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Energy and Telecommunications Interim Committee

59th Montana Legislature

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May 11, 2006

TO: Energy and Telecommunications Interim Committee
FROM: Todd Everts, ETIC Legal Staff
RE: Requested Staff Legal Opinion

At the April 21, 2006, Energy and Telecommunications Interim Committee (ETIC) meeting, the Committee voted to request a legal opinion from committee legal staff as to whether the Board of Environmental Review's (BER) proposed administrative rulemaking on mercury emissions is subject to the environmental review provisions of the Montana Environmental Policy Act (MEPA) (75-1-101, MCA, et seq.).

Before I begin this analysis, a couple of qualifiers are necessary here. 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 or board. Second, this legal opinion does not reflect any opinion or action on the part of the ETIC. So much for the qualifiers, let the analysis begin.

QUESTION: Is the BER's proposed administrative rulemaking process regarding the regulation of mercury emissions for coal-fired electric utility steam generating units (EGUs) subject to the MEPA review process?¹

SHORT ANSWER: Yes

LEGAL ANALYSIS:

The confluence of BER's statutory and regulatory authority, MEPA statutory requirements, the BER's administrative rules implementing MEPA, MEPA case law, provisions of the Montana

¹ The term "MEPA review", as used throughout this legal opinion, means any environmental assessment, environmental impact statement, or other written analysis required under MEPA by a state agency of a proposed action to determine, examine, or document the effects and impacts of the proposed action on the quality of the human and physical environment as required under MEPA (see 75-1-220(4), MCA).

constitution, and to some extent federal case law dictates whether the BER's mercury emission rulemaking process is subject to MEPA review.

BER Authority

Pursuant to 2-15-3502, MCA, the BER is a statutorily created quasi-judicial board that is administratively attached to the Department of Environmental Quality (DEQ). The BER has various duties under a variety of environmental regulatory statutes, including rulemaking authority to enact substantive rules under Montana's air quality laws in order to establish limits on emissions of air pollutants from any air pollutant source necessary to prevent, abate, or control air pollution (75-2-111, 75-2-203, and 75-2-204, MCA).

The action at issue here, according to the BER's notice of proposed rulemaking, is that "mercury emissions from coal-fired electric utility steam generating units (EGUs), i.e., coal-fired power plants, pose a threat to human health and safety and the environment, and the Board is proposing to regulate those emissions in the proposed amendments and new rule" (Attachment #1: MAR Notice No. 17-246). The BER's administrative rulemaking process is governed by the Montana Administrative Procedure Act (MAPA), which provides a formal process (including timeframes, public hearings, and public comment) for adoption and publication of rules (2-4-101, MCA, et seq.).

MEPA Statutory Directives

The articulated legislative intent of MEPA is as follows:

The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Montana Environmental Policy Act. The Montana Environmental Policy Act is procedural, and it is the legislature's intent that the requirements of [MEPA] provide for the adequate review of state actions in order to ensure that environmental attributes are fully considered (75-1-102(1), MCA).

The expressed purpose of MEPA is to:

declare a state policy that will encourage productive and enjoyable harmony between humans and their environment, to protect the right to use and enjoy private property free of undue government regulation, to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans, to enrich the understanding of the ecological systems and natural resources important to the state . . . (75-1-102(2), MCA).

Part of MEPA's policy declaration states that:

it is the continuing policy of the state of Montana, in cooperation with the federal government, local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which humans and nature can coexist in productive harmony, to recognize the right to use and enjoy private property free of undue government regulation, and to fulfill the social, economic, and other requirements of present and future generations of Montanans (75-1-103, MCA).

MEPA also states that the "policies and goals set forth in [MEPA] are supplementary to those set forth in existing authorizations of all boards, commissions, and agencies of the state" (75-1-105, MCA).

The pertinent action-forcing mechanisms of MEPA require that all agencies of the state, except the legislature and the Public Service Commission (PSC), shall:

- ⇒ to the fullest extent possible, use a systematic, interdisciplinary approach that will ensure:
 - ✓ the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking that may have an impact on the human environment (75-1-201(1)(b)(i)(A), MCA); and
 - ✓ that in any environmental review that is not subject to environmental impact statement requirements, any alternative analysis must comply with the alternative analysis requirements statutorily provided (75-1-201(1)(b)(i)(B), MCA);
- ⇒ identify and develop methods and procedures that will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking, along with economic and technical considerations (75-1-201(1)(b)(ii), MCA);
- ⇒ identify and develop methods and procedures that will ensure that state government actions that may impact the human environment are evaluated for regulatory restrictions on private property (75-1-201(1)(b)(iii), MCA); and
- ⇒ include in each recommendation or report on proposals for projects, programs, and other major actions of state government significantly affecting the quality of the human environment a detailed statement (75-1-201(1)(b)(iv), MCA).

