A Guide to the

# MONTANA ENVIRONMENTAL POLICY ACT



Revised by
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**ACKNOWLEDGMENTS**

In 1998, the legislative Environmental Quality Council (EQC) developed *A Guide to the Montana Environmental Policy Act* in an effort to help Montana's citizens better understand and to help Montana's state agencies better implement our environmental policy laws. Originally authored by John Mundinger and Todd Everts, the *Guide* received updates in 2004 by Larry Mitchell, 2006 by Todd Everts, in 2009, 2013, 2019, and 2021 by Hope Stockwell, and in 2024 by Jason Mohr.

## DISCLAIMER

This *Guide to the Montana Environmental Policy Act* should not be used as a legal reference. When in doubt, always refer to the statutes (Title 75, chapter 1, parts 1 through 3, MCA) or the state agency's administrative rules. When making any legal judgments on the adequacy or completeness of procedure, always consult state agency legal staff.

**IN MEMORIAM**

Representative George Darrow, a Republican and geologist from Billings, sponsored MEPA in 1971. Darrow served in the Montana Legislature from 1967 to 1974 as both a representative and a senator.

Darrow was the first chairman of the Environmental Quality Council and said in the Council's inaugural report:

> "In the years to come, I believe the people of Montana will increasingly recognize the milestone action of the 1971 legislature in enacting the Montana Environmental Policy Act and the enduring benefit to the well-being of Montanans made possible by this action. On behalf of the council, I wish to express our appreciation for the opportunity to serve during this formative period."

Throughout his life, Darrow participated in environmental organizations and stayed politically active, successfully influencing environmental legislation.

Darrow died on February 25, 2015, at the age of 90.

George Darrow, 1924 - 2015

# FOREWORD

In 1971, a farsighted Montana Legislature initiated a state program of environmental quality with its passage of the Montana Environmental Policy Act (MEPA). MEPA is unique among environmental laws, creating a bipartisan committee—the Environmental Quality Council—as a statutory arm of the Legislature to provide continuing oversight and guidance for a system of coherent, coordinated, and consistent environmental legislation.

In MEPA's innovative provision for environmental impact statements on "major actions of state government significantly affecting the quality of the *human* environment", MEPA significantly expanded the public right to participate in the decisions of government. Such impact statements were in effect deeply **conservative** provisions requiring thoughtful, informed, and deliberate consideration of the consequences and impacts of state actions. Simply expressed, they mandated, "Look before you leap."

MEPA was **purposeful** in establishing a *process* whereby Montana can *anticipate* and *prevent* unexamined, unintended, and unwanted consequences rather than continuing to stumble into circumstances or cumulative crises that the state can only *react to* and *mitigate*. Again, simply expressed in country vernacular, "An ounce of prevention is worth a pound of cure."

With its enactment a year earlier than the 1972 Montana Constitutional Convention, MEPA acted as a precursor to the strong environmental stance asserted in the new constitution. This constitutional declaration of environmental rights and duties now undergirds and reinforces the provisions of the Montana Environmental Policy Act.

Since its passage, MEPA has undoubtedly saved the State of Montana from proceeding with hasty, ill-considered, and costly actions that may have foreclosed future opportunities or cost tens of millions of dollars to mitigate, restore, or repair.

Environmental actions are a special class of human activities affecting the evolved ecosystems that contain human economic activity and determine the potential for human quality of life in that they *are essentially irreversible.* Actions such as revenue collection and allocation, facility design, and management strategies can be revised or reversed with minimal disruption. However, a river valley and stream channel, however reshaped to accommodate a railroad or an interstate highway, are essentially changed for all time. The farmland stripped of its topsoil and paved over for a shopping center will not grow crops again. Ore bodies and oil fields depleted for present uses are not available to our descendants to meet their needs. Wildlife and fish habitats converted to other uses cannot readily be restored to their original productivity.

Such decisions, for better or worse, become an irretrievable forward-ratcheting of the evolution of our economy and the environment that contains it. Within that shaped environment, we and our children's children must construct our lives.

For nearly a third of a century, MEPA's influence has continued to sustain the integrity of Montana's ecosystems and Montana communities. With this in mind, I am pleased to present this citizen's guide to the Montana Environmental Policy Act. This compelling manual provides detailed information on MEPA's history and process and its opportunities for public participation and assists interested Montana citizens in taking action to preserve the state's existing environmental integrity that allows us to be a shining magnet that will attract and perpetuate the best there can be.

Rep. George Darrow, Republican
1971 MEPA Sponsor
(June 1998)

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## WHAT IS THE PURPOSE OF MEPA?

The purpose of the MONTANA ENVIRONMENTAL POLICY ACT (MEPA)[1] is to declare *a state policy that will encourage productive and enjoyable harmony between humans and their environment, to protect the right to use and enjoy private property free of undue government regulation, to promote efforts that will prevent, mitigate*[2]*, or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans, to enrich the understanding of the ecological systems and natural resources important to the state . . .* (75-1-102(2), MCA).

Legislative amendments in 2003 to MEPA's purpose statement note that the Montana Legislature, "mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Montana Environmental Policy Act" (75-1-102(1), MCA). MEPA is procedural, and it is the Legislature's intent that the requirements of MEPA provide for adequate review of state ACTIONS in order to ensure that environmental attributes are fully considered "by the Legislature in enacting laws to fulfill constitutional obligations"[3].

The 2011 Legislature further clarified that the purpose of requiring an ENVIRONMENTAL ASSESSMENT (EA) or an ENVIRONMENTAL IMPACT STATEMENT (EIS) under MEPA "is to assist the legislature in determining

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[1] Terms that are capitalized and underlined are further defined or explained in the Glossary and Index section beginning on page 61.

[2] Senate Bill No. 233, Chapter 396, Laws of 2011, added the term "mitigate".

[3] Senate Bill No. 233, Chapter 396, Laws of 2011, added the words inside the quotation marks.

whether laws are adequate to address impacts to Montana's environment and to inform the public and public officials of potential impacts resulting from decisions made by state agencies" (75-1-102(3)(a), MCA). The 2011 Legislature also added that except to the extent that an applicant agrees to the incorporation of measures in a permit, it is not the purpose of MEPA to provide for regulatory authority, beyond authority explicitly provided for in existing statute, to a state agency (75-1-102(3)(b), MCA).

MEPA is patterned after the NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 (NEPA) and includes three distinct parts. Part 1 is the “spirit” of MEPA. Part 1 establishes and declares Montana’s environmental policy. It acknowledges that human activity can have a profound impact on the environment. It requires state government to coordinate state plans, functions, and resources to achieve various environmental, economic, and social goals. Part 1 has no legal requirements, but the policy and purpose provide guidance in interpreting and applying the statutes.

Part 2 is the “letter of the law”. Part 2 requires state agencies to carry out the policies in Part 1 through the use of a systematic, INTERDISCIPLINARY ANALYSIS of state actions that have an impact on Montana's HUMAN ENVIRONMENT. This is accomplished through the use of a deliberative, written ENVIRONMENTAL REVIEW.

Part 3 of MEPA establishes the ENVIRONMENTAL QUALITY COUNCIL (EQC) and outlines its authority and responsibilities.

To truly understand MEPA's purpose, a brief review of the environmental, public participation, and right-to-know provisions of Montana's 1972 Constitution is necessary. The Legislature enacted MEPA in the spring of 1971 just prior to the Constitutional Convention, which started in November of 1971. Montana voters subsequently ratified the new Constitution in June of 1972. The language of MEPA is, to some extent, reflected in the Constitution.

