

BEFORE THE DEPARTMENT OF LIVESTOCK  
OF THE STATE OF MONTANA

In the matter of the amendment of ) NOTICE OF AMENDMENT  
ARM 32.4.502 importation of )  
restricted or prohibited alternative )  
livestock and 32.4.1309 import )  
requirements for cervids )

TO: All Concerned Persons

1. On December 27, 2019, the Department of Livestock published MAR Notice No. 32-19-304 regarding the proposed amendment of the above-stated rules at page 2307 of the 2019 Montana Administrative Register, Issue Number 24.

2. The department has amended the following rules as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

32.4.502 IMPORTATION OF RESTRICTED OR PROHIBITED ALTERNATIVE LIVESTOCK (1) through (1)(b) remain as proposed.

~~(c) Importation of wild or captive elk, mule deer, and whitetail deer into Montana, except direct to slaughter, is restricted except pursuant to a diagnostic technique and test protocol for the antemortem detection of chronic wasting disease that is approved by the state veterinarian. No animal may be imported from a geographic area or alternative livestock area where chronic wasting disease is endemic or has been diagnosed ever.~~ Species susceptible to chronic wasting disease may not be imported from a geographic area or alternative livestock premises where chronic wasting disease is endemic or has been diagnosed within 50 miles within the previous five years. The county of origin must have a wildlife surveillance program that has been reviewed and approved by the state veterinarian.

(2) through (4) remain as proposed

AUTH: 81-2-102, 81-2-103, 87-4-422, MCA

IMP: 81-2-102, 81-2-103, 87-4-422, MCA

32.4.1309 IMPORT REQUIREMENTS FOR CERVIDS (1) and (2) remain as proposed.

(3) The state veterinarian may deny importation from states that do not meet the following requirements:

(a) The state of origin must have the legal means of control or disposition of CWD affected, exposed or trace herds;

(b) the state of origin must have the power and authority to quarantine CWD affected, exposed or trace herds; and

(c) if CWD has been confirmed in any herds within the state of origin, the state veterinarian of that state must have completed an epidemiological investigation

and identified all CWD affected, exposed or trace herds; and

~~(d) no confirmed cases of CWD in wildlife as established by a wildlife surveillance program that the state veterinarian determines is equivalent to or more robust than Montana's program.~~

(4) remains as proposed.

AUTH: 81-2-102, 81-2-103, 87-4-422, MCA

IMP: 81-2-102, 81-2-103, 87-4-422, MCA

3. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

Comment #1: The Montana Department of Fish, Wildlife and Parks (FWP) appreciates the opportunity to provide comment of the Montana Department of Livestock's proposed amendment of ARM 32.4.502 (importation of restricted or prohibited alternative livestock) and ARM 32.4.1309 (import requirements for cervids).

Importation of CWD positive animals would pose a threat not only to Montana's cervid industry, but to free-ranging wildlife as well. These amendments will reduce the risk of importation of CWD positive animals that might go undetected even while participating in a herd certification program, since currently available antemortem tests cannot detect the earliest stages of infection. In addition, the amendment to ARM 32.4.1309 addresses uncertainty regarding the geographic distribution of CWD in wildlife in many states and provinces which makes it difficult to definitively determine risk associated with proximity of some captive cervids to infected wildlife.

FWP supports the amendments as proposed.

Response #1: Thank you for the comment. The Montana Department of Livestock (department) agrees that changes to current administrative rules are necessary to mitigate the risk of importing a CWD positive animal to an alternative livestock premises.

Comment #2: Concerns were raised because of 18 certified U.S. herds being diagnosed with CWD in 2018.

First, of the 18 herds that tested positive, only one pertained to elk, the others were mostly whitetail operations. I believe this is because that until implementing the federal CWD Program, most states with Whitetail operations did a limited percentage of testing, if requiring any at all. Elk operations, especially in the Western States and Canada, implemented testing many years prior to the federal program.

The elk operation in question is located in Oklahoma and has been a certified, closed herd status for many years. How did CWD surface in this herd? Certainly,

we do know it was not from importation but more than likely came from outside the operation's fence. Currently the largest CWD threat to our private operations, especially in Montana, is not importation but from Montana's untested wildlife.

Much time is spent by producers, along with the Montana Department of Livestock, prior to all importations. CWD from importation is very low risk with the small number of animals imported under the current regulations that are already in place. Rather than putting further restrictions on existing operations' ability to conduct business, I would ask the department to look at other alternatives such as:

- Whereas the 2018 statistics show the current CWD issue is overwhelmingly in whitetail, ban the importation of whitetail deer only.
- Limit importation of elk to certified herds from an area that has not had a positive CWD within the county of residence of said herd within the last five years.