BER MEPA Administrative Rules

In order to implement MEPA's statutory requirements, a number of state agencies have adopted MEPA administrative rules. The BER has, through administrative rule, incorporated by reference the DEQ's MEPA administrative rules in ARM Title 17, chapter 4 (ARM 17.4.102). The BER MEPA rules provide detailed legal requirements on what constitutes a BER action that is subject to MEPA review.

MEPA Case Law

Over MEPA's 35-year history, provisions of MEPA have been litigated and resolved in 31 cases before the Montana courts. When Montana courts review MEPA issues, the courts first look to the laws and regulations governing the MEPA process. See *North Fork Preservation Ass'n v. Dept. of State Lands*, 238 Mont. 451 (1989), and *Ravalli Co. Fish and Game Ass'n, Inc. v. Dept. of State Lands*, 273 Mont. 371 (1995). The Montana courts, without fail, also look to previous MEPA case law for direction. The Montana courts have also found it appropriate, because MEPA is modeled after the National Environmental Policy Act (NEPA), to look to federal case law for guidance. See *Kadillak v. Anaconda Co.*, 184 Mont. 127, 137 (1979); *Montana Wilderness Ass'n v. Board of Natural Resources and Conservation*, 200 Mont. 11 (1982); *North Fork Preservation Ass'n v. Dept. of State Lands*, 238 Mont. 451 (1989); *Ravalli Co. Fish and Game Ass'n, Inc. v. Dept. of State Lands*, 273 Mont. 371 (1995); and *Montana Environmental Information Center v. Dept. of Transportation*, 2000 MT 5, 298 Mont. 1 (2000).

Montana Constitutional Considerations

“The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Montana Environmental Policy Act” (75-1-102(1), MCA). This statement in MEPA by the legislature is important for two reasons:

1. It provides a constitutional backdrop to MEPA as a statutory mechanism to assist the legislature in fulfilling its constitutional obligations to:
 - ⇒ administer and enforce the constitutional duty that the state and each person maintain and improve a clean and healthful environment (Article IX, section 1(1) and (2), of the Montana constitution);
 - ⇒ provide "adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources" (Article IX, section 1(3), of the Montana constitution);
 - ⇒ protect Montanans' inalienable rights, including "the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways" (Article II, section 3, of the Montana constitution).
2. MEPA, unlike NEPA, was enacted to assist the Montana legislature and state agencies in meeting specific Montana constitutional obligations.

It should also be noted that the Clean Air Act of Montana (CAAM), from which the BER derives its authority to promulgate the proposed mercury air emission rules, states the following:

The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution has enacted the Clean Air Act of Montana. It is the legislature's intent that the requirements of [CAAM] provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources (75-2-102(1), MCA).

Four-Step Analysis

Having provided the overarching legal context in which to address the question raised by ETIC, there are four specific statutory and administrative legal requirements that are dispositive regarding MEPA review and the BER mercury emission rulemaking process. The BER's proposed mercury emission administrative rulemaking process is an action that is subject to MEPA review if the:

- ⇒ **Step #1:** BER is an agency of state government that is not statutorily exempted from MEPA;
- ⇒ **Step #2:** action being taken by BER is defined as an "action" under the BER's MEPA administrative rules;
- ⇒ **Step #3:** action is not exempt or excluded from MEPA review; and

- ⇒ **Step #4:** BER's proposed mercury emission rulemaking process is not likely to be functionally equivalent to the MEPA review process.

Step #1 *Is BER an agency of state government that exempted from MEPA?*

Legal Conclusion: No

The BER is an agency of state government that is subject to the provisions of MEPA. The only state agencies that are statutorily exempted from MEPA are the legislature and the Public Service Commission.