The noteworthy constitutional provisions include:

> **Article II, section 3. Inalienable rights.** All persons are born free and have certain inalienable rights. They include *the right to a clean and healthful environment* and *the rights of pursuing life's basic necessities*, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, *health* and happiness in all lawful ways. *In enjoying these rights, all persons recognize corresponding responsibilities*. (emphasis added)
>
> **Article II, section 8. Right of participation.** The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.
>
> **Article II, section 9. Right to know.** No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.
>
> **Article IX, section 1. Protection and improvement.** (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
> (2) The legislature shall provide for the administration and enforcement of this duty.
> (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

The Montana Supreme Court has ruled that the inalienable right is a fundamental right, that Article II, section 3, and Article IX, section 1, are interrelated and interdependent, and that any state action that implicates

the constitutional environmental right will be upheld only if it furthers a compelling state interest and only minimally interferes with the right while achieving the state's objective.

The purpose of the above-noted constitutional provisions mirrors, and is intertwined with, the underlying purposes of MEPA. If implemented correctly, MEPA should facilitate the ability of state agencies to make better decisions. Better decisions should be BALANCED DECISIONS. Balanced decisions maintain Montana's clean and healthful environment without compromising the ability of people to pursue their livelihoods as enumerated in MEPA and the Constitution. Better decisions should be ACCOUNTABLE DECISIONS. Accountable decisions, as required in MEPA, clearly explain the AGENCY'S reasons for selecting a particular course of action. Better decisions are made with PUBLIC PARTICIPATION. Montana's Constitution mandates open government—people have the right to participate in the decisions made by their government. MEPA requires agencies to open government decisions for public scrutiny. The Montana Constitution also recognizes that people have the responsibility to participate in decisions that may affect them.

MEPA is *not* an act that controls or sets regulations for any specific land or resource use. It is *not* a preservation, wilderness, or antidevelopment act. It is *not* a device for preventing industrial or agricultural development. If implemented correctly and efficiently, MEPA should encourage and foster economic development that is environmentally and socially sound. By taking the time to identify the environmental impacts of a state decision before the decision is made and including the public in the process, MEPA is intended to foster better decisionmaking for people and the environment.

MEPA *does* suggest that there should be a balance between people and their environment, between population and resource use, and between short-term use and long-term productivity. MEPA further acknowledges that each generation of Montanans has a CUSTODIAL RESPONSIBILITY concerning the use of the environment. It notes that Montanans are trustees for future generations. MEPA also suggests a utilitarian

philosophy. Utilitarian terms such as “human environment”, “productive”, “beneficial uses”, “high standards of living”, and “life's amenities” were intentionally inserted in the purpose and policy of MEPA. MEPA truly is a “balancing act” act.

## WHY DID MONTANANS DECIDE TO ENACT MEPA?

Backed by a very broad and unanimous coalition of interests (**Table 1**), MEPA was enacted in 1971 by a Republican House (99-0), a Democratically controlled Senate (51-1), and a Democrat in the Governor's Office. George Darrow, a Republican representative and geologist from Billings, sponsored the legislation. Although the legislative record is sparse in detail, it reflects some of the reasons why legislators enacted MEPA.

Selective statements from the legislative record include:

- MEPA "states the responsibility of the state".
- MEPA spells out that "each citizen is entitled to a healthy environment".
- "The intent of the bill is to establish a working partnership between the Executive and Legislative Branch of state government concerning the protection of the environment."
- MEPA "would coordinate the environmental facts of the state".
- "Montana's productive age populace is leaving the state for employment in other states, and if we wanted to keep taxpayers in the state, she suggested passage of HB 66 (MEPA)."
- "A major conservation challenge today is to achieve needed development and use of our natural resources while concurrently protecting and enhancing the quality of our environment."
- The sponsor of this bill "legislates foreknowledge".
- MEPA "seeks that often elusive middle ground between purely preservationist philosophy and purely exploitive philosophy, and indeed we must soon find that middle ground".

- MEPA will "establish a unified state policy pertaining to development and preservation of our environment".
- "As we guide Montana's development, we must use all of the scientific, technological, and sociological expertise available to us. This is our responsibility . . . . We must avoid creating emotionally explosive situations that have occurred in the past and, indeed, are present right now in some of our communities . . . . We must establish a state policy for the environment."
- "Include people in the decisionmaking."
- MEPA is "a master plan for the enhancement of our environment and promulgation of our economic productivity".
- MEPA "commits the state, through its agencies, to consider the environmental consequences of its actions".
- MEPA "says that Montana should continue to be a wonderful place to live and that development of its resources should be done in such a manner that quality of life will be assured to those who follow".

Unfortunately, the legislative record does not include transcripts from the floor debates in the House or the Senate. The votes are the only indicator of MEPA's support in those debates.

**Table 1. Persons and Interests That Supported or Opposed MEPA During the House and Senate Legislative Hearings in 1971.** (Source: House and Senate Minutes, 1971)

| Person/Organization | Supported MEPA | Opposed MEPA |
|---|---|---|
| Ted Schwinden, Commissioner of State Lands | X | |
| R.W. Beehaw, Board of Natural Resources | X | |
| John Anderson, Executive Officer of the Department of Health | X | |

| Person/Organization | Supported MEPA | Opposed MEPA |
|---|---|---|
| Winton Weydemeyer, Montana Conservation Council | X | |
| Zoe Gerhart, Citizen | X | |
| Dennis Meehan, Citizen | X | |
| Wilson Clark, Professor at Eastern Montana College, Billings/Yellowstone Environmental Council | X | |
| Jan Rickey, Citizen | X | |
| Polly Percale, Assistant Professor at Eastern Montana College | X | |
| Ted Reineke, Eastern Montana College Wilderness Club | X | |
| Chris Field, Montana Scientist Committee for Public Information | X | |
| Marilyn Templeton, Gals Against Smog and Pollution (GASP) | X | |
| Cecil Garland, Montana Wilderness Society | X | |
| Robert Helding, Montana Wood Products Association | X | |
| Dorothy Eck, League of Women Voters | X | |
| Robert Fischer, Montana Chamber of Commerce | X | |
| Ben Havdahl, Petroleum Industry, Rocky Mountain Oil and Gas Association, Montana Petroleum Association | X | |
| Don Boden, Citizen | X | |
| Joe Halterman, Good Medicine Ranch | X | |
| Calvin Ryder, Citizen | X | |
| Gordon Whirry, Bozeman Environmental Task Force | X | |

| Person/Organization | Supported MEPA | Opposed MEPA |
|---|---|---|
| R.E. Tunnicliff, American Association of University Women | X | |
| Kirk Dewey, Montana Council of Churches | X | |
| Pat Calcaterra and Margaret Adams, Montana Sierra Club | X | |
| Don Aldrich, Montana Wildlife Association | X | |
| David Cameron, Professor at Montana State University | X | |
| Mons Teigen, Montana Stockgrowers | X | |
| Jim Posowitz, State of Montana Fish and Game Commission | X | |
| Frank Griffin, Southwestern Miners Association | X | |

MEPA sets a very high standard for state agencies, and this standard may, at times, be difficult to achieve. That difficulty was already apparent during the 1971 legislative session. There seemingly was unanimous agreement about the need for balance, accountability, and public involvement in agency decisions that affect Montana's environment. However, there were strongly divergent opinions about how best to achieve those purposes.

MEPA was one of several environmental bills considered by the 1971 Legislature. One of the companion bills—the Montana Environmental Protection Act—would have declared that *a public trust exists in the natural resources of this state* and that those *natural resources should be protected from pollution, impairment, or destruction*. To enforce this trust, the Protection Act would have allowed anyone, including nonresidents, to sue the state for failure to perform any legal duty concerning the protection of the air, water, soil and biota, and other natural resources from pollution, impairment, or destruction.

The Protection Act generated much public controversy. The votes both in committee and on the floor mirrored the political realities that each bill endured. The Protection Act received an adverse committee report with a 6 to 5 do not pass vote. When brought up on second reading in the House, the Protection Act died on a 49 to 48 vote. In contrast to the Protection Act's much-contested demise, MEPA sailed through third and final readings in both the Republican House, 101 to 0, and the Democratic Senate, 51 to 1. The House accepted the Senate's amendments with a final vote of 99 to 0.