Response #2: Thank you for your comment. The number of certified herds diagnosed with CWD nationally is of significant concern to the department. In FY18, there were 15 detections with seven of the affected herds holding certified herd status. In FY19, there were 19 detections with nine of the affected herds holding certified herd status. Between FY18 and FY19, eight of the 34 total herds were elk herds.

The department does not feel that species specific limitations will address our concern pertaining to the efficacy of the CWD Herd Certification Programs (HCP). However, the department does agree that the risk of CWD from wildlife or the movement of risk materials is of concern to alternative livestock operations in Montana. Because of that risk, the department is amending the language from the proposed rule to limit the importation of susceptible species from areas where CWD is endemic or has been diagnosed within 50 miles within the previous five years and requiring that the county of origin has a wildlife surveillance program that has been reviewed and approved by the state veterinarian.

This change will still allow for importation of live animals into Montana. This change will also address the department's concern that the CWD HCP does not provide sufficient surveillance to detect recent introductions from wildlife into herds that may export animals to Montana.

Comment #3: As a Montana producer I see no need for any rule change with the very low number of importations into our state. After working with the state on rules for many years it appears that Montana continues to work toward elimination by regulation of the industry. After being involved in cattle and hog production for 40 years I have never seen the constant rule changes in any other livestock industry. Please leave the rules alone and work with the producers using the rules that we have had for years with no issues instead of again limiting our genetic abilities for the future.

Response #3: The department recognizes that this rule limits access to new genetics and that there is a low number of alternative livestock imports into Montana.

The department is concerned about the ability of the CWD HCP to detect new introductions of CWD into an alternative livestock herd prior to animal exports from such a herd. The impact of importing a CWD positive animal or an animal that originated from a CWD affected premises would be severe for Montana alternative livestock producers. To address these concerns, the department is amending the language from the proposed rule to limit the importation of susceptible species from areas where CWD is endemic or has been diagnosed within 50 miles within the previous five years and requiring that the county of origin has a wildlife surveillance program that has been reviewed and approved by the state veterinarian. This change will still allow for importation of live animals into Montana. This change will also address the department's concern that the CWD HCP does not provide sufficient surveillance to detect recent introductions from wildlife into herds that may export animals to Montana.

Comment #4: These rules will only force more game farms out of business. We are reducing our deer and elk to a hobby as that is what this industry really has become. As other states take up this stance, a family farm like us who only sell out of state will have nowhere to go with the animals. A meat market will not pay the bills incurred with the testing requirement, vet requirements, herd inventory requirement, and the animal tax.

Response #4: Thank you for your comment. The department recognizes that animal health regulations can have financial implications on livestock operations. The department is concerned about the efficacy of the CWD HCP program to prevent the movement of CWD infected animals across state lines and believes that the consequences of an unchecked spread of CWD will have a much greater impact on alternative livestock operations. These consequences include possible herd depopulation or extended year quarantine. However, in recognition of the risk of CWD associated with the presence of the disease in wildlife in Montana, the department has revised the language from the proposal. Please refer to the department's Response #2.

Comment #5: I ranch in the Cascade area and produce Angus feeder calves and also operate an alternative livestock operation. Regarding administrative rule changes, they need to be as a result of Legislative directive and clear and concise. The new language in ARM 32.4.1309(3)(d) does neither.

This language is as gray as it gets and is wide open for interpretation. It could be interpreted that if the governing agency determines that if the export state is not looking hard enough that the importation could be denied. If export state surveillance isn't equivalent? Does that mean one portion in his or her opinion does not meet their expectations that import is denied?

Make no mistake health concerns are paramount in any animal production and must be taken very seriously. The elk industry has supported high standards for health review and we currently have checks and balances in the current standards that are working. What we do not need is more unpredictability and vagueness in the rules.

CWD has raised its ugly head in the state's wildlife, and I find it hard to believe that increasing the difficulty of producers to import superior genetics is going to help that situation. Our state as well as other states monitor our private herds at a much higher degree than those managing the wildlife.

At the very least strike the new language in ARM 32.4.1309(3)(d) from proposed rule changes.

Response #5: Thank you for your comment. The department understands your concern regarding the interpretation of the language in rules. In order to address the department's concerns about the efficacy of the CWD HCP while addressing comments received during this rulemaking process, the department has removed the language amendment to ARM 32.4.1309(3)(d). The department has also modified the language proposed for ARM 32.4.502 to clarify when alternative livestock import permits will be restricted due to concern over the presence of CWD in wildlife in proximity to the shipment origin.

Comment #6: The North American Elk Breeders Association (NAEBA) stands in opposition to the proposed amendments on the basis that the change will financially damage existing Montana elk ranches by halting their ability to engage in commerce and to grow their businesses, including the importation of new genetics and potential export opportunities due to reciprocity laws.