An argument could be made that because the federal Clean Air Act exempts the Environmental Protection Agency (EPA) from environmental impact statement (EIS) requirements under NEPA, the BER should be exempt from MEPA environmental review when promulgating rules under the Clean Air Act of Montana (see 15 U.S.C.A. sec. 793(c)(1)). This argument is problematic because:

1. The federal exemption seems to apply only to EPA's requirement under NEPA to prepare an EIS. It does not seem to exempt EPA from conducting an environmental assessment (EA) under NEPA.
2. MEPA is a state act, implemented by state agencies on state actions.
3. There are a number of significant differences between the requirements of NEPA and MEPA.
4. MEPA, unlike NEPA, was enacted to assist the Montana legislature and state agencies in meeting Montana's environmental and inalienable rights constitutional obligations.
5. The BER is a state board that has adopted its own MEPA administrative rules specifically to implement the provisions of the Act (ARM 17.4.102).
6. The BER previously has used the MEPA review process to evaluate a BER administrative rulemaking process involving air quality rules (Attachment #2: BER EA).

Step #2 *Is the BER's proposal to adopt mercury emission administrative rules defined as an "action" under BER's MEPA administrative rules?*

Legal Conclusion: Yes

The term "action" as defined by the BER administrative rules is very broad. If a BER 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 (ARM 17.4.603).

BER's proposal to adopt mercury emission administrative rules is an "activity directly undertaken" by BER and therefore is clearly an "action" as defined under the BER MEPA rules.

An argument can be made that state agencies, in adopting the MEPA administrative rules in 1989, patterned the rules after the federal NEPA rules and that the MEPA rules defining the term "action" do not contain the term "rulemaking" that is found in the federal NEPA rules. The inference here is that the state agencies consciously omitted "rulemaking" from the definition of the term action and therefore rulemaking is not an action under MEPA. I don't find this argument persuasive for two reasons:

1. The Montana legislature has, throughout MEPA's 35-year history, exempted a number of state activities from MEPA review (see specific exemptions below). The Montana legislature has not exempted state agency administrative rulemaking.
2. The BER has used the MEPA review process to evaluate its own administrative rulemaking process involving air quality rules previously (Attachment #2: BER EA). This is an acknowledgment or admission based on prior BER conduct that an air quality MAPA administrative rulemaking process was an action under MEPA and the BER's MEPA rules that was subject to MEPA review in the form of an EA.

Step #3 Is the BER's action exempt or excluded from MEPA review?

Legal Conclusion: No

Almost any BER activity fits the broad definition of "action" under the BER MEPA administrative rules. However, a MEPA review is not required for all BER actions. There are specific actions that have been statutorily or administratively exempted or excluded from MEPA review. The legislature has statutorily exempted the following actions from MEPA review:

- ⇒ 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) (82-4-342, MCA).
- ⇒ The transfer of permits for portable emission sources (75-2-211(5), MCA).
- ⇒ A qualified exemption for reciprocal access agreements on state land. The Department of Natural Resources and Conservation (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 (77-1-617, MCA).
- ⇒ 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 (75-1-201(1)(d), MCA).

- ⇒ Issuance of a historic right of way deed (77-1-130, MCA).
- ⇒ Issuance of any lease or license by the DNRC and the Board of Land Commissioners that expressly states that the lease or license is subject to further permitting under any of the provisions of Title 75 or 82, MCA (77-1-121(2), MCA).
- ⇒ DNRC 's issuance of lease renewals (77-1-121(3), MCA).
- ⇒ 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 (77-1-121(3), MCA).
- ⇒ DNRC or Board of Land Commissioner actions, including preparing plans or proposals, in relation to and in compliance with the following local government actions:
 - (a) development or adoption of a growth policy or a neighborhood plan pursuant to Title 76, chapter 1, MCA;
 - (b) development or adoption of zoning regulations;
 - (c) review of a proposed subdivision pursuant to Title 76, chapter 3, MCA;
 - (d) actions related to annexation;
 - (e) development or adoption of plans or reports on extension of services; and
 - (f) other actions that are related to local planning (77-1-121(4), MCA).
- ⇒ Certain emergency timber sale situations (fire, fungus, insect, parasite, blowdown, etc.) or time-dependent access situations involving timber. DNRC is exempt from MEPA review to the extent that DNRC's compliance with MEPA is precluded by limited time (77-5-201, MCA).
- ⇒ Small business licenses under the Montana Small Business Licensing Coordination Act (30-16-103(3)(b), MCA).
- ⇒ The DEQ is prohibited from preparing an environmental review under 75-1-201, MCA, for a transfer of mine operating permits unless the department can show that the operation has caused or may cause significant impacts that have not been analyzed previously in an environmental review document prepared pursuant to 75-1-201 (82-4-250(4), MCA).