MEPA's almost unanimous bipartisan approval would, on its face, appear to reflect a true consensus on the direction of the state's environmental policy. However, the battle over MEPA's funding is likely a better indicator of the political climate surrounding its enactment than the votes on the House and Senate floors. Originally, close to $300,000 was sought to implement MEPA but only $100,000 was approved in the 1971 regular session. Efforts to secure additional funding during a special session held later that year failed.

## HOW HAS THE MONTANA LEGISLATURE DEALT WITH MEPA SINCE ITS ENACTMENT?

Since MEPA's enactment in 1971, successive Legislatures have struggled to determine the role of MEPA in directing state environmental policy. As of 2021, legislators proposed to modify or study MEPA in some way in 128 introduced pieces of legislation. Seventy-one of those bills have been enacted.

Trends in the legislative history include significantly increasing the statutory responsibilities of the EQC, clarifying that certain actions *are* subject to MEPA review while excluding others, and making it more difficult for a plaintiff to litigate a MEPA case and to win a MEPA case against a state agency.

In 1995, the Legislature enacted **Senate Bill No. 231** (Chapter 352, Laws of 1995) that clarified that it is the state's policy under MEPA to protect the right to use and enjoy private property free of undue government regulation. MEPA always required an economic and social impact

analysis, but Senate Bill No. 231 further specified that when agencies conduct that analysis, regulatory impacts on private property rights and ALTERNATIVES must be considered.

The watershed year of legislative changes to MEPA occurred during the 2001 legislative session. Until that time, proposed legislation, ranging from significantly limiting the scope of MEPA to significantly expanding MEPA's breadth and influence, was frequently introduced and subsequently killed. Of the ten MEPA-related bills introduced in 2001, eight were enacted. Senate Bill No. 377, House Bill No. 459, and House Bill No. 473 were perhaps the most significant.

**Senate Bill No. 377** (Chapter 299, Laws of 2001) established time limits and procedures for conducting environmental reviews; it defined specific terms used in MEPA; it required that legal challenges to actions under MEPA be brought only in District Court or federal court within 60 days of a final agency action; and it provided an exception to the permitting time limits if Board review of certain agency decisions is requested.

**House Bill No. 459** (Chapter 267, Laws of 2001) required that any alternative analyzed under MEPA must be reasonable, that the alternative must be achievable under current technology, and that the alternative must be economically feasible as determined solely by the economic viability for similar projects having similar conditions and physical locations and determined without regard to the economic strength of the specific PROJECT SPONSOR. House Bill No. 459 required that the agency proposing the alternative consult with the project sponsor and give due weight and consideration to the project sponsor's comments. It also provided that a project sponsor could request a review by the APPROPRIATE BOARD of an agency's determination regarding the reasonableness of an alternative.

**House Bill No. 473** (Chapter 268, Laws of 2001) clarified a long-standing and controversial issue—is MEPA procedural or is it substantive? That is to say, does MEPA provide state agencies with additional authority to mitigate or use stipulations on a permit, license, or state-initiated action beyond the agency's permitting, licensing, or state-initiated action statutory or regulatory authority? House Bill No. 473 ensured that MEPA

is a procedural statute that does not dictate a certain result, but dictates a process. In the 2003 legislative session, **House Bill No. 437** (Chapter 361, Laws of 2003) further articulated that MEPA is procedural by amending MEPA's purpose section to include the following statement: "The Montana Environmental Policy Act is procedural, and it is the legislature's intent that the requirements of parts 1 through 3 of this chapter provide for the adequate review of state actions in order to ensure that environmental attributes are fully considered" (75-1-102(1), MCA). The 2011 Legislature added to that sentence in **Senate Bill No. 233** (Chapter 396, Laws of 2011), clarifying that it is the legislature's intent..."to ensure that: (a) environmental attributes are fully considered by the legislature in enacting laws to fulfill constitutional obligations; and (b) the public is informed of the anticipated impacts in Montana of potential state actions."

Legislative consideration of MEPA has continued since 2001. Since 2007, legislators introduced bills to alter the scope and purpose of MEPA in nearly every session. Of those, three significant pieces were enacted.

In 2007, the Legislature approved **Senate Bill No. 448** (Chapter 469, Laws of 2007), requiring a customer fiscal impact analysis to be conducted as part of the permitting process for new electrical generation facilities and for certification of new facilities or facility upgrades under the Montana Major Facility Siting Act.

In 2009, the Legislature approved **House Bill No. 529** (Chapter 239, Laws of 2009), which limits the scope of environmental reviews for certain energy development proposals on state land to the impacts of the proposed action within the boundaries of the state land where the action would take place.

The third bill enacted to alter the scope and purpose of MEPA since 2001 was **Senate Bill No. 233** (Chapter 396, Laws of 2011). As previously discussed, lawmakers again clarified the purpose of MEPA in Senate Bill No. 233, while making other notable changes as well by:

- putting geographic arms around the term "human environment" by limiting it to the human environment *within Montana's borders*.

Previously, MEPA said that when conducting an environmental review, agencies must recognize national impacts "…and lend appropriate support…to maximize cooperation in anticipating and preventing a decline in the quality of the world environment." Now, MEPA says an environmental review may not include a review of actual or potential impacts beyond Montana's borders or consider actual or potential impacts that are regional, national, or global in nature unless the environmental review is conducted by the Department of Fish, Wildlife, and Parks for the management of wildlife and fish or a review beyond Montana's borders is required by law, rule, regulation, or federal agency.

- defining the term "STATE-SPONSORED PROJECT" and exempted projects that are not state-sponsored from certain aspects of environmental analysis, including identifying and developing methods and procedures that will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking. The ALTERNATIVES ANALYSIS for projects that are not state-sponsored is also limited by Senate Bill No. 233, which states that if "alternatives are recommended, the project sponsor may volunteer to implement the alternative. Neither the alternatives analysis nor the resulting recommendations bind the project sponsor to take a recommended course of action." Senate Bill No. 233 defined "alternatives analysis" such that for a project that is not state-sponsored, the analysis cannot include an alternative facility or an alternative to the project itself.

In 2023, the legislature passed two acts, limiting legal challenges of environmental reviews (Senate Bill No. 557) and prohibiting evaluation of greenhouse gas emissions and climate impacts (House Bill No. 971).

Later that year, a Helena district court found these bills unconstitutional. (See Held v. State, 2023 Mont. Dist. 2). An appeal of this ruling was pending at the time of this writing.

Although the legislature adjusted the mechanics of MEPA implementation over the years, Montana's 1971 environmental policy and purpose declared in Part 1 of MEPA and the 1972 constitutional environmental provisions remain as the guiding principles for how people relate to their environment.

## HOW HAVE THE MONTANA COURTS INTERPRETED MEPA?

As of Oct. 1, 2024, state agencies had completed more than 77,961 MEPA documents since 1971, according to the EQC MEPA database.

According to a 2020 review by the LEGISLATIVE ENVIRONMENTAL POLICY OFFICE (LEPO), 25 of 79 adjudicated cases have been stayed, dismissed, or settled — 11 in the state's favor. Many MEPA cases also involve litigation of other state laws, including constitutional provisions and permitting. Six of the cases resolved by state courts have been decided on merits not involving MEPA.

The review found that of the cases decided by the courts on MEPA issues, the state prevailed 60 percent of the time. This statistic includes three split decisions in which the state prevailed on the involved MEPA questions but lost on other merits. In the Montana Supreme Court, the review found the state had an 82 percent success rate on MEPA issues.[4]



[4] A list of major MEPA cases, along with related court and MEPA documents, is available online at www.leg.mt.gov/mepa. Simply follow the link for "Court Cases".

