hope this answers your questions. If you have any further questions don't hesitate to contact me at (406) 444-3747.

Sincerely,

Todd Everts  
Legal Staff, LEPO/LSD

cc: Council Members  
Krista Evans  
Larry Mitchell  
Jeff Hagener

CI2255 2205teea.