The BER's mercury emission administrative rulemaking activity does not fit under any of the above statutory exemptions.

In addition to the statutory exemptions, the BER's MEPA administrative rules do not require MEPA review for the following types of BER actions:

- ⇒ 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 BER exercises no discretion and only acts upon a given state of facts in a prescribed manner);
- ⇒ 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 (ARM 17.4.607(5)).

The BER's proposed mercury emission administrative rulemaking activity does not fit under any of the above exemptions or under the categorical exclusion. I will analyze the applicability of each of the exemptions and the exclusion.

ADMINISTRATIVE ACTIONS, ACTIONS INVOLVING MINOR REPAIRS, AND INVESTIGATIVE ACTIONS

The BER's proposed mercury emission rulemaking process is not a mundane administrative action involving routine clerical functions, nor does it constitute minor repairs or operation and maintenance of existing facilities. The BER mercury emission rules may involve some elements of investigation, enforcement, and data collection activities, but the primary objective of the proposed rules is to regulate mercury emissions from EGUs.

MINISTERIAL ACTIONS

The BER decision as to whether to adopt the proposed mercury emission rules, modify elements of the proposed rules, or reject the proposed rules involves substantial BER discretion and therefore does not constitute a ministerial action under ARM 17.4.607(5)(e). In the only Montana case to deal with the question of whether an agency action was ministerial or not, the Montana Supreme Court noted that in cases of renewal and assignment of state land grazing leases, permits, and licenses, if the renewal or assignment merely maintains the status quo and that there is no change in use or condition which significantly affects the quality of the human environment, then those actions are ministerial in nature and are not subject to MEPA review. See *Ravalli Co. Fish and Game Ass'n, Inc. v. Dept. of State Lands*, 273 Mont. 371 (1995). Obviously, the BER proposed rulemaking is quite different from a renewal or assignment of state grazing leases. The proposed BER mercury emission regulations do not maintain the "status quo". In fact, the proposed rules are, by their very nature, designed to upset the status quo by regulating an air pollutant (mercury) that has not been previously regulated. The proposed mercury emission rules could change current and future EGU mercury emission conditions, which could affect the quality of the human environment. So, even under the *Ravalli* test for ministerial actions, a very compelling argument can be made that the BER's action is not a ministerial action that is exempt from MEPA review.

ACTIONS THAT ARE PRIMARILY SOCIAL OR ECONOMIC AND THAT DO NOT OTHERWISE AFFECT THE HUMAN ENVIRONMENT

A BER action is exempt from MEPA review if the proposed rulemaking is primarily social or economic in nature and proposed rulemaking does not otherwise affect the human environment (ARM 17.4.607(5)(f)). The human environment encompasses the biological, physical, social, economic, cultural, and aesthetic factors that interrelate to form the environment (ARM 17.4.603(12)). Obviously, this is a very broad definition and almost any BER action taken would likely (but not always) have an impact on the human environment.

The BER's rulemaking is proposing to regulate an air pollutant (mercury) that has been previously unregulated. Specifically, the BER rules propose to establish:

- ⇒ who/what is subject to mercury emission regulations;
- ⇒ a specific mercury emission rate;

- ⇒ a timeline for compliance;
- ⇒ an alternative mercury emission limit;
- ⇒ a monitoring process; and
- ⇒ mercury allowance allocations under a cap and trade budget.

The justification for regulating mercury emissions from EGUs, according to the BER, is because mercury emissions "pose a threat to human health and safety and the environment" (Attachment #1: MAR Notice No. 17-246). This statement reflects the BER's own opinion that mercury emissions have an impact on the human environment, primarily in the areas of human health and safety and the physical and biological areas of the environment. Logically, if the BER's action is doing something to prevent or minimize impacts to certain aspects of the human environment, then by extension, the BER's action impacts the human environment.

The decision by the BER on who/what should or should not be regulated under the proposed mercury emission rules could impact the human environment in a variety of ways. The potential range of alternative mercury emission limits and allocations that the BER could impose may result in different types and levels of impacts on the human environment. The processes used to sequester and concentrate mercury may also have different impacts on the human environment. The impacts of the BER rulemaking process are not just social and economic in nature but could broadly impact the human environment, and therefore, the BER mercury emission rulemaking does not fall under this administrative exemption.