Each MEPA suit has its own cause and effect but generally can be lumped into two basic categories:

- Was a MEPA analysis (EA or EIS) required?
- Was the MEPA analysis (EA or EIS) adequate?

As to the question of whether a MEPA review (EA or EIS) is adequate, the courts review the record to determine whether the agency complied with the statute and its own MEPA rules in writing the MEPA review document. Adequacy issues reviewed by the courts include CUMULATIVE IMPACTS, alternatives, cost-benefit analysis, impact analysis generally, and economic impact analysis.

In 2000, after an intensive interim study, the EQC concluded that "generally, the MEPA process has resulted in state agencies making legally defensible decisions. It appears that the more complete the environmental document, the more likely the state is to prevail in litigation." The EQC further concluded that the state tends to lose more MEPA cases when the state agency fails to conduct an EIS. The EQC also noted that "no evidence has been received that the cases were frivolous" and that "there is no information to suggest that legal appeals of agency decisions have not been timely".

As of October 2024, major unresolved MEPA cases include:

- Held v. State
- Montana Trout Unlimited v. Tintina
- MEIC v. Montana DEQ

## WHAT REQUIREMENTS DOES MEPA IMPOSE ON STATE AGENCIES?

MEPA is a PROBLEM SOLVING tool. One of the broader implied goals of MEPA is to foster wise actions and better decisions by state agencies. This is accomplished by ensuring that relevant environmental information is available to public officials *before* decisions are made and *before* actions are taken. MEPA has two central requirements:

- Agencies must consider the effects of pending decisions on the environment and on people prior to making each decision.
- Agencies must ensure that the public is informed of and participates in the decision-making process.

## HOW DO AGENCIES CONSIDER THE EFFECTS OF PENDING DECISIONS AND ACTIONS?

MEPA's chief sponsor, Representative George Darrow, once noted that the fundamental premise of MEPA is *common sense*. In his words, *MEPA is a "think before you act" act*. State agencies are required to think through their actions before acting. MEPA provides a process that can help ensure that permitting and other agency decisions that might affect the human environment are INFORMED DECISIONS—informed in the sense that the consequences of the decision are understood, reasonable alternatives are evaluated, and the public's concerns are known.

MEPA's first objective requires agencies to conduct thorough, honest, unbiased, and scientifically based full DISCLOSURE of all relevant facts concerning impacts on the human environment that may result from agency actions. This is accomplished through a systematic and interdisciplinary analysis that ensures "the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking for a state-sponsored project" (75-1-201(1)(b)(i)(A), MCA).

MEPA embodies the basic tenet of problem solving: think before you act. Before making a decision to implement an action that might affect the

human environment, MEPA requires the agency to generate and organize information that:

- describes the need for the action or the problem that the agency intends to solve (PURPOSE AND NEED);
- explains the agency's intended solution to the problem (PROPOSED ACTION);
- discusses other possible solutions to the problem (alternatives)[6];
- analyzes the potential consequences of pursuing one alternative or another in response to the problem (impacts to the human environment); and
- discusses specific procedures for alleviating or minimizing adverse consequences associated with the proposed actions (MITIGATION).

Although the consequences of an agency decision must be determined, MEPA does not necessarily result in forcing a particular decision. This is especially the case when an agency is being asked to authorize an action or approve a permit that is allowed under another state law. The 2001 and 2011 amendments to MEPA make it clear that the permitting or authorizing statutes form the basis for whether the decision will be made

and that MEPA cannot be used to deny or impose conditions on the approval unless the APPLICANT agrees.

In the case of an agency action that is initiated by the agency, MEPA requires the agency to provide justification for its decisions unencumbered by permitting restrictions and mandates. The

[6] If alternatives are recommended for a project that is not state-sponsored, the project sponsor may volunteer to implement the alternative but is not required to take a recommended course of action.

consequences of the proposed action can be more easily mitigated or avoided when the agency is the applicant.

## HOW DO AGENCIES INFORM AND INVOLVE THE PUBLIC?

MEPA's second objective—public participation—compels state agencies to involve the public through each step of the decision-making process,

depending on the complexity and seriousness of the environmental issues associated with a proposed action. This is accomplished by:

- telling the public that an agency action is pending;
- seeking preliminary comments on the purpose and need for the pending action (SCOPING);
- preparing an environmental review (CATEGORICAL EXCLUSION (CE), EA, or EIS) that describes and discloses the impacts of the proposed action and evaluates reasonable alternatives and mitigation measures;
- requesting and evaluating public comments about the environmental review; and
- informing the public of what the agency's decision is and the justification for that decision.

The underlying premise of the public participation requirement is government accountability. MEPA requires state government to be accountable to the people of Montana when it makes decisions that impact the human environment. Government accountability encourages trust, communication, and understanding between the affected parties. It can result in better decisionmaking, fewer environmental impacts, and improved environmental policies if statutory limitations are discovered.

## WHAT IS AN "INTERDISCIPLINARY APPROACH"?

MEPA requires that agencies consider all of the features that make up the human environment—legal constraints, economics, political

considerations, biological communities, physical settings, etc. These features are variously described by the biological, physical, social, and political sciences. An interdisciplinary analysis ensures that the appropriate perspectives and disciplines from the various sciences and the environmental design arts are incorporated in the agency's analysis. The intent behind this requirement is to ensure that experts trained in specific facets of the affected human environment (i.e., wildlife biologist, economist, geologist, ecologist, hydrologist, archaeologist, soil scientist, sociologist, etc.) are all involved in the analysis. If the agency does not have people with the necessary expertise on staff, the agency may obtain assistance from other agencies, universities, consultants, etc.

# THE ENVIRONMENTAL QUALITY COUNCIL

## WHAT IS THE ENVIRONMENTAL QUALITY COUNCIL?

The EQC is a state legislative committee created by MEPA. As outlined in MEPA, the EQC's purpose is to encourage conditions under which people can coexist with nature in “productive harmony”. The EQC fulfills this purpose by assisting the Legislature in the development of natural resource and environmental policy, by conducting studies on related issues, and by serving in an advisory capacity to the state’s natural resource programs.

## WHO IS ON THE EQC?

The EQC is composed of 17 Montana citizens: 6 are state senators; 6 are state representatives; 4 are members of the public; and 1, a nonvoting member, represents the Governor. Four of the senators and representatives must be members of the majority party.

Council members serve 2-year terms, concurrent with the state legislative bienniums.

## WHO STAFFS THE EQC?

The Legislative Environmental Policy Office (LEPO) staff, under the supervision of the Legislative Environmental Analyst, is responsible for assisting EQC members in the fulfillment of their duties. Staff responsibilities include conducting studies assigned by the Legislature, researching and writing reports, organizing and monitoring public meetings and hearings, drafting proposed legislation, and serving as committee staff to the House and Senate Natural Resources Committees and other committees during legislative sessions. The LEPO staff acts as an impartial and nonpolitical source of information on environmental matters for the EQC, the Legislature, and the public.

# WHEN IS AN ENVIRONMENTAL REVIEW REQUIRED?

Montana state agencies are required to prepare an environmental review whenever the following three conditions are satisfied:

- The agency intends to take an action, as defined by MEPA and agency administrative rules. (MEPA model rules served as guidance for individual executive agencies to craft their own rules.)
- The action is not an EXEMPT ACTION or excluded from MEPA review.
- The action may impact the human environment.

The degree and intensity of impacts determine the type of environmental review that should be conducted. However, the degree or intensity of the potential impact is irrelevant in determining whether an environmental review must be conducted.

**WHAT IS A STATE "ACTION"?**

The term "action" as defined by the MEPA Model Rules is very broad. If an agency project, program, or activity falls within the following definition of the term "action", then it is potentially subject to MEPA review:

- a project, program, or activity directly undertaken by an agency;
- a project or activity supported through contract, grant, subsidy, loan, or other form of funding assistance from the agency, either singly or in combination with one or more other state agencies; or
- a project or activity involving the issuance of a lease, permit, license, certificate, or other entitlement for use or permission to act by the agency, either singly or in combination with other state agencies.

