VOLUME NO. 43 OPINION NO. 65

ADMINISTRATIVE LAW AND PROCEDURE - Authority of Department of Health to delegate enforcement of underground storage tank leak prevention program to local governments;
HAZARDOUS WASTE - Authority of Department of Health to delegate enforcement of underground storage tank leak prevention program to local governments;
HEALTH AND ENVIRONMENTAL SCIENCES, DEPARTMENT OF - Authority to delegate enforcement of underground storage tank leak prevention program to local governments;
LOCAL GOVERNMENT - Authority of Department of Health to delegate enforcement of underground storage tank leak prevention program to local governments;
STATE AGENCIES - Authority of Department of Health to delegate enforcement of underground storage tank leak prevention program to local governments;
MONTANA CODE ANNOTATED - Sections 75-10-401 to 75-10-451;
OPINIONS OF THE ATTORNEY GENERAL - 38 Op. Att'y Gen. No. 75 (1980);
UNITED STATES CODE - 42 U.S.C. §§ 6901 to 6987.

HELD: 1. In light of the nonrestrictive language in section 75-10-405(2)(c)(vi), MCA, allowing the department to delegate to local agents the implementation of the underground storage tank program, the department may delegate to properly designated local agents enforcement of the statutes and rules governing the program.

2. The department's designated local agents may, on behalf of the department, use any of the enforcement methods available to the department.

3. The letters of designation issued by the department delegating authority to local agents are an appropriate method for delegation as long as the letters clearly define the rights, duties, and responsibilities of the department and local agents.

July 23, 1990

Donald E. Pizzini, Director
Department of Health and
Environmental Sciences
Cogswell Building
Helena MT 59620

Dear Mr. Pizzini:

You have requested an opinion on the following questions:

1. May the Department of Health and Environmental Sciences delegate to local government units the enforcement of the underground storage tank statutes and rules?

2. May the local government units use any of the enforcement methods available to the department, as indicated in ARM 16.45.1003?

3. Is there any particular form the delegation must take?

In 1989, the Montana Legislature amended the Montana Hazardous Waste Act (now Montana Hazardous Waste and Underground Storage Tank Act), sections 75-10-401 to 451, MCA, to include provisions addressing the problems of leakage of hazardous substances and petroleum products from underground storage tanks. Senate Bill 321, 51st Leg. Sess., 1989 Mont. Laws, ch. 384. The Legislature recognized that petroleum products and hazardous substances stored in underground tanks are a separate category of substances regulated under the Resource Conservation and Recovery Act of 1976 (42 U.S.C. §§ 6901 to 6987), as amended. § 75-10-402(3), MCA.

Prior to 1989, the Department of Health and Environmental Sciences (department) had been vested with the authority to adopt, administer, and enforce the hazardous waste program pursuant to the Resource Conservation and Recovery Act. § 75-10-402(1), MCA. In 1989, the department was further authorized to establish, administer, and enforce the underground storage tank leak prevention program. § 75-10-402(3), MCA. The department may use the authority provided in sections 75-10-413 to 417, MCA, and other appropriate authority provided by law to remedy violations of underground storage tank requirements. *Id.*

In order to implement the new undergound storage tank program, the Legislature authorized the department to adopt rules for the prevention and correction of leakage from underground storage tanks. § 75-10-405(2)(c), MCA. Under section 75-10-405(2)(c)(vi), MCA, these rules expressly included

> delegation of authority and funds to local agents for inspections and implementation. The delegation of authority to local agents must complement and may not duplicate existing authority for implementation of rules adopted by the state fire marshal that relate to underground storage tanks.

While the statutes are unclear as to who is meant by "local agents," the department rules indicate that the department intends to designate local government units as "implementing agencies" for the underground storage tank

program. § 16.45.1003, ARM. Upon approving the application of a local government unit as an "implementing agency," the department will issue a "letter of designation" authorizing the local government unit to act as the implementing agency and setting forth any conditions or limitations determined necessary by the department. § 16.45.1003(6), ARM.

Once a local government unit is designated as an implementing agency, the implementing agency shall,

> at the request of the department and at other times as necessary, conduct on behalf of the department inspections of the installation, maintenance, operation and closure of underground storage tanks to determine compliance with ARM Title 16, chapter 45, applicable industry standards, and limitations or conditions contained in the department's letter of designation, and may enforce any rule in ARM Title 16, chapter 45 as it is authorized or required by any such rule to administer, in the same manner as the department.

§ 16.45.1004(1), ARM.