An argument can be made that because the proposed BER rules set mercury emission limits, the proposed rules do not authorize any specific physical action to take place and therefore there is no impact to the human environment. According to this line of argument, the air quality permitting process would authorize specific mercury emission limitation actions that are site-specific and are therefore subject to MEPA review. In addition to the reasons cited above, I find this argument problematic because:

1. The BER rulemaking process sets up an extensive programmatic framework in which a previously unregulated air pollutant (mercury) will now be regulated. The BER has the discretion in its rulemaking process to alter the proposed framework in which mercury will be regulated. This framework includes at its most basic level: who and what is regulated, how they are regulated, to what extent they are regulated, and when they are regulated. A decision on the part of the BER to alter any of these variables in the rulemaking process may result in different types and levels of impacts to the human environment. There is a direct causal link between the BER decisions regarding these rules and the potential impacts on the human environment. Although the rules may be just "paper", the words on that piece of paper shape future actions that have a direct physical impact on the human environment.
2. Whenever the BER is contemplating a series of BER-initiated actions, programs, or policies "which in part or in total may constitute a major state action significantly affecting the human environment, it shall prepare a programmatic review discussing the impacts of the series of actions" under MEPA (ARM 17.4.628(1)). Given the programmatic nature of the proposed BER mercury emission rules and the potential impacts that those rules may have on the human environment, a credible argument can be made that the BER is required to

conduct a programmatic review under MEPA. The BER previously has used the programmatic review process under MEPA to evaluate a BER administrative rulemaking process involving air quality rules (see Attachment #2: BER EA).

CATEGORICAL EXCLUSION

To my knowledge (and this has been confirmed by DEQ legal staff), the BER has not adopted a categorical exclusion either through a programmatic environmental review or administrative rulemaking that excludes any BER rulemaking activity from MEPA review.

Step #4 *Will the BER's mercury emission rulemaking process be functionally equivalent to the MEPA review process?*

Legal Conclusion: Probably Not

The BER formally published its proposed mercury emission rules on May 4, 2006 (Attachment #1: MAR Notice No. 17-246). I am making the assumption in this legal opinion that the BER will proceed through the rulemaking process as required by MAPA, that the BER will adhere to the procedures articulated in the proposed rule notice, and that the BER will not deviate from its normal and historical practices in promulgating and adopting these rules. I want to emphasize that I am in the uncomfortable position of making assumptions about a particular rulemaking activity that is in its adoption process infancy. I have to note here (as I have throughout this legal opinion) that the BER has previously used the MEPA review process to evaluate a BER administrative rulemaking process involving air quality rules (Attachment #2: BER EA). The decision on the part of the BER to conduct a MEPA review on that rulemaking activity could be construed to mean that the BER has impliedly or expressly acknowledged in the recent past that its air quality rulemaking process was not functionally equivalent to the MEPA review process.

In addition, the role that the BER plays as a quasi-judicial board is important contextually regarding the issue of functional equivalence. The BER can request information from various interest groups, the DEQ, and other agencies, but BER is dependent on "others" to provide that information. Testimony and written comments may or may not systematically address all of the issues associated with the BER's action. The BER is ultimately required to base its decision on the administrative record that is produced during the administrative rulemaking process (Attachment #1: MAR Notice No. 17-246, page 1124). This "information-receiving" role is much different than BER's "information-generating" role required under MEPA. MEPA requires the BER to proactively and systematically evaluate alternatives, impacts, and mitigation measures of a particular action. Under MEPA it is the BER's legal responsibility to produce the information itself and evaluate that information prior to making a decision. This fundamental difference between being a receiver of information as opposed to a generator of information makes it difficult to conclude that the BER's rulemaking process is functionally equivalent to the MEPA review process.

MEPA'S FUNCTIONAL EQUIVALENCE REQUIREMENTS

The BER's MEPA rules contemplate that the BER, instead of conducting a MEPA review in the form of an EA, can implement an interdisciplinary analysis and public review process that meets specific requirements (see ARM 17.4.607(3)(b)). In addition to BER's rulemaking requirements,

there are MEPA statutory requirements that have a bearing on whether the BER's proposed rulemaking process is functionally equivalent to the MEPA review process.