## WHICH ACTIONS ARE EXEMPT FROM MEPA?

Almost any agency activity fits the broad definition of action. However, a MEPA review is not required for all agency actions. The following categories of actions, because of their special nature, do not require any review under MEPA (MEPA Model Rule III(5)):

- ADMINISTRATIVE ACTIONS (routine clerical or similar functions, including but not limited to administrative procurement, contracts for consulting services, or personnel actions);
- minor repairs, operations, and maintenance of existing facilities;
- investigation, enforcement, and data collection activities;
- MINISTERIAL ACTIONS (actions in which the agency exercises no discretion and only acts upon a given state of facts in a prescribed manner, e.g., a decision by the Montana Department of Fish, Wildlife, and Parks to issue a fishing license);
- actions that are primarily social or economic in nature and that do not otherwise affect the human environment;
- actions that qualify for a categorical exclusion; and
- specific actions of certain agencies that are statutorily exempt.

Appendix C provides a complete list of activities excluded or exempted from MEPA.

## HOW DOES MEPA AFFECT LOCAL GOVERNMENT?

MEPA applies specifically to agencies of the State of Montana. It does not establish a requirement for agencies of local governments. However, local government agencies often receive funding support from state agencies. Actions by state agencies to support local government are subject to the provisions of MEPA.

## WHAT IS THE "HUMAN ENVIRONMENT"?

The human environment encompasses the biological, physical, social, economic, cultural, and aesthetic factors that interrelate to form the environment (MEPA Model Rule II(12)).

The 2011 Legislature clarified that evaluation of the actual or potential impacts of a proposed action under MEPA is limited to impacts on the *Montana* human environment and may not include actual or potential impacts beyond Montana's borders or those that are regional, national, or global in nature unless the environmental review is conducted by the Department of Fish, Wildlife, and Parks for the management of wildlife and fish or a review beyond Montana's borders is required by law, rule, regulation, or federal agency (75-1-201(2), MCA).

# WHAT TYPE OF ENVIRONMENTAL REVIEW IS THE AGENCY REQUIRED TO PERFORM?

If the agency's action has a potential impact on the human environment (adverse, beneficial, or both) and if that action is neither categorically excluded nor exempt from MEPA review, then some form of environmental review is required. Agencies must use some discretion in determining which level of environmental review is appropriate for the pending decision. MEPA and administrative rules delineate levels of review, based on the SIGNIFICANCE of the potential impacts of the agency's action.

Two key factors strongly influence the determination that an impact is potentially significant. First, the agency must appraise the SCOPE and magnitude of the project, program, or action. Second, the characteristics of the location where the activity would occur must be assessed. In determining the significance of potential impacts on the quality of the human environment, MEPA Model Rule IV requires agencies to consider the following criteria:

- the severity, duration, geographic extent, and frequency of occurrence of the impact;
- the probability that the impact will occur if the proposed action occurs or, conversely, the reasonable assurance in keeping with the potential severity of an impact that the impact will not occur;
- growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts;

- the quantity and quality of each environmental resource or value that would be affected, including the uniqueness and fragility of those resources or values;

- the importance to the state and to society of each environmental resource or value that would be affected;

- any precedent that would be set as a result of an impact of the proposed action that would commit the Department to future actions with significant impacts or a decision in principle about such future actions; and

- potential conflict with local, state, or federal laws, requirements, or formal plans.

Any determination that an agency action would significantly affect the quality of the human environment must be endorsed in writing by the director of the agency making the significance determination or recommendation.

## WHAT ARE THE LEVELS OF ENVIRONMENTAL REVIEW?

MEPA specifies three different levels of environmental review, based on the significance of the potential impacts. The levels are CE, EA, and EIS. Within those levels, the MEPA Model Rules also provide for three additional types of review. These are a MITIGATED ENVIRONMENTAL ASSESSMENT OR MITIGATED EA (MODEL RULE III(4)), a PROGRAMMATIC REVIEW (MODEL RULE XVII), and a SUPPLEMENTAL REVIEW (MODEL RULE XIII).

## WHEN IS A "CATEGORICAL EXCLUSION" APPROPRIATE?

State agencies are provided with the option of defining, through either rulemaking or a programmatic environmental review, the types of actions that seldom, if ever, cause significant impacts. The rulemaking or programmatic review must also identify the circumstances that could cause an otherwise excluded action to potentially have significant environmental impacts and provide a procedure whereby these situations would be discovered and appropriately analyzed. A categorical exclusion is a determination, based on the rulemaking or programmatic review, that

the proposed agency action satisfies all of the criteria for exclusion. Therefore, no further environmental review is required.

## WHEN IS AN "ENVIRONMENTAL ASSESSMENT" APPROPRIATE?

If it is unclear whether the proposed action may generate impacts that are significant, then an agency may prepare an EA in order to determine the potential significance (MEPA Model Rule III (3)). If the EA determines that the proposed action will have significant impacts, then either an EIS must be prepared or the effects of the proposed action must be mitigated below the level of significance and documented in a mitigated EA (MEPA Model Rule III(4)).

If it is clear that the proposed action will not have a significant effect on the human environment, then an agency may prepare an EA or some other form of systematic and interdisciplinary analysis.

## WHEN IS AN "ENVIRONMENTAL IMPACT STATEMENT" APPROPRIATE?

An EIS is a detailed environmental review that is required whenever an agency proposes a major action significantly affecting the quality of the human environment (75-1-201(1)(b)(iv), MCA).

## WHEN IS A "MITIGATED ENVIRONMENTAL ASSESSMENT" APPROPRIATE?

In certain situations, it may be possible to require mitigation through enforceable design and control measures. When an agency is being asked to authorize an action or approve a permit that is allowed under another state law, the enforceable measures or conditions either must be authorized by the approval or permitting statutes or must be mutually agreed to by the applicant under MEPA. If mitigation is sufficient to reduce impacts to a level below significance, the agency may, at its own discretion, prepare a mitigated EA (MEPA Model Rule III (4)). An agency's discretion in choosing to prepare a mitigated EA, rather than an EIS, is limited. The agency may prepare a mitigated EA only if it can demonstrate all of the following:

- All impacts of the proposed action are accurately identified.
- All impacts will be mitigated below the level of significance.
- No significant impact is likely to occur. (MEPA Model Rule III (4))

## WHEN IS A "PROGRAMMATIC" ENVIRONMENTAL ASSESSMENT OR IMPACT STATEMENT APPROPRIATE?

If an agency is contemplating a series of agency-initiated actions, programs, or policies that in part or in total may significantly impact the human environment, the agency must prepare a programmatic review that discusses the impacts of the series of actions. An agency may also prepare a programmatic review when required by statute, if the agency determines that such a review is warranted, or whenever a state/federal partnership requires a programmatic review. The determination as to whether the programmatic review takes the form of an EA or an EIS will be made in accordance with the significance criteria noted above (MEPA Model Rule XVII).

## WHEN ARE "SUPPLEMENTAL DOCUMENTS" APPROPRIATE?

Agencies are required to prepare a supplemental review to either a draft or final EIS whenever:

- the agency or applicant makes a substantial change in the proposed action;
- there are significant new circumstances discovered prior to a final agency decision, including information bearing on the proposed action or its impacts, that change the basis for the decision; or
- following preparation of a draft EIS and prior to completion of a final EIS, the agency determines that there is a need for substantial, additional information to evaluate the impacts of a proposed action or reasonable alternatives (MEPA Model Rule XIII (1)).

The supplement must explain the need for the supplement, state the proposed action, and describe the impacts that differ from or were not included in the original document.

