



# MONTANA LEGISLATIVE BRANCH

## Legislative Fiscal Division

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Director  
AMY CARLSON

8/11/2010

### *Informal economic analysis of the LClive draft legislation as requested by the Economic Affairs Committee.*

Prepared By:

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Overview of the situation as provided by committee staff:

The Economic Affairs Interim Committee identified an issue dealing with the Department of Livestock's use of orders as opposed to administrative rules. Committee staff requested that the Legislative Fiscal Division prepare an informal fiscal analysis of proposed committee legislation dealing with the issue. As explained to me by committee staff, the Dept of Livestock has the power to issue rules and orders (81-2-101, MCA), but the legislature has not provided a definition in statute that specifically details the difference between an order and a rule. In dealing with the brucellosis problem, the department has been issuing orders to ranchers and cattle operations that border or are in near proximity to Yellowstone Park that generally address these entities, but are not issued to each specific operation. That is to say that the department may have issued an order that states "the cattle producers that are within x miles of Yellowstone Park must...." rather than "Bar Z ranch must...."

The issue prompting the draft legislation is the process and oversight differences between issuing an order and the creation of a rule. The bill provides a definition between the two based on the specificity of whom the action compels. The definition applies only to the chapter wherein it is codified and is therefore not applicable in a general sense.

Assumptions related to the Analysis:

The proposed legislation does not specifically state that it is applicable to existing orders that the Department of Livestock has in place, but legal staff believe that existing orders may be challenged based on the new law should the legislation be passed.

The passage of the draft legislation would mean that the Department of Livestock would have two options. The first option is to do nothing and see if there are any challenges to the existing orders. The second option is to take some kind of action that brings the existing orders into

compliance with the new legislation by: a) reissuing each order that compels a generalized group of people or entities as specifically addressed, individual orders; b) to adopt each general order as a rule and follow the correct administrative procedure in doing so; or c) to do some kind of combination of the two.

If the department takes some kind of action, as in the second option, the analysis assumes that some unknown portion of the effort can be absorbed in the normal operation of the division.

#### Key Procedural Differences Related to the Assumptions in the Analysis:

Rulemaking is subject to the Montana Administrative Procedure Act and specifically to Title 2, Chapter 4, MCA. It includes among other things: notice, hearing and submission of views, form and general content requirements, and publication requirements. An order is subject to the contested case provision of Title 2, chapter 4, part 6, which does not require a public notice, hearing or submission of views prior to enactment of the order. Furthermore, 2-4-4, MCA provides for legislative review of administrative rules including requests for the anticipated economic impact, validity of rulemaking process or authority, and recommendation to repeal, amend, or adopt a rule.

#### Fiscal Analysis:

The fiscal impact of the proposed legislation is entirely dependent on the course of action that is taken by the Department of Livestock along with the number of existing orders that are impacted. In the absence of a known number of orders and without knowledge of the exact course of action that the Department of Livestock would take in the event of the proposed legislation becoming law, this analysis is limited to the identification of primary cost components and discussion of hypothetical implementation scenarios. An exact dollar impact is not possible with the information available at this time.

If the department decides to do nothing, there is no immediate financial impact of the proposed legislation. But should an existing order be challenged, the resulting action could involve significant legal costs and may end up compelling the department to issue a new order or create a rule anyway.

Should the department decide to issue individual orders, the individual entities would need to be identified, orders prepared and issued. The preparation of an order can be as simple as writing, signing and mailing a letter, but with an unknown number of orders impacted and to an unknown number of individuals affected, we can only infer that there may be some unknown increase in workload for the individuals producing the orders. As stated in the assumptions above, a portion the activity remains in the scope of the normal function of the existing program. A cursory look at a number of the existing orders posted on the department's web site resulted in several orders that appear to be potentially impacted by the proposed legislation. Based on the concerns about the cost and funding impact of the proposed legislation's provisions that are expressed by Director Mackay in the department's response to the proposed legislation as detailed in the attached email, it is doubtful that the reissuing of these orders could be completely absorbed in the normal operations of the department and therefore some kind of fiscal impact would result

from this course of action. At a minimum, additional costs would include the publication and distribution of the orders.

Should the department decide to create administrative rules to replace the general orders that had been previously issued, the required procedures would have to be followed, including public hearing and notification of the Economic Affairs Committee of the proposed rules. As an example, the Department of Livestock was asked to compile the estimated cost of producing a simple two page rule. The department responded with an informal spreadsheet that included the following:

- Board Member expenses \$842.25
- Bureau Chief \$189.23
- Administrative Secretary \$75.60
- Publishing and distribution \$300.00

The total cost attributable to the creation of a single rule was estimated at \$1,407.08. In practice however, other than the cost of publishing and distribution of the rule, the cost per additional rule is entirely dependent upon the number of new rules that are being issued. The department did not include legal costs in the estimate that was provided. The department uses contract legal services from the Attorney General's office and should the department require legal review or assistance with proposed rules there would be a cost component added to the estimate above. The department could minimize at least a portion of the cost of the required rule making process, particularly board member expenses which comprise nearly 60 percent of the example above, by scheduling the notice, hearing, and additional administrative requirements en masse, incorporating as much of the additional work load into existing schedules as possible. At a minimum, the costs of publication and distribution would be a constant multiple of the number of rules that are created, but an overall estimate of the costs would require, among other things, knowing how many orders that would have to be replaced by rule, the complexity of each new rule in terms of amount of time required to create and process the rule, and the amount of available board and administrative resources that would be available to absorb a portion of the additional workload.