In order for the BER mercury emission rulemaking process to be legally and functionally equivalent to the MEPA review process, the rulemaking process must meet the following statutory and administrative rule requirements:

1. ensure that the BER uses a systematic, interdisciplinary approach that will ensure the integrated use of 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 BER action;
3. determine the need to prepare an EIS through an initial evaluation and determination of the significance of impacts associated with the BER-proposed action;
4. ensure the fullest appropriate opportunity for public review and comment on the BER-proposed action, including alternatives and planned mitigation, where the residual impacts do not warrant the preparation of an EIS; and
5. identify and develop methods and procedures that will ensure that BER actions that may impact the human environment are evaluated for regulatory restrictions on private property (see 75-1-201(1)(b)(i)-(iv), MCA, and ARM 12.2.430(2)(a)-(2)(d), (3)(b)).

If the BER follows its usual MAPA practices and adheres to the procedural requirements in its proposed rulemaking notice in adopting these rules, the process will likely be insufficient in meeting the requirements of 2, 3, and 5 above. A persuasive argument could be made that the BER's process would be functionally equivalent for requirements 1 and 4. I will analyze each requirement individually.

INTERDISCIPLINARY APPROACH

It is not totally clear whether the BER would use a systematic, interdisciplinary approach that would ensure the integrated use of the natural and social sciences and the environmental design arts in the BER-proposed rulemaking process. This is a factual determination. The Montana courts have not dealt with this issue. Some federal courts have interpreted this requirement to mean that federal agencies must consult with experts and other agencies having expertise relevant to the proposed action. (See *Nucleus of Chicago Homeowners Ass'n v. Lynn*, 524 F.2d 225 (7th Cir. 1975); *Sierra Club v. Callaway*, 499 F.2d 982 (5th Cir. 1974); *Simmans v. Grant*, 370 F. Supp. 5 (S.D. Tex. 1974); and *Environmental Defense Fund, Inc. v. Hardin*, 325 F. Supp. 1401 (D.C. Cir. 1971).) In preparing the proposed rules, I would assume that the BER consulted experts and other agencies. I would also assume that the BER would consult experts and other agencies throughout the rulemaking process. MAPA specifically allows BER to use informal conferences, consultations, and committees to seek input from experts (2-4-304, MCA). The BER is also required under 75-2-207(2)(b), MCA, to make a written finding that must

reference information and peer-reviewed scientific studies contained in the record that formed the basis for the BER's conclusion.

EVALUATION OF REASONABLE ALTERNATIVES

MEPA and the BER's MEPA rules require that BER conduct an analysis of reasonable alternatives and develop conditions, stipulations, or modifications to be made a part of the proposed BER action (75-1-201(1)(b)(iv)(C), MCA, and ARM 12.2.430(2)(b)). Under the BER MEPA rules, the term "alternative" means:

- (1) an alternate approach or course of action that would appreciably accomplish the same objectives or results as the proposed action;
- (2) design parameters, mitigation, or controls other than those incorporated into a proposed action by an applicant or by an agency prior to preparation of an EA or draft EIS;
- (3) no action or denial; and
- (4) for agency-initiated actions, a different program or series of activities that would accomplish other objectives or a different use of resources than the proposed program or series of activities (ARM 17.4.603(2)).

MEPA notes that a "reasonable" alternative must be achievable under current technology and it must be economically feasible (75-1-201(1)(b)(iv)(C), MCA). MEPA also requires that the BER "complete a meaningful no-action alternative analysis. The no-action alternative analysis must include the projected beneficial and adverse environmental, social, and economic impact of the project's noncompletion (75-1-201(1)(b)(iv)(C), MCA).

The BER has noted in its proposed rulemaking statement that:

the board will consider comments not only on this specific proposal but also on rule amendments and new rules that vary from these proposals and that are more or less stringent than these proposals, but that would achieve mercury reductions at least as stringent as those necessary to meet the mercury budgets established by EPA for the state. The final amendments and new rules adopted by the board will be based on the record of the proceeding, including comments on the board's specific proposal as well as comments on any different proposals that would at least meet the state's mercury budgets (Attachment #1: MAR Notice No. 17-246, page 1124).

