

**LETTER OPINION
2002-L-49**

August 27, 2002

The Honorable Eliot Glassheim
House of Representatives
619 N 3rd St
Grand Forks, ND 58203-3203

Dear Representative Glassheim:

Thank you for your letter regarding the authority of the Board of Animal Health to issue quarantine orders similar to its March 27, 2001, order entitled "In the matter of Emergency Measures related to Foot and Mouth Disease" (Order).

The Order has four paragraphs. The first paragraph requires all domestic animals and nontraditional livestock to have an importation permit prior to entry into North Dakota. The second restricts the importation of equines into North Dakota from a Foot and Mouth Disease (FMD) infected country until six months after the country of origin is declared FMD-free. The third provides quarantine instructions for owners of companion animals coming from FMD countries. In the Order's fourth paragraph, cloven-hoofed animals from an FMD infected country are restricted from entering the state until six months after the FMD country is declared free of FMD.

Your first question asks whether the BOAH has the statutory authority under N.D.C.C. §§ 36-01-08 and 36-01-12, to issue a quarantine order such as this one. Within your question, however, you acknowledge that the BOAH has the general authority to quarantine infected animals or animals that could be infected. More specifically, you ask whether there must be a rational scientific basis for such quarantine, and whether these provisions give the BOAH the authority to issue orders.

The first part of your first question asks whether there must be a rational scientific basis for this quarantine Order. The law does not specifically use a rational scientific basis standard to determine whether a quarantine order is appropriate. Section 36-01-08, N.D.C.C., allows the BOAH to quarantine an animal to prevent the escape and release of an animal injurious to or competitive with agriculture, horticulture, forestry, wild animals, and other natural resource interests. N.D.C.C. § 36-01-12 also authorizes the BOAH to:

[T]ake such steps as it may deem necessary to control, suppress, and eradicate any and all contagious and infectious diseases among any of the domestic animals and nontraditional livestock of this state. For this purpose, the board may quarantine any domestic animal or nontraditional livestock which is infected, or may be infected, with any such disease or which has been exposed, or may be exposed, to infection

Id. Furthermore, any matter relating to the health and welfare of domestic animals and nontraditional livestock and not specifically assigned by statute to another entity is deemed to be within the authority of the board. N.D.C.C. § 36-01-08.

Although the words “rational scientific basis” are not used, any actions by the BOAH must generally have a rational scientific basis due to the nature of the BOAH’s duties. See generally, 4 Am. Jur. 2d Animals § 43. The basis for the protection of the health of the domestic animals and nontraditional livestock of this state would likely be scientific as the reasons for protective measures would be based upon a scientific determination that a health risk existed to the state’s domestic animals and nontraditional livestock.

The second part of your first question asks whether the BOAH has the authority to issue quarantine orders even though the BOAH has the authority to quarantine.

The BOAH is vested with broad powers relating to the control and management of the state’s domestic animals and non-traditional livestock. Section 36-01-08 allows the board to “determine and employ the most efficient and practical means for the prevention, suppression, control, and eradication of dangerous, contagious, and infectious diseases” among domestic animals and nontraditional livestock. Section 36-01-12 provides similarly broad language in that the BOAH “may take such steps as it may deem necessary to control, suppress, and eradicate any and all contagious and infectious diseases among any of the domestic animals and nontraditional livestock of this state.” To accomplish this, the BOAH may quarantine domestic animals and nontraditional livestock within the state. N.D.C.C. § 36-01-12. Although in N.D.C.C. § 36-01-08, the BOAH is authorized to make rules to effectuate the chapter’s purposes, section 36-01-12 imposes no requirement that the BOAH adopt rules to control or suppress disease. Furthermore, the BOAH has the authority to quarantine cities and counties within the state. Id. In this case, the BOAH chose to quarantine all of the state’s counties, or the entire state.

The BOAH’s use of an Order for its quarantine was within the scope of its authority. By using an Order to do so, the BOAH ensured that notice would be quick, as well as practical and efficient.

Your second question asks whether the BOAH has statutory authority to require importation permits for both domestic animals, such as dogs and cats, and non-traditional livestock. The BOAH has the power to “employ the most efficient and practical means for the prevention, suppression, control, and eradication of dangerous, contagious, and infectious diseases among the domestic animals and nontraditional livestock of this state.” N.D.C.C. § 36-01-12. The phrase “domestic animal” means, among others, dogs and cats. N.D.C.C. § 36-01-00.1(3). “Any matter relating to the health and welfare of domestic animals and nontraditional livestock not specifically assigned by statute to another entity is deemed to be within the authority of the board.” N.D.C.C. § 36-01-12. The BOAH is specifically authorized to “prohibit the arrival in or departure from this state of any such animal.” *Id.* Therefore, it is my opinion that the BOAH has statutory authority to require importation permits for all domestic animals, including dogs and cats, and all nontraditional livestock.