Your first question concerns whether the department can delegate not only inspection duties, but also enforcement of the underground tank statutes and rules. Enforcement of the department rules is provided for in sections 75-10-413 (administrative enforcement through notice of violation and opportunity of administrative hearing), 75-10-414 (instituting injunctions to enjoin a violation of the rules), 75-10-416 (cleanup orders), 75-10-417 (instituting court action to impose civil penalties), and 75-10-418, MCA (imposing criminal penalties). These sections were not amended by the Legislature to provide expressly for enforcement by local agents. You indicate, however, that any administrative or judicial actions under these enforcement provisions would be brought by a local attorney acting as an agent for the department and that the enforcement action would still be captioned "Department of Health and Environmental Sciences v. [Respondent/Defendant]."

Section 75-10-405(2)(c)(vi), MCA, allows the department to adopt rules for the "prevention and correction of leakage from underground storage tanks ... including delegation of authority and funds to local agents for inspections and implementation." Administrative agencies enjoy only those powers specifically conferred upon them by the Legislature. State ex rel. Anderson v. State Board of Equalization, 133 Mont. 8, 319 P.2d 221 (1957); State ex rel. STAB v. Montana Board of Personnel Appeals, 181 Mont. 366, 593 P.2d 747 (1979); Bell v. Department of Licensing, 182 Mont. 21, 22, 594 P.2d 331 (1979); Bick v. State Department of Justice, 224 Mont. 455, 730 P.2d 418, 420 (1986).

While section 75-10-405(2)(c)(vi), MCA, clearly authorizes the department to delegate inspection duties, the section also uses the term "implementation" in describing the extent of the authority that may be delegated to a local agent. The specific question here is whether the Legislature intended by use of the term "implementation" to allow the department to delegate enforcement of the underground storage tank program. By definition the verb "to implement" means "carry out, accomplish; to give practical effect to and ensure of actual fulfillment by concrete measures." Webster's Ninth New Collegiate Dictionary 604 (1988). If the local agents may "implement" the underground storage tank program, by definition, the local agents should be able to carry out and accomplish the purposes of the program. Presumably, enforcement must be included in the authority to carry out the program.

Legislative history of the underground storage tank program supports this conclusion. The legislative history of Senate Bill 321, 51st Leg. Sess., 1989 Montana Legislature, does not indicate that the terms "inspection and implementation" were intended as restrictive terms. The statement of intent for the bill provided:

> It is the intent of the legislature that the department be able to delegate authority and funds to local agents for inspections and for other duties related to the underground storage tank program.

The statement of intent contained no restrictions upon the authority to be exercised at the local level, but expressly allowed delegation of "other duties related to the underground storage tank program."

Committee testimony indicated that there are about 18,000 underground tanks that are registered in Montana and perhaps as many as 12,000 that are not registered. Of these 30,000 tanks there were estimates that 3,000 to 10,000 tanks were leaking. Minutes, Senate Committee on Natural Resources, February 8, 1989, at 2; Minutes, House Committee on Natural Resources, March 8, 1989, at 16. In response to a question from Senator Severson on how the proposed underground storage tank program would be enforced, Larry Mitchell from the department stated:

> The department will rely heavily on local fire and health authorities and building inspectors for enforcement and inspection. Local fire and health authorities will check to ensure that a tank inspection was done in the scheduled year, and to ensure that protection systems are installed and that the owner is keeping records on the test results.

Minutes, Senate Committee on Natural Resources, February 8, 1989, at 6.

One of the purposes of Senate Bill 321 was to impose tank fees that would in turn fund the underground storage tank program. As indicated in the fiscal note accompanying the bill, the department intended to fill only four full-time positions. According to the fiscal note, the "[s]tate program staff [are] to operate where local jurisdictions are unable or unwilling to participate." The legislative history therefore indicates that the department and the Legislature intended that the new program would in great part be implemented at the local level. There is no indication that such implementation did not include enforcement of violations as well as inspections. In fact, the legislative history places no restrictions on the delegation authority of the department, indicating that the department may delegate as much authority as it deems necessary for the proper implementation of the underground storage tank program. The department could therefore delegate to local agents the entire scope of enforcement authority vested in the department.

As a general rule, expressed in the maxim "delegatus non potest delegare," delegated power may not be delegated, absent express legislative authority. 2 Am. Jur. 2d Administrative Law § 222 at 52 (1962). An administrative agency may not alienate or surrender its powers or duties or delegate authority which under the law may be exercised only by it. 73 C.J.S. Public Administrative Law and Procedure § 56 at 513 (1983). Kerr-McGee Nuclear Corp. v. New Mexico Environmental Imp. Board, 97 N.M. 88, 637 P.2d 38 (1981); Anderson v. Grand River Dam Authority, 446 P.2d 814 (Okla. 1968); Bunger v. Iowa High School Assoc., 197 N.W.2d 555 (Iowa 1972).