This statement reflects the BER's desire to have interested parties provide alternatives to the BER's proposed rules. Under 75-2-207, MCA, the BER is required to make a written finding based on evidence in the record that the proposed BER mercury emission limit rules are achievable with current technology and that the proposed rules mitigate harm to public health and the environment. The BER's written finding must also include information from the record regarding costs to the regulated community that are directly attributable to the BER's proposed action (75-2-207(2)(b), MCA). The BER's request from interested parties for alternatives and many of the CAAM requirements are equivalent with a number of the MEPA alternative analysis requirements. However, the BER's rulemaking process is missing the following elements of a reasonable MEPA alternatives analysis:

1. a systematic analysis of an array of reasonable alternatives, including the no action alternative;
2. a "meaningful" no action alternative analysis; and

3. the systematic development of conditions, stipulations, or modifications to the proposed action and any reasonable alternatives that are developed.

DETERMINATION OF NEED FOR AN EIS

With the exception of the BER using a MEPA review process to evaluate a BER administrative rulemaking process involving air quality rules (Attachment #2: BER EA), past BER rulemaking activities have not formally included a determination on whether the impacts of the rulemaking process were significant enough to trigger the need for an EIS. Given this past history, I would not expect the BER to make a determination as to the need of an EIS for the proposed mercury emission rules.

PUBLIC REVIEW AND COMMENT

For the most part, I think that the public hearing and comment process under MAPA provides a process that is functionally equivalent to the public review process required in MEPA and the BER MEPA rules. The level of public involvement required in the MEPA review process is dependent on the type of review the agency conducts. For EAs, the use of a public comment period is discretionary, depending on the seriousness and complexity of the potential impacts (ARM 17.4.610(1)). If public comment is received, agencies are required to consider public comments to EAs prior to making a final decision (ARM 17.4.610(6)). The public's opportunity for involvement in the EIS process is mandatory. Agencies are required to invite public participation in determining the scope of the EIS. Agencies must provide a minimum 30-day public comment period for the draft EIS and a 15-day public comment period for the final EIS (ARM 17.4.618). Agencies must include public comments and the agency's response to public comments in the final EIS (ARM 17.4.619).

The BER MAPA rulemaking process contains many public involvement mechanisms that are similar to what MEPA and the MEPA administrative rules require. The BER's typical rulemaking process under MAPA (2-4-101, MCA, et seq.) usually involves the following public involvement process elements:

1. Notice of the proposed rule is published and interested parties are notified of the publication.
2. BER may conduct hearings on the proposed rule.
3. Written public comment is submitted on the rule.
4. BER responds to written comments.
5. BER files adoption notice.
6. Adoption notice is published.
7. Rule becomes effective one day after publication.

In the notice of proposed rulemaking, the BER must state the principal reasons and rationale for its intended action and for the particular approach that it takes in complying with its mandate to adopt rules (2-4-305(6), MCA). In this instance where the BER is proposing mercury emission standards that are more stringent than the federal standards, the BER is required to hold a public hearing, take public comment, and make certain written findings (75-2-207(2)(a), MCA).

The only MEPA public involvement elements that may not be addressed in the BER MAPA and CAAM process are allowing the public comment on alternatives to BER's proposed rulemaking action and planned mitigation requirements if any.

REGULATORY RESTRICTION ANALYSIS ON PRIVATE PROPERTY

Unlike NEPA, MEPA requires that state agencies identify and develop methods that will ensure that an action that may have an impact on the human environment is evaluated for regulatory restrictions on private property (75-1-201(1)(b)(iv), MCA). If the BER's proposed action involves regulation of private property, MEPA requires an analysis of alternatives that reduce, minimize, or eliminate the regulation of private property (75-1-201(1)(b)(iv)(D), MCA). The BER-proposed mercury emission rules, if adopted, may impose regulatory restrictions on the owner or operator of a privately held EGU to limit/cap mercury emissions or potentially trade for additional mercury emission capacity.

Under 75-2-207(2)(b), MCA, the BER when proposing rules that are more stringent than federal requirements is required to make a written finding that includes "information from the hearing record regarding costs to the regulated community that are directly attributable to the proposed standard or requirement." Under MAPA, the appropriate administrative rule review committee or a least 15 legislators can request that the BER conduct an economic impact statement (2-4-405, MCA). But absent that request, the BER would not undertake such an analysis.

The BER process will likely be insufficient in meeting MEPA's regulatory restriction analysis requirements because the BER process would not likely systematically analyze alternatives that reduce, minimize, or eliminate regulation of private property.