## HOW SHOULD AN AGENCY RESPOND WHEN AN "EMERGENCY ACTION" IS NECESSARY?

The MEPA Model Rules include special provisions that allow state agencies to implement EMERGENCY ACTIONS prior to completion of an environmental review for the action (MEPA Model Rule II (8) and Rule XIX). Emergency actions generally include those actions necessary to:

- repair or restore property or facilities damaged or destroyed as a result of a disaster;

- repair public service facilities necessary to maintain service; or
- construct projects to prevent or mitigate immediate threats to public health, safety, or welfare or the environment.

Emergency actions are not exempt from environmental review. However, agencies may postpone the environmental review until after an action is taken. Within 30 days following initiation of the action, the agency must notify both the Governor and the EQC as to the need for the action and the impacts and results of taking the action (MEPA Model Rule XIX). Note that emergency actions must be limited to those actions immediately necessary to control the impacts of the emergency.

# ELEMENTS OF AN ENVIRONMENTAL REVIEW

## WHAT IS THE DIFFERENCE BETWEEN AN EA AND AN EIS?

The only substantive differences between an EA and an EIS lie in the scope and depth of analysis. There also are substantial procedural differences between an EA and an EIS. For example, an EIS requires more formal procedures for public review and agency RESPONSE TO PUBLIC COMMENT.

Although an EIS is more complex than an EA, the substantive requirements for both types of documents are similar. A standard topical outline for a generic environmental review document (EA or EIS) would include the following elements:

- a description of the purpose and need for the proposed action;
- a description of the AFFECTED ENVIRONMENT;
- a description and analysis of the alternatives, including the NO ACTION ALTERNATIVE; and
- an analysis of the impacts to the human environment of the different alternatives, including an evaluation of appropriate mitigation measures.

## WHAT IS "PURPOSE AND NEED"?

The purpose and need describe the problem that the agency intends to solve or the reason why the agency is compelled to make a decision to implement an action.

The purpose and need include five general elements:

- a description of the proposed action (including maps and graphs) and an explanation of the benefits and purpose of the proposed action;

- an explanation of the decision(s) that must be made regarding the proposed action;

- an acknowledgment and explanation of the concerns and issues generated through public and agency comment;

- a list of any other local, state, or federal agencies that have overlapping or additional jurisdiction or responsibility for the proposed action and a list of all necessary permits and licenses; and

- a description of any other environmental review documents that influence or supplement this document. (Source: Shipley & Associates, Applying the NEPA Process)

## WHAT IS A "PROPOSED ACTION"?

A proposed action is a proposal by an agency to authorize, recommend, or implement an action to serve an identified need or solve a recognized problem. An adequate description of the proposed action includes a description of: who is proposing the action; what action, specifically, is being proposed; where the action will occur; how the agency proposes to implement the proposed action; when the action will begin; the duration of the action; and why the agency is considering the proposed action.

It is important to recognize the difference between the proposed action and the final decision. Clarification of the proposed action is the logical place to begin an environmental review. However, the agency may not make a decision to implement the proposed action or an alternative to the proposed action until the environmental review is complete.

## WHAT IS THE "SCOPE" OF AN ENVIRONMENTAL REVIEW?

Scope is the full range of issues that may be affected if an agency makes a decision to implement a proposed action or alternatives to the proposed action. The scope of the environmental review is described through a definition of those issues, a reasonable range of alternatives, a

description of the impacts to the human environment, and a description of reasonable mitigation measures that would ameliorate the impacts.

Scoping is the process used to identify all issues that are relevant to the proposed action. The scoping process typically includes a request for public participation in the identification of issues. Notifications for a PUBLIC SCOPING PROCESS by an agency must be objective and neutral and may not speculate on the potential impacts of a proposed action.

## WHAT IS AN "ISSUE"?

An issue is a clear statement of a resource that might be adversely affected by some specific activities that are part of a proposed way to meet some objective(s). Stated another way, an issue is a problem or unresolved conflict that may arise should the agency's objectives be met as proposed. (Source: Shipley & Associates, Applying the NEPA Process)

Issues and agency project objectives systematically drive MEPA's environmental review process. The issues establish the framework for the development of alternatives, the description of the affected environment, the determination of which resources must be evaluated in the analysis of environmental impacts, and the complexity of the analysis.

## HOW ARE ISSUES IDENTIFIED?

Issues may be determined in a variety of ways. These include agency statutory mandates; issues, concerns, and opportunities identified in agency planning documents; issues generated from compliance with other laws or regulations; current internal concerns; changes in public uses, attitudes, values, or perceptions; issues raised by the public during scoping and comment; comments from other government agencies; and issues raised by identifying changes to the existing condition of resources that might be affected by the proposed action. (Sources: U.S.D.A. Forest Service, 1900-01 Training Manual; Shipley & Associates, Applying the NEPA Process)

Public participation is essential for identification of all issues. A public scoping process is optional if an agency is preparing an EA, but it is mandatory if the agency is preparing an EIS (MEPA Model Rule VII). Any

public scoping process for an environmental review that is triggered by a permitting or state-approval process must be completed within 60 days of the agency's receipt of a COMPLETE APPLICATION.

## WHICH ISSUES ARE RELEVANT?

Relevant issues are those that should be evaluated in the environmental review. Relevant issues tend to have one or more of the following common attributes: the agency is uncertain whether the impacts associated with the issue are significant; the agency is uncertain about the impacts associated with the issue or the effectiveness of the mitigation measures; or there is disagreement between the agency and one or more parties about the impacts associated with the issue or the effectiveness of mitigation measures. (Source: Montana Department of State Lands (now Department of Natural Resources and Conservation), Forestry Division, Applying MEPA to Forest Management Activities)

Nonrelevant issues are those that do not contribute to a useful analysis of environmental consequences. Nonrelevant issues share one or more of the following attributes: they are beyond the scope of the proposed action; there are no remaining unresolved conflicts (both the agency and the party who identified the issue are satisfied); the issue is immaterial to the decision; the issue is not supported by scientific evidence; or the issue has already been decided by law. (Source: Montana Department of State Lands (now Department of Natural Resources and Conservation), Forestry Division, Applying MEPA to Forest Management Activities; U.S.D.A. Forest Service, 1900-01 Training Manual)

## WHAT IS AN “ALTERNATIVE”?

Alternatives are different ways to accomplish the same objective as the proposed action. A reasonable alternative is one that is practical, technically possible, and economically feasible. A reasonable alternative should fulfill the purpose and need of the proposed action and will address significant and relevant issues.

Depending on the proposal, MEPA and the MEPA Model Rules require an analysis of the proposed action, reasonable alternatives to the

proposed action, and the no action alternative. This is the core of the environmental review document. If done objectively, the range of alternatives will correspond with the full scope of the issues. The alternatives chosen for detailed study should be compared and contrasted by summarizing their environmental consequences. When a no action alternative is considered, the agency must also describe the impacts to the human environment from not proceeding with the proposed action. Each alternative should receive equal treatment so that reviewers may evaluate each alternative's comparative merits. An alternative comparison should be clear and readable to help the public understand the information that the DECISIONMAKER needs for a reasoned and well-informed choice.

If an alternatives analysis is conducted for a project that is not state-sponsored and alternatives are recommended, the project sponsor may volunteer to implement the alternative but is not required to take a recommended course of action (75-1-201(1)(b)(v), MCA).

## WHAT IS THE "NO ACTION ALTERNATIVE"?

MEPA and the MEPA Model Rules require an analysis of the no action alternative for all environmental reviews that include an alternatives analysis. The no action alternative provides a comparison of environmental conditions without the proposal and establishes a baseline for evaluating the proposed action and the other alternatives. The no action alternative must be considered, even if it fails to meet the purpose and need or is illegal.

