VOLUME NO. 42 OPINION NO. 62

AGRICULTURE, DEPARTMENT OF - Department required to comply with MEPA for grasshopper spraying program;
MONTANA ENVIRONMENTAL POLICY ACT - Department of Agriculture required to comply with MEPA for grasshopper spraying program;
MONTANA ENVIRONMENTAL POLICY ACT - Emergency exception to MEPA allowed only when immediate action required and not reasonably foreseeable;

PESTICIDES - Pesticide spraying for grasshopper control requires compliance with MEPA where state participates with funding and expertise;
MONTANA CODE ANNOTATED - Title 10, chapter 3; Title 75, chapter 1; Title 80, chapter 7, part 5; sections 10-3-405, 75-1-103, 75-1-201;
ADMINISTRATIVE RULES OF MONTANA - Title 4, chapter 2, sub-chapter 3; sections 4.2.303, 4.2.307, 4.2.308.

HELD: 1. The participation of the State of Montana in a grasshopper spraying program in which the state pays up to one-third of the costs and provides financial management and technical expertise, is a major state action in which compliance with the terms of the Montana Environmental Policy Act is required.

2. While an emergency situation is a legitimate exception to the requirements of MEPA, the Montana Department of Agriculture should, in the future, comply with MEPA before participating in a grasshopper spraying program, if the need for such program is reasonably foreseeable.

5 February 1988

Keith C. Kelly, Director
Department of Agriculture
Scott Hart Building
303 Roberts
Helena MT 59620

Dear Mr. Kelly:

On June 1, 1987, Governor Schwinden issued a proclamation declaring that an infestation of grasshoppers constituted an emergency in the State of Montana. The effect of the proclamation was to make available up to $200,000 of state disaster and emergency funds for expenditure under the provisions of Title 80, chapter 7, part 5, MCA. That part of Title 80 provides authority for the Montana Department of Agriculture (hereinafter the Department) to participate with counties in a program of cropland spraying for the purpose of controlling insect infestations.

In this instance, the Department adopted a set of emergency rules setting forth the specific requirements for counties and individuals to participate in the program. Each county had to elect participation and was required to levy two mills pursuant to authority

contained in section 10-3-405, MCA. Further rules pertaining to landowners established the dates by which applications must be made and the reimbursement procedures. The state, through the Disaster and Emergency Services Division of the Department of Military Affairs, provided financial management of the program. The state also limited its total financial participation to one-third of the overall cost of the program or $200,000, whichever was less.

The emergency rules also required participating counties to enter into a pest management agreement with the Department. Neither the emergency rules nor the pest management agreement clearly stated the division of authority between the state, the county, and the landowner. The basic plan was that the landowner could either do his own spraying or contract for the spraying of grasshoppers by an independent contractor. The landowner could then be reimbursed for a portion of his costs by the county and the state depending on the amount of funds that each had available and the number of participating landowners. The Department also made available technical expertise in pest management and conducted the survey to document the extent of the grasshopper infestation.

The Montana Environmental Policy Act (Tit. 75, ch. 1, MCA) (hereinafter MEPA), mandates that "it is the continuing responsibility of the state of Montana to use all practicable means consistent with other essential considerations of state policy to improve and coordinate state plans, functions, programs, and resources" in order to attain certain goals. § 75-1-103(2), MCA. Among the goals enumerated are to

> (b) assure for all Montanans safe, healthful, productive, and aesthetically and culturally pleasing surroundings; [and]
>
> (c) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences[.]

§ 75-1-103(2), MCA.

In order to assure that these values are reflected in the decisions of government agencies, the Legislature has required that the agency shall, "to the fullest extent possible[,]" include an environmental impact statement (hereinafter EIS) "in every recommendation or report on proposals for projects, programs, legislation, and other major actions of state government

significantly affecting the quality of the human environment[.]" § 75-1-201(1)(b)(iii), MCA.

MEPA gives no further guidance on what constitutes "major state action." However, in implementing MEPA the Department itself has adopted certain procedural rules (Tit. 4, ch. 2, sub-ch. 3, ARM), one of which addresses the determination of whether an environmental impact statement is required:

> (3) The following are categories of actions which normally require the preparation of an EIS:
>
> (a) actions which may significantly affect environmental attributes recognized as being endangered, fragile, or in severely short supply;
>
> (b) actions which may be either significantly growth inducing or growth inhibiting;
>
> (c) actions which may substantially alter environmental conditions in terms of quality or availability; or
>
> (d) actions which will result in substantial cumulative impacts.

§ 4.2.303(3), ARM.

There has been very little judicial interpretation of MEPA requirements in Montana. However, the Montana Supreme Court has indicated that federal interpretations of parallel provisions of the National Environmental Policy Act (hereinafter NEPA) may be looked to for guidance. Kadillak v. Anaconda Co., 184 Mont. 127, 602 P.2d 147, 153 (1979).

The subject of pesticide spraying is indisputably one which most courts have found to be within the ambit of NEPA since such spraying may well have "an impact on man's environment" (§ 75-1-201(1)(b)(i), MCA). See Annot., 74 A.L.R. Fed. 249. See also Alaska Survival v. Weeks, 18 Env't Rep. Cas. (BNA) 1814 (Alaska 1981); State of Wisconsin v. Butz, 389 F. Supp. 1065 (E.D. Wis. 1975). The more critical inquiry is whether the state involvement in the grasshopper spraying program constitutes "major state action" sufficient to trigger the requirements of MEPA.

As outlined earlier, the state's role in the spraying program was to provide a maximum of one-third of the

cost of the program and to supervise the financial administration of the program. Certain technical expertise was also provided. The actual spraying was done by landowners contracting with local businesses to provide the service or doing it themselves.