Response #6: Thank you for your comment. Please refer to Response #3 that addresses concerns regarding impacts to business due to restrictions on alternative livestock imports.

Comment #7: NAEBA does not believe a state closing its border is the answer to protecting the state from Chronic Wasting Disease. This course of action implies that interstate movement of farmed cervids is the biggest risk to the state for transmission of the disease. However, Montana is already discovering CWD in free-ranging deer herds on a regular basis.

Response #7: Thank you for your comment. Please refer to Response #2 that addresses the risk of CWD from wildlife in Montana and the department's revision to proposed language to address our concern regarding the efficacy of the CWD HCP while acknowledging the presence of CWD in wildlife in Montana.

Comment #8: There is greater concern about Montana's existing free-ranging wild deer than importation of farmed elk.

Response #8: Thank you for your comment. Please refer to Response #2 that addresses the risk of CWD from wildlife.

Comment #9: The proposed rule contains ambiguous language, including "geographic area" and "endemic". These terms are not defined and can therefore be widely interpreted.

Response #9: Thank you for your comment. The department appreciates the input regarding the interpretation of the language in rules. The term endemic has a consistent definition that assumes the disease is regularly found within a population. To address the concern regarding the term geographic area, the department has revised the language to reference the county from which an import originates and findings of CWD within 50 miles of the shipment origin.

Comment #10: The USDA Animal Plant and Health Inspection Service (APHIS) standards label movement of animals from certified herds as low-risk interstate movements. The program is working to find and control the disease.

Response #10: Thank you for your comment. The department disagrees that the program is working to find and control disease. The number of positive detections in herds that have reached Certified status in the CWD HCP suggests that the program is not effective in finding affected herds prior to the occurrence of interstate movements from these herds. Interstate movement of animals from affected herds has significant and long-term consequences for the receiving herds, including potential depopulation or long-term quarantine.

Comment #11: In the past decade, despite the absence of any blanket prohibition against importing elk, mule deer and whitetail deer into Montana, no CWD has been detected at any captive cervid farm within the state. These ten years of actual experience are strong empirical evidence that the importation of elk, mule deer, and whitetail deer to captive cervid facilities in Montana under current restrictions poses very little, if any, risk of spreading CWD within the state.

Response #11: Thank you for your comment. In the past decade, 38 total alternative livestock animals have been imported into Montana. All these imports have gone to a single alternative livestock premises within the state. As the majority of alternative livestock premises in Montana have not received imports in the past decade, this data is of limited value in assessing the risk level of importations. Nationally, the most recent elk herd detected in Oklahoma had several exports prior to detection. Upon tracing these movements, trace out animals were found and confirmed to be positive for CWD.

Comment #12: The USDA CWD Herd Certification Program effectively controls the transmission of CWD through interstate commerce.

Response #12: Thank you for your comment. Please see Responses #3 and #11 that address the number of certified herds found to be positive for CWD and the transmission of CWD through interstate commerce.

Comment #13: While no controlling judicial precedent directly addresses whether the department's blanket ban on the importation of elk, mule deer, and whitetail deer into Montana violates the Commerce Clause, if a statute or regulation discriminates against interstate commerce either on its face or in its practical effect, it is subject to

the strictest scrutiny, and the burden shifts to the governmental body to prove both the legitimacy of the purported local interest and the lack of alternative means to further the local interest with less impact on interstate commerce.

Response #13: Thank you for your comment. Regarding legitimate local purpose, this comment was raised pertaining to previous rulemaking and has since been addressed in the reasonable necessity statement associated with this rulemaking. By allowing for an ante-mortem test that would permit alternative livestock entry into Montana, and in the absence of risk from wildlife populations within Montana, the department proposed the least restrictive approach to ensure no introduction of CWD into Montana. As knowledge of the CWD distribution within wildlife in Montana increases, the department recognizes the risk of introduction of CWD from wildlife within Montana. Please refer to Response #2 that addresses this risk and the subsequent adjustments to the proposed rule language.

Comment #14: The proposed language represents an impermissible blanket ban on the importation of elk, mule deer, and whitetail deer into the State of Montana which substantially discriminates, either facially or in practical effect, against interstate commerce without any legitimate local purpose.

Response #14: Thank you for your comment. The department disagrees that the language creates an absolute barrier against the importation of alternative livestock. The language included a provision for the development and approval of an ante-mortem test that would allow importation of cervids into Montana to resume.

Regarding legitimate local purpose, this comment was raised pertaining to previous rulemaking and has since been addressed in the reasonable necessity statement associated with this rulemaking.

BY: /s/ Michael S. Honeycutt  
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