There are two interpretations of no action—either: (1) no change from the current status quo; or (2) the proposed action does not take place. The first interpretation usually involves a situation in which current management or ongoing program actions are taking place even as new plans or programs are being developed. In these situations, the no action alternative is no change from current management or program direction or level of management or program intensity. The second interpretation usually involves state agency decisions on proposals for new programs or

projects. No action under this interpretation would mean that the agency would decide to not implement the proposal.

## WHAT IS THE "AFFECTED ENVIRONMENT"?

The affected environment describes those aspects of the existing environment that are relevant to the identified issues. The description of the affected environment should be concise but thorough. The description should emphasize those aspects of the human environment that are relevant to each identified issue. The description of the affected environment serves three purposes: (1) it provides a baseline from which to analyze and compare alternatives and their impacts; (2) it ensures that the agency has a clear understanding of the human environment that would be impacted by the proposed action; and (3) it provides the public with a frame of reference in which to evaluate the agency's alternatives, including the proposed action. (Source: U.S.D.A. Forest Service, 1900-01 Training Manual; Montana Department of State Lands (now Department of Natural Resources and Conservation), Forestry Division, Applying MEPA to Forest Management Activities)

Senate Bill No. 233 (Chapter 396, Laws of 2011) limited the term "human environment" (and therefore the term "affected environment") to the human environment *within Montana's borders*. MEPA now says an environmental review may not include a review of actual or potential impacts beyond Montana's borders or consider actual or potential impacts that are regional, national, or global in nature unless the environmental review is conducted by the Department of Fish, Wildlife, and Parks for the management of wildlife and fish or a review beyond Montana's borders is required by law, rule, regulation, or federal agency.

## WHAT IS AN "ENVIRONMENTAL IMPACT"?

An environmental impact is any change from the present condition of any resource or issue that may result as a consequence of an agency's decision to implement a proposed action or an alternative to the proposed action. An environmental impact may be adverse, beneficial, or both. An EIS is required to include an analysis of the short-term and long-term

beneficial aspects of a proposed project, including its economic advantages and disadvantages.

The MEPA Model Rules require an analysis of the environmental effects in terms of the direct, secondary, and cumulative impacts on the physical and human environment. This analysis should be completed for all resources that are raised and identified as relevant issues in the initial scoping process.

## WHAT IS A "DIRECT IMPACT"?

DIRECT IMPACTS are those that occur at the same time and place as the action that triggers the effect.

## WHAT IS A "SECONDARY IMPACT"?

SECONDARY IMPACTS are those that occur at a different location or later time than the action that triggers the effect.

## WHAT IS A "CUMULATIVE IMPACT"?

Cumulative impacts are defined in MEPA as the collective impacts on the human environment when considered in conjunction with other past, present, and future actions related to the proposed action by location and generic type. Cumulative impact analysis includes a review of all state and nonstate activities that have occurred, are occurring, or may occur that have impacted or may impact the same resource as the proposed action.

An agency is required to evaluate the cumulative impacts of a project when it is appropriate. However, related future actions need to be considered only if they are undergoing concurrent evaluation by any agency through preimpact statement studies, separate impact statement evaluations, or permit processing procedures (75-1-208(11), MCA).

The key to an effective cumulative impact analysis is using reasonable and rational boundaries that will result in a meaningful and realistic evaluation. Spatial boundaries (e.g. hydrologic unit codes, wildlife management units, subbasins, area of unique recreational opportunity, viewshed), temporal boundaries, and identification of parcel ownership within the analysis area can be useful tools.

## HOW SHOULD ENVIRONMENTAL IMPACTS BE INTERPRETED?

Each of the elements in the environmental review helps to describe the environmental impacts of the proposed action. The purpose and need, issues, and alternatives help define the scope of the environmental effects analysis. The significance of each impact helps establish the level

of analysis and documentation. Monitoring and mitigation respond to the environmental effects.

A well-written analysis of environmental impacts displays a sharp contrast among the alternatives, provides a comparison of alternatives with respect to significant or relevant issues, and provides a clear basis for choice among alternatives.

## WHAT IS "MITIGATION"?

Mitigation reduces or prevents the undesirable impacts of an agency action. Mitigation measures must be enforceable. The MEPA Model Rules define mitigation as:

- avoiding an impact by not taking a certain action or parts of an action;
- minimizing impacts by limiting the degree or magnitude of an action and its implementation;
- rectifying an impact by repairing, rehabilitating, or restoring the affected environment; or
- reducing or eliminating an impact over time by preservation and maintenance operations during the life of an action or the time period thereafter that an impact continues (MEPA Model Rule II (14)).

## WHAT ARE "RESIDUAL IMPACTS"?

RESIDUAL IMPACTS are those that are not eliminated by mitigation. The significance of a project's residual impacts may determine whether an EIS is necessary.

## WHAT IS A "REGULATORY RESTRICTION ANALYSIS"?

MEPA requires state agencies to prepare a REGULATORY RESTRICTION ANALYSIS whenever the agency prepares an EA or an EIS for a proposed action on private property that appears to restrict the use of the private

property. If the agency has discretion on the implementation of state or federal laws, the agency must include:

- a description of the impact of the restriction on the use of private property;
- an analysis of reasonable alternatives that reduce, minimize, or eliminate the restriction on the use of private property while satisfying state or federal laws; and
- the agency's rationale for decisions concerning the regulatory restriction analysis.

## HOW DETAILED SHOULD THE ENVIRONMENTAL REVIEW BE?

The level and depth of analysis and the appropriate detail required to adequately evaluate the proposed action are determined from an assessment of the complexity of the proposed action, the environmental sensitivity of the area, the degree of uncertainty that the proposed action will have a significant impact, and the need for and complexity of mitigation required to avoid the presence of significant impacts (MEPA Model Rule V(2)).

Although MEPA and the MEPA Model Rules provide a range of criteria to aid agencies in determining an appropriate depth of analysis, the decisions necessarily entail a great deal of agency discretion. This is one of the more frustrating as well as stimulating aspects of MEPA implementation.

If the agency documents its reasons for selecting a given level of analysis and that reasoning is rational, then the environmental review satisfies the purpose of a well-informed decision and the legal defensibility of the document is substantially improved. However, for particularly contentious proposals and decisions, agencies and applicants would be well advised to address the reasons for any objections. Often they will be the result of anticipated impacts that are perceived to be significant. Therefore, a more detailed analysis or a mitigation of the potential impacts may be warranted.

# PUBLIC PARTICIPATION

## WHAT IS PUBLIC PARTICIPATION?

MEPA embodies one of the Montana Constitution's most fundamental rights — the right to know and participate in governmental deliberations. Article II, section 9, of the Montana Constitution states:

> No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Within MEPA, public participation is a process by which the agency includes interested and affected individuals, organizations, and agencies in decisionmaking. Public participation is not public relations, which seeks to present information in the best possible light. Public participation is not a popularity contest that measures how many people favor or oppose a proposal. Public participation is not public information, which seeks only to inform the public (one-way communication). The purpose of public participation is two-way communication—to inform the public and to solicit response from the public.

One of the central premises of MEPA is informed decisionmaking. Without public participation, a truly informed decision is unobtainable. The philosophical underpinnings of public participation lie in the notion that government derives its power and legitimacy from the consent of the governed. Public involvement is not a separate component of the MEPA process. Rather, public involvement is integral to each step of environmental review.

## WHAT ARE THE BENEFITS OF PUBLIC PARTICIPATION?

The benefits of public participation include:

- early identification and proper study of relevant issues;
- early identification and elimination from further study of irrelevant issues;
- broad information base upon which decisions are made;
- clarification of the public's concerns and values;
- support for decisionmakers to make better decisions;
- enhanced agency credibility; and
- increased likelihood of successful implementation of the agency's decision.

