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June 15, 2001

Representative Dan McGee
Speaker of the House
1925 Pinyon Drive
Laurel, Montana 59044

Dear Speaker McGee:

I am writing in response to your request for an analysis of the emergency energy powers of the Governor, including the changes to those powers made by Senate Bill No. 521, enacted as Chapter 593, Laws of 2001. Senate Bill No. 521 became effective May 5, 2001. The energy emergency powers of the Governor are contained in Title 90, chapter 4, part 3, MCA. Section 90-4-302, MCA, defines an energy emergency as "an existing or imminent domestic, regional, or national shortage of energy or a *price of energy* that will result in curtailment of essential services or production of essential goods or the disruption of significant sectors of the economy unless action is taken to conserve or limit the use of the energy form involved and the allocation of available energy supplies among users *or to increase the available supply of energy*". The italicized language was added by Senate Bill No. 521. Energy is defined as petroleum or other liquid fuels, natural or synthetic fuel gas, or electricity. An energy supply alert is defined as a condition of energy supply on a national, regional, state, or local basis that foreseeably will affect significantly the availability of essential energy supplies or *the price of energy* within the ensuing 90-day period unless action is taken under 90-4-309 to reduce energy usage by state agencies and political subdivisions *or action is taken to increase the supply of energy*.

Section 90-4-309, MCA, provides that the Governor may, upon finding that an energy alert condition exists, declare an energy alert for a period of not longer than 90 days. The declaration must set forth the reasons for the energy alert, and the declaration may be renewed for succeeding 90-day periods upon a finding that the energy alert condition will continue for that period or time. During an energy supply alert, the Governor may by executive order direct actions reducing energy resource usage by state agencies and political subdivisions and direct actions promoting conservation, prevention of waste, and salvage of energy resources and the materials, services, and facilities derived from or dependent upon energy resources by state agencies and political subdivisions.

Section 90-4-310, MCA, provides for the energy emergency powers of the Governor. It provides that the Governor may, upon finding that a situation exists that threatens to seriously disrupt or diminish energy supplies to the extent that life, health, or property may be jeopardized, declare a condition or state of energy emergency. An energy emergency terminates after 90 consecutive days unless extended by a declaration of the Legislature by joint resolution of a continuing condition of energy emergency of a duration to be established by the Legislature. During a declared energy emergency, the Governor may implement programs, controls, standards, priorities, and quotas for the production, allocation, conservation, and consumption of energy, including plans for the curtailment of energy. Senate Bill No. 521 provided that in the implementation, the Governor may but is not required to impose controls, quotas, or curtailments according to the nature of the end use to be made of the energy consistent with existing transmission and distribution systems serving the geographic area affected by the energy emergency. The Governor is also authorized to suspend and modify existing pollution control standards and requirements or any other standards or requirements affecting or affected by the use of energy, including those relating to air or water quality control. All actions authorized or required under Title 90, chapter 4, part 3, MCA, or that are taken pursuant to any order issued by the Governor are exempt from all requirements and provisions of the Montana Environmental Policy Act (MEPA), Title 75, chapter 1, parts 1 through 3, MCA. The exemptions from MEPA include but are not limited to the requirement for environmental impact statements.

Unless specifically ordered by the Governor or unless impossibility of compliance is a direct result of an order of the Governor, a person is not exempt from compliance with the provisions of any other law, rule, or directive.

Section 90-4-313, MCA, provides that all persons who are specifically ordered by the Governor to comply with an order issued or an action taken pursuant to Title 90, chapter 4, part 3, MCA, are required to comply with the order, notwithstanding any other provision of law or contract. Senate Bill No. 521 also provided that a proceeding or project that is commenced under an energy emergency may proceed to completion even if the completion occurs after the termination of the emergency.

Section 90-4-314, MCA, provides that the Governor may order any distributor to take action on the Governor's behalf that may be required to implement orders issued pursuant to section 90-4-310, MCA, and that a distributor or person is not liable for actions taken in accordance with the order. (Section 90-4-302, MCA, defines a distributor as any person, private corporation, partnership, producer, individual proprietorship, public utility, joint operating agency, or cooperative that engages in or is authorized to engage in the activity of generating, producing, transmitting, or distributing energy in Montana.) This authority would allow the Governor, upon a finding that a price of energy threatens to seriously disrupt or diminish energy supplies to the extent that life, health, or property may be jeopardized, to order a distributor to provide energy to a specified area. If the price of energy is the basis for the emergency, it appears that the Governor could order that the energy be supplied at a price that was not a "taking". Under section 90-4-313, MCA, this action could be ordered notwithstanding existing contracts. Because these provisions have never been exercised, it is not unlikely that litigation could result from the orders issued and the actions taken.

Section 90-4-317, MCA, provides that the powers granted to the Governor in Title 90, chapter 4, part 3, MCA, are in addition to the emergency powers contained in Title 10, chapter 3, MCA, or in any other state law. Section 90-4-318, MCA, provides that the Governor may authorize the incurring of liabilities and expenses to be paid as other claims against the state from the general fund, in the amount necessary, when an energy emergency is declared by the Governor and the emergency justifies the expenditure as set forth in section 10-3-311, MCA, for other emergency or disaster expenditures.

Section 10-3-104, MCA, provides that the Governor may suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or orders or rules of any state agency if the strict compliance with the provisions of any statute, order, or rule would in any way prevent, hinder, or delay necessary action in coping with the emergency. Section 10-3-312, MCA, provides that an amount not to exceed $12 million is statutorily appropriated to the office of the Governor in any biennium for the purpose of meeting emergencies or disasters. The statutory appropriation may be used by any state agency designated by the Governor. If money expended under section 10-3-312, MCA, is recovered, the spending authority is reinstated to a level reflecting the recovery.

There are no reported decisions interpreting Title 90, chapter 4, part 3, MCA. In 42 A.G. Op. 62 (1988), Attorney General Greely determined that although Governor Schwinden's proclamation declaring a grasshopper infestation as an emergency constituted a legitimate exception to the requirements of MEPA, the Department of Agriculture should comply with MEPA before participating in a spraying program if the need for the program was reasonably foreseeable. However, there is no provision in Title 10, chapter 3, MCA, explicitly exempting emergency actions from MEPA similar to the exemption contained in section 90-4-310, MCA, for an energy emergency.

I hope that I have adequately addressed your questions. If you have other questions or if I can provide additional information, please feel free to contact me.

Sincerely,

Gregory J. Petesch
Director of Legal Services
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