In question 3, you ask whether the BOAH may issue an order that regulates society at large. Without defining what “society at large” is, it is difficult to answer your question. It appears that you are asking whether the BOAH can issue an order that regulates all animals without limitation. The BOAH has the power to regulate domestic animals and nontraditional livestock in North Dakota, and the power to prohibit animals from entering the state under certain circumstances. Thus, the BOAH’s power to regulate animals is limited and does not apply to society at large.

You specifically asked whether this Order is a de facto administrative rule issued without following rulemaking procedures. The purpose of a quarantine order issued under N.D.C.C. § 36-01-12 differs from the purpose of administrative rulemaking under N.D.C.C. ch. 28-32, including emergency rulemaking under N.D.C.C. § 28-32-03. A quarantine order issued under N.D.C.C. § 36-01-12 most logically addresses an immediate situation of temporary duration that calls for unusual or unique action.¹ Rulemaking under N.D.C.C. ch. 28-32 is intended to create “an agency statement of general applicability which implements or prescribes law or policy or the organization, procedure, or practice requirements of the agency.” N.D.C.C. § 28-32-01(11). Such a statement is intended to be of a permanent or longstanding duration. While emergency rulemaking is applicable when “[i]mmminent peril threatens public health, safety, or welfare, which would be abated by emergency effectiveness,” N.D.C.C.

¹ A quarantine order addresses animals which are or may be infected or exposed to disease, establishes whether such animal is to be killed, restricted in arrival or departure from the state, or detained, and the order may be limited to particular territory described in geographic terms or limited to particular enclosures or buildings. N.D.C.C. § 28-32-12.

§ 28-32-03(2)(a), the purpose of emergency rulemaking is still to produce a final rule, N.D.C.C. § 28-32-03(3).²

This Order originally was adopted to address an immediate situation regarding FMD. However, the Order also can be read as if it were “an agency statement of general applicability which implements or prescribes law or policy or the organization, procedure, or practice requirements of the agency,” which is the definition of a rule under N.D.C.C. § 28-32-01(11). The Order appears to be permanent because it addresses the situation where a country is declared to be a FMD infected country by the U.S. Department of Agriculture and applies until the country is declared to be FMD free by that agency or the Office of International des Epizooties. Additionally, the Order requires all domestic animals or nontraditional livestock to have an importation permit before entering the state, with no termination date on this requirement. The Order was issued in March 2001, almost a year and a half ago.

Rulemaking, with its opportunity for public notice, input and legislative oversight, is preferable to case-by-case adjudication as a means of implementing law or policy except in limited circumstances.³ Rulemaking also is preferable to ex parte orders of general scope and long duration. It is my opinion that the Order is valid, but the passage of time requires that the BOAH reexamine this Order to determine whether it is still necessary, whether it can be rephrased to avoid the appearance of being a permanent rule, or whether rulemaking is a more appropriate means of addressing FMD on an ongoing basis.

Question number 4 asks whether the Board must specify an end date to the Order. You also question whether the Order is still needed since England has been declared free of Foot and Mouth disease

The Order makes no reference to England. While England may have been one primary concern for FMD, the Order is applicable to any “FMD infected country”. The Order contains a non-specific end date for paragraphs two and four. Paragraphs two and four cease to be effective with respect to any particular country six months after that country

² Although N.D.C.C. § 28-32-03(6) states that an interim final rule is ineffective one hundred eighty days after its declared effective date if it is not adopted as a final rule, this provision does not provide authority for the creation of temporary rules. Rather it addresses the status of an emergency rulemaking if the agency does not follow through with the required rulemaking procedures.

³ Amerada Hess v. Conrad, 410 N.W.2d 124, 137 (N.D. 1987) (VandeWalle, J. concurring and dissenting), and Rocky Mountain Oil & Gas Ass’n v. Conrad, 405 N.W.2d 279, 284 (N.D. 1987) (VandeWalle, J., dissenting). See generally Arthur Earl Bonfield, State Administrative Rule Making 97-140 (Little, Brown and Co., 1986).

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is declared FMD-free by the Office of International des Epizooties (OIE). Paragraphs one and three do not have an end date. Paragraphs one and three should be amended to clarify when they cease to have effect because they will continue to be in force until the BOAH revokes the Order, the Order is amended to reflect an end date, or the Order is terminated by the judicial process.

You question whether the Order requires the following classes of domestic animals to obtain a license or to have a vet's certificate for each animal: Dogs and cats traveling in cars on I94, hunters coming to North Dakota with hunting dogs, people in East Grand Forks traveling to Grand Forks with a pet in the car, and North Dakota residents traveling out of state with a pet and returning.

Dogs and cats are considered domestic animals, thus both would be required to have an importation permit prior to entry into North Dakota. Although I am hesitant to review all of the circumstances in which an animal might enter or re-enter the state, it would be reasonable to assume that if an animal has never been to North Dakota, and the intent of the owner is to bring the animal to North Dakota, the entry of the animal into the state requires an importation permit. The scope of this Order should be considered by the BOAH when it considers whether to continue or amend this Order or whether to begin the rulemaking process.

Sincerely,

Wayne Stenehjem
Attorney General

ms/vkk

cc: Board of Animal Health
Larry Schuler, DVM, State Veterinarian