The only Montana Supreme Court case which has dealt with the application of MEPA to programs involving different levels of government and the private sector is Montana Wilderness Association v. Board of Health and Environmental Sciences, 171 Mont. 477, 559 P.2d 1157 (1976). Under the facts of that case and without delineating any test to aid in future determinations, the Court found that the subdivision review process, conducted pursuant to the Montana Subdivision and Platting Act, was essentially a local process and was not within the scope of MEPA. By its terms, MEPA applies to "all agencies of the state" (§ 75-1-201, MCA), and not to local government entities. Montana Wilderness Association is thus of limited value to the issue presented here because it did not involve any financial participation by the state.

This paucity of authority in Montana again leads to a review of decisions interpreting the federal act. In the analogous area of categorical grants by the federal government to local and state governments, one commentator has stated that "[s]tate and local projects that receive federal financial assistance are subject to NEPA." D. Mandelker, NEPA Law & Litigation § 5.13 (1984). The leading case in this area appears to be Save the Courthouse Committee v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975). In that case, the court determined that the participation of the United States Department of Housing and Urban Development in a local urban renewal plan was sufficient to require an EIS. The federal agency had participated financially by giving grants and loan guarantees although there was local decisionmaking by both private entities and local government units. Other cases have reached the same result where the participating federal agency made a loan to a nonfederal entity (Proetta v. Dent, 484 F.2d 1146 (2d Cir. 1973)) and where federal mortgage insurance was available (Wilson v. Lynn, 372 F. Supp. 934 (D. Mass. 1974)).

In NORML v. U.S. Drug Enforcement Administration, 545 F. Supp. 981 (D.D.C. 1982), the issue was whether the federal Drug Enforcement Administration (DEA) had to prepare an EIS for a paraquat spraying program undertaken by the State of Florida. The court found that while the federal agency gave general assistance grants for law enforcement to the State of Florida, none

of the money was earmarked for the spraying program. The State of Florida said it would do the spraying even without federal involvement. Since it found no direct financial assistance by the federal agency to the spraying program, the court ruled that there was no "major federal action."

In State of Alaska v. Andrus, 591 F.2d 537 (9th Cir. 1979), the court similarly underscored that federal financial participation is often the touchstone for finding that NEPA applies to the federal action. The court stated:

> There can be major federal action when the primary actors are not federal agencies, but rather state or local governments, or private parties. Most courts agree that significant federal funding turns what would otherwise be a local project into a major federal action. See Homeowners Emergency Life Protection Committee v. Lynn, 541 F.2d 814 (9th Cir. 1976) (per curiam) (federal disaster-relief funding for municipal dam and reservoir ect).

5[illegible] at 540.

This review of federal decisions interpreting NEPA indicates that federal financial participation in a nonfederal project is usually sufficient to bring the agency's action under NEPA. As stated in NEPA Law & Litigation § 8.25:

> In most cases in which a federal agency makes a direct categorical grant for a nonfederal project, the use of federal funds for the project is sufficient to bring it under NEPA.

Applying these precedents to the facts under review here, it is clear that the participation of the State of Montana in providing up to one-third of the funding for the grasshopper spraying program together with financial management and technical expertise is a major state action for MEPA purposes.

Another aspect of this matter is the proclamation of emergency issued by the Governor of Montana pursuant to his authority under Title 10, chapter 3, MCA. You have inquired whether MEPA applies to state action that involves an emergency.

The MEPA rules adopted by the Department of Agriculture deal with the issue of emergency. Section 4.2.308, ARM, provides as follows:

> (1) Emergencies. The department of agriculture may take or permit action having a significant impact on the human environment in an emergency situation without preparing an EIS. Within 30 days following initiation of the action, the department of agriculture shall notify the governor and the EQC as to the need for such action and the impacts and results of it. Emergency actions shall be limited to those actions necessary to control the immediate impacts of the emergency.

In this instance the Department did not follow the directive of that rule in filing a report with the Governor and the Environmental Quality Council, perhaps because it felt its action was not covered by MEPA even in a nonemergency situation.

It is, of course, necessary that MEPA be construed to allow for an exception to its requirements in emergency situations since it would otherwise deter the state's ability to respond to situations of great need. However, the emergency exception should not be used to avoid the provisions of MEPA.

I am reluctant to determine whether the emergency exception was properly invoked here because all of the pertinent facts are not before me. I nonetheless note that, because severe grasshopper infestations have occurred during the last three years, the Department is adequately on notice that future spraying may be necessary. Further reliance on the emergency exception, therefore, appears inappropriate. The emergency exception must be used sparingly and only when (1) immediate action is required, and (2) the necessity or nature of the action was not reasonably foreseeable.

Finally, I note that under the Department's rules it has authority to adopt a so-called programmatic EIS. § 4.2.307, ARM. The programmatic EIS is designed to review ongoing programs of the Department and actions which it may be required to undertake in the future. The virtue of the programmatic EIS is that it is done before the Department is confronted with an emergency situation, and yet it provides for a consideration of the values embodied in MEPA. It appears that the programmatic EIS may be the desirable way for the Department to meet the requirements of MEPA and be able

to respond readily when confronted by an immediate need to deter a grasshopper infestation.

THEREFORE, IT IS MY OPINION:

1. The participation of the State of Montana in a grasshopper spraying program in which the state pays up to one-third of the costs and provides financial management and technical expertise, is a major state action in which compliance with the terms of the Montana Environmental Policy Act is required.

2. While an emergency situation is a legitimate exception to the requirements of MEPA, the Montana Department of Agriculture should, in the future, comply with MEPA before participating in a grasshopper spraying program, if the need for such program is reasonably foreseeable.

Very truly yours,

MIKE GREELY
Attorney General