Contested orders and rules are provided the same mechanism for resolution and would need to be dealt with on an individual basis with the cost varying on a case by case basis. Nevertheless the resultant cost of the process should be the same for both so the fiscal impact of this provision is negligible.

It appears from this analysis that the additional cost of the proposed legislation is, in either of the active choices, those expenses that are related to the publication and distribution of the new or amended orders or rules and the additional workload placed upon the department staff and/or the board. An examination of the current orders that the department has in effect would have to be produced in order to determine which of these appear to be in question in relation to the proposed legislation in order to estimate the cost of each course of action. The department may also be able to mitigate the fiscal impact of the proposed legislation by using a combination of inaction and action by only addressing those orders that were brought in to question by third parties as they came up. In this way, the department would be able to work a large portion of the required change in to existing schedules and staff constraints.

## **Stayner, Matt**

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**From:** Mackay, Christian  
**Sent:** Friday, August 06, 2010 9:13 AM  
**To:** Stayner, Matt  
**Subject:** Response to draft legislation  
**Attachments:** image001.png

Mr. Stayner:

You asked for the Department of Livestock's comments to the Economic Affairs Interim Committee's proposed legislation. The proposed legislation requires all Orders issued by the Department, the Board of Livestock, or the State Veterinarian to be subject to the Montana Administrative Procedure Act (MAPA). The Department opposes the proposed the legislation, believing it will detract from, not enhance public health and safety. The Department believes the proposed legislation is misguided, that it will be costly to implement, and that it is not in the best interests of the livestock industry.

Montana statutes currently authorize the department to both adopt rules and issue orders. See 81-2-102, MCA. Administrative rules are in place for more permanent programs or actions, and the Department has promulgated numerous rules that are already subject to the provisions of MAPA.

In contrast, Department (both Board and State Veterinarian) orders routinely expire or are altered as conditions change. They are issued for purposes of addressing immediate public health and disease outbreak concerns. The practical effect of having all orders go through the administrative rule process would be to add expense and to contradict the time-critical activities of disease control. We are extremely concerned that the proposal would have the effect of slowing disease response, and thus increase the potential of wider outbreaks of animal disease and potential human transmission.

The Department's powers are akin to the powers of local health boards and the Department of Health and Human Services, entities which have similar authority to issue written orders of a temporary duration to address threats to public health. In Montana, where the livestock industry is a vital part of the economy and livestock significantly outnumber people, it is critical that the animal health and human health authorities work in conjunction and retain the ability to deal swiftly with disease. To have the animal health authority hampered in its ability to control disease outbreaks ultimately puts public health at greater risk.

Of equal concern is that the proposed legislation appears to limit Department (both Board and Veterinarian) "orders" to those effecting "an individual or entity." However, animal health diseases often have the potential to affect entire classes of livestock and/or large areas of the state. Official orders are critical for disease control during rapidly developing incidents, when the scope is not yet ascertained or when the susceptible population is not individually known. The powers granted the Department by statute are intended to constrain disease outbreaks to as small an area as possible before they have a devastating effect on the livestock industry, or in the cases of zoonotic diseases such as rabies, anthrax, avian influenza and tuberculosis (TB), before they spread to humans. If the intent of the proposed legislation is to prevent the department from issuing orders that affect classes of livestock or large areas of the state, the department takes strong offense to the proposal as jeopardizing both public health and safety, and the livestock industry.

An example is a recent bluetongue outbreak in southeast Montana. In the fall of 2007, Montana experienced an outbreak of blue tongue, a disease affecting sheep and carried by insects. The disease was first detected in Musselshell County and began quickly spreading through insect vectors, and commercial movements of sheep. A stop movement order on sheep in 16 counties was placed until there was a freeze that killed the insects. This case affected approximately 500 individual sheep producers. A requirement to individually quarantine each operation would have made it impossible to control the spread of this disease in a timely manner and would have resulted in a significantly

greater financial loss to the sheep industry. Further, the inability to place this hold order would have caused the interstate spread of the disease, and fostered a lack of confidence in animal health response capability of the state of Montana with subsequent negative impact on the marketability of the state's livestock. A blanket order was necessary.

Finally, the proposed legislation makes orders issued by the Department subject to the contested case provisions of MAPA. While the Department has not yet determined the fiscal impact of this provision, we have concerns as to the cost and the funding mechanism that will be available for implementation.

Should you have any further questions, please feel free to contact me.

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