In the past, subdelegation within a particular agency was even restricted. For example, in Cudahy Packing Co. v. Holland, 315 U.S. 357, 62 S. Ct. 654 (1942), the Supreme Court held that the Wage-Hour Administrator could not delegate to a regional director the power to sign and issue subpoenas. A few years later, however, the Supreme Court retreated from this strict restriction on subdelegation authority and acknowledged that the existence of rulemaking authority may itself be an adequate source of authority to delegate a particular function, "unless by express provision of the Act or by implication it has been withheld." Fleming v. Mohawk Wrecking and Lumber Co., 331 U.S. 111 (1947). If there is no statute specifically limiting subdelegation authority, federal courts uniformly have allowed subdelegation of duties within an agency or to subordinates based on general delegation authority. United States v. Cuomo, 525 F.2d 1285, 1287-88 (5th Cir. 1976); In re Persico, 522 F.2d 41 (2d Cir. 1975); United States v. Wrigley, 520 F.2d 362 (8th Cir.), cert. denied, 423 U.S. 987 (1975); United States v. Cravero, 545 F.2d 406 (5th Cir. 1976), cert. denied, 430 U.S. 983 (1977). As stated in Hall v. Marshall, 476 F. Supp. 262, 272, aff'd, 622 F.2d 78 (3d Cir. 1980): "While the legality of a subdelegation of an agency's power is primarily a function of legislative intent, the omission of any specific grant of power to delegate should not be construed as a denial of that power. [Citations omitted.]"

The Montana Supreme Court similarly has held that an agency director may delegate his final decisionmaking authority to a subordinate even without express or specific legislation authorizing such delegation. In Hoven, Vervick and Amrine v. Montana Commissioner of Labor and Industry, 46 St. Rptr. 1024, 774 P.2d 995 (1989), the Court relied upon section 2-15-112(2)(b), MCA, which expressly allows the head of a department to delegate "any of the functions vested in the department head to subordinate employees."

Given this current approach in allowing delegation based on broad general authority and given the legislative history of Senate Bill 321, the term "implementation" as used in section 75-10-405 (2)(c)(vi), MCA, must be construed in its broadest sense. As such, the answer to your first two questions is that the department can lawfully delegate enforcement authority and that local governments may, on behalf of the department, use any of the enforcement methods available to the department provided they are properly designated agents of the department.

Your third question asks what form the delegation must take. The restriction on delegation still exists when there is a concern that one individual subject to the political process should be held publicly responsible for agency action. Should abuses occur in the administrative process, responsibility should be traceable to one identifiable person. United States v. Turner, 528 F.2d 143, 151 (1975) (construing United States v. Giordano, 416 U.S. 505 (1974) and the federal restrictions on delegation of authority by the Attorney General under the federal statutes governing electronic surveillance.)

Here, the lines of authority should be clearly drawn through the letters of designation that the department issues to the local government units. The subdelegation should not involve a "surrender" or "abdication" of authority. In State ex rel. Browning v. Brandjord, 106 Mont. 395, 81 P.2d 677, 682 (1938), the court recognized that a state agency may not merely pass funds through the agency without entering into a contract with the entity receiving the funds.

The department rules indicate that the department will maintain some oversight of the implementing agencies. The department will have a list of all persons directly involved in implementing the program. § 16.45.1002(2), ARM. The department may set forth any "conditions or limitations determined necessary by the department" in the letters of designation. § 16.45.1003(6), ARM. Under section 16.45.1004, ARM, the implementing agency must report to the department quarterly describing all inspections and enforcement activity undertaken in the preceding calendar quarter. If the department determines that the implementing agency is not conducting inspections or enforcements in accordance with department rules, the department may revoke the letter of designation. § 16.45.1005, ARM.

While accountability provisions could be negotiated by contract through interlocal agreements, interlocal agreements need not be the exclusive method of delegation, especially in light of express legislative authorization through the rulemaking process. See 38 Op. Att'y Gen. No. 75 (1980). The proposed letters of designation are an appropriate method for delegation of department authority as long as the letters clearly delineate the rights, duties, and responsibilities of the department and the local governments.

THEREFORE, IT IS MY OPINION:

1. In light of the nonrestrictive language in section 75-10-405(2)(c)(vi), MCA, allowing the department to delegate to local agents the implementation of the underground storage tank program, the department may delegate to properly designated local agents enforcement of the statutes and rules governing the program.

2. The department's designated local agents may, on behalf of the department, use any of the enforcement methods available to the department.

3. The letters of designation issued by the department delegating authority to local agents are an appropriate method for delegation as long as the letters clearly define the rights, duties, and responsibilities of the department and local agents.

Sincerely,

MARC RACICOT
Attorney General