OTHER FUNCTIONAL EQUIVALENCE CONSIDERATIONS

It is my opinion that MEPA and the BER's MEPA rules are the primary authority regarding the requirements necessary to meet the elements of functional equivalence under MEPA. Based on the above analysis I conclude that the proposed BER mercury emission rulemaking process is not likely to be functionally equivalent to the MEPA process. However, I would be remiss if I didn't address the argument that based on federal case law, BER's mercury emission rulemaking process would likely be functionally equivalent to the MEPA review process.

The Montana courts have not ruled on the issue of functional equivalence. The Montana courts look to federal NEPA case law for guidance (see *Kadillak supra*). The federal courts have created a narrow functional equivalence exemption when environmental evaluation and public participation processes in EPA regulatory legislation, such as the Clean Air Act, are equivalent to NEPA requirements (see *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973)). As noted previously in this memorandum, Congress subsequently exempted EPA actions from NEPA under the Clean Air Act. But cases like *Portland Cement* provide some criteria in applying functional equivalence at the federal level that may translate to the BER's action at issue here. The court in *Portland Cement* evaluated an EPA rule adopting a new source performance standard (emission limitations for certain air pollutants from stationary sources) for the *Portland Cement* plants. In *Portland Cement*, the court concluded that new source performance standards:

- ⇒ directed that the best system of emission reduction be used and that the EPA take cost into account;
- ⇒ required EPA to take into account counterproductive environmental effects;
- ⇒ required EPA to include with the proposed standards a statement of reasons for the proposed standards including the pros and cons and the environmental considerations involved;
- ⇒ struck a workable balance between the advantages and disadvantages of NEPA review; and
- ⇒ provided an opportunity for public comment.

The court in *Portland Cement* also noted that good faith required EPA to disclose adverse environmental impacts and that judicial review would enforce this good faith requirement.

Like the EPA and the federal Clean Air Act, the CAAM is the BER's "regulatory legislation." In fact, the CAAM was enacted in part to allow the BER and DEQ working with EPA to implement provisions of the federal Clean Air Act through federal/state primacy agreements. The BER's proposed mercury emission rules are more stringent than federal regulations (Attachment #1: MAR Notice No. 17-246). When adopting a rule that is more stringent than federal regulations, the BER must adhere to the following statutory provisions:

- (2) (a) The board or department may adopt a rule to implement this chapter that is more stringent than comparable federal regulations or guidelines only if:
 - (i) a public hearing is held;
 - (ii) public comment is allowed; and
 - (iii) the board or the department makes a written finding after the public hearing and comment period that is based on evidence in the record that the proposed standard or requirement:
 - (A) protects public health or the environment;
 - (B) can mitigate harm to the public health or the environment; and
 - (C) is achievable with current technology.
- (b) The written finding required under subsection (2)(a)(iii) must reference information and peer-reviewed scientific studies contained in the record that form the basis for the board's or the department's conclusion. The written finding must also include information from the hearing record regarding costs to the regulated community that are directly attributable to the proposed standard or requirement (75-2-207(2), MCA).

The provisions of 75-2-207(2), MCA, closely match the *Portland Cement* criteria for functional equivalence. It is almost as if the provisions of 75-2-207(2), MCA, were written with *Portland Cement* in mind. It is unclear to me as to whether the BER rulemaking process under MAPA and CAAM strikes a "workable" balance between the advantages and disadvantages of MEPA review. I do note that the BER previously found a workable balance between its obligations under MAPA and CAAM and its obligations under MEPA (Attachment #2: BER EA).

If the BER was a federal agency as opposed to a state agency that was subject to NEPA instead of MEPA, the BER would have a credible argument that under the *Portland Cement* criteria the proposed BER mercury emission rulemaking process would be the functional equivalent of the requirements of NEPA. As I have noted throughout this opinion, there are a number of significant differences between the requirements of NEPA and MEPA and that MEPA, unlike NEPA, was enacted to assist the Montana legislature and the BER in meeting Montana's environmental and inalienable rights constitutional obligations.

CONCLUSION:

Based on very lengthy but necessary legal analysis, the BER's proposed administrative rulemaking process regarding mercury emissions regulations for coal-fired electric utility steam generating units (EGUs) is subject to the MEPA review process.

Generally, it has been my legal opinion over the years that agency rulemaking triggers the MEPA review process. 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. This is an issue that the legislature may need to address: should agencies conduct MEPA reviews on agency rulemaking or not?

cc: Richard Opper, Director of the Department of Environmental Quality
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