To ensure that these benefits are achieved, effective strategies for public participation include:

- conducting public involvement early in the environmental review process;
- involving the public throughout the environmental review process;
- obtaining input that is representative of all interested and affected citizens, organizations, and agencies;
- using personal and interactive methods to relate with people; and
- demonstrating how public input was used in the environmental review and in making the final decision.

Effective public participation may require considerable time and resources. However, effective public participation also is quality public service, and agencies are institutions established to serve the public. Moreover, the initial investment in public involvement at the beginning of the project often can save considerable time and expense during subsequent steps in the MEPA analysis and project implementation.

## WHAT ARE THE PROCEDURAL REQUIREMENTS FOR PUBLIC INVOLVEMENT?

MEPA and the MEPA Model Rules require that the members of the public have the opportunity to be involved in the environmental review process. The appropriate level and type of public involvement for EAs depend on the complexity of the project, the seriousness of the potential environmental impacts, and the level of public interest in the proposed action (MEPA Model Rule VI). As the significance and complexity of the impacts increase, the procedural requirements as to the level of public involvement also increase.

Although almost identical in their substantive requirements, EAs and EISs are procedurally very different. For an EA, the agency's responsibility to provide public access to the process is largely *discretionary*. Although an agency has considerable discretion, MEPA Model Rule VI notes that an EA is a public document and may be inspected upon request. The use of a public comment period for an EA is also discretionary, again depending on the level of public interest and the seriousness and complexity of the potential impacts of the decision.

The MEPA Model Rules also require agencies to *consider substantive comments* to EAs prior to making final decisions about the adequacy of the analysis in the EA, modifications to the proposed action, and the necessity of preparing an EIS. Additionally, the MEPA Model Rules require that if the agency chooses to initiate a process to determine the scope of an EA, the agency must follow formal EIS scoping procedures.

Public involvement for a mitigated EA must include the opportunity for public comment, a public meeting or hearing, and adequate notice.

The public's opportunity for involvement in the EIS process is *mandatory*. The MEPA Model Rules require agencies to:

- invite public participation in the determination of the scope of an EIS;
- provide a minimum 30-day public comment period for the draft EIS; and
- include public comments and the agency's response to public comments in the final EIS.

## HOW DO PUBLIC PARTICIPATION AND SCOPING RELATE?

As noted earlier, scoping is the process used to identify all issues that are relevant to the proposed action. The MEPA rules (Model Rule VII) provide for a formal process for determining the scope of an EIS. The process also may be used in the preparation of an EA (Model Rule V(1)).

Scoping is often the first opportunity for public involvement in the MEPA process. The proposed action will dictate the level and degree of scoping required. As the complexity, number of issues, and number of people and agencies affected increase, the scoping process must in turn be more comprehensive. The purposes of the scoping process are to involve the affected public, to identify all potentially significant issues, to identify issues that are not likely to involve significant impacts, to identify existing environmental review and other related documents, to identify possible alternatives, and to identify potential sources of information that may be referenced in the environmental review. The scoping process and the public's participation in that process can serve to focus the environmental review on those issues and resources that are considered most important.

## WHEN ARE AGENCIES REQUIRED TO HOLD PUBLIC HEARINGS?

The MEPA Model Rules require agencies to schedule public hearings for an EIS if a hearing is requested by 10% or 25, whichever is less, of the people who will be directly affected by the proposed action; by another agency that has jurisdiction over the action; by an association having no fewer than 25 members who will be directly affected by the proposed action; or by the applicant, if any. Agencies are required to resolve instances of doubt about the sufficiency of the request in favor of holding a public hearing.

The MEPA rules define the minimum notification requirements for public hearings. The rules also specify that, if held, hearings must be scheduled after the draft EIS is circulated and prior to preparation of the final EIS or after an EA is circulated and prior to any final agency determinations concerning the proposed action.

At their discretion, agencies may hold public meetings in lieu of formal hearings as a means of soliciting public comment when a hearing is not requested. The solicitation of public comment on an EA through public meetings or public hearings or by other methods is at the discretion of the agency, depending on the seriousness and complexity of the environmental issues related to the proposed action and the level of public interest (MEPA Model Rule VI(3) and Rule XXIII).

## HOW SHOULD AGENCIES RESPOND TO PUBLIC COMMENTS?

If members of the public participate, they may reasonably expect that their involvement and comments will have some influence on the environmental review process. If agencies want the public to take the time to participate, the agencies should also expect to take the time to respond to public comments in a documented and visible fashion.

The MEPA Model Rules do not require agencies to include scoping comments in an EA or draft EIS. However, when reading an environmental review, a person who provided scoping comments should be able to determine how those comments influenced the identification of issues, the formulation of alternatives, or the analysis of impacts.

The MEPA Model Rules do require agencies to include all comments or, if impractical, a representative sample of all comments and the agency's response to all substantive comments with the final EIS. Upon request, agencies are also required to provide copies of all comments (MEPA Model Rules X, XI, and XII). Agencies are required to consider the substantive comments submitted in response to an EA and to determine if an EIS is needed, if the EA needs revision, or if a decision can be made with or without any appropriate modification (MEPA Model Rule VI(6)).

## WHAT MAKES FOR EFFECTIVE PUBLIC PARTICIPATION?

The agency is required to consider fairly the relevant concerns of each person who will be affected by the decision. To participate effectively, each person should help the agency understand how the person will be affected by the decision and why that is an important consequence.

The following guidelines may help people to participate more effectively in agency decisions:

- People should **participate**. One or a few timely, well-written letters often are sufficient.
- People should **be informed**. Communication to the agency is more effective if it is based on an accurate understanding of the agency's proposal. Agency website

information can be helpful in making contacts and understanding proposals under consideration.

- People should **understand** how other permitting or authorizing laws and rules relate to the proposal.
- People should **follow** the process. Comments made during scoping should emphasize identification of issues and possible sources of information. Comments about the draft should emphasize adequacy of the analysis.

- People should **provide specific information** about why they are concerned about the pending decision (issues), how the decision will affect them or the environment (impacts), how the agency might alleviate their concerns (mitigation), what factual information the agency should consider, and whether the environmental review is accurate and complete.

- People should **comment**, not vote. Remember that MEPA is an exercise in responsible agency decisionmaking, not a public referendum. One personal letter that addresses relevant issues deserves more attention than a bundle of form letters. On the other hand, the level of public participation can be an indication of the level of public acceptance or rejection of a proposal. This may result in voluntary project modifications that have fewer impacts.

- People should **respect** the right of other people to participate. The agency must consider the concerns of everyone who may be affected by its decision.

- People should **expect** the agency to make a balanced decision in accordance with other permitting or authorization laws. Good decisions are based on a fair consideration of everyone’s interests.

# FINAL ANALYSIS AND DECISION

## HOW DOES MEPA RELATE TO STATE AGENCY DECISIONMAKING?

An environmental review is designed to be a process for developing objective information. Agency decisionmakers should use the MEPA process as a tool to make effective and strategic decisions.

## WHAT IS THE ROLE OF THE "DECISIONMAKER"?

The decisionmaker—the person whose responsibility it is to approve the environmental review document and to decide whether to implement the proposed action (to grant a permit, to construct a facility, etc.)—plays a critical role in the MEPA process. The decisionmaker must be someone different from the person(s) who is responsible for writing the environmental review and must be someone who has the authority to make decisions on behalf of the agency. The individual who fills the role of decisionmaker may vary from agency to agency or even between programs within the same agency.

Neither MEPA nor the MEPA Model Rules specifically tell agencies how they should use the products of the environmental review process in their planning and decisionmaking. However, one of the purposes of MEPA is to foster better, more informed, and wise decisions. State agencies are required to think through their actions before acting. This process necessitates an objective environmental review.

Many considerations, in addition to environmental factors, make up the decisionmaking process. Therefore, although the MEPA document must be objective, the decisionmaking process may involve discretion, judgment, and even bias. The basis for that judgment must be founded,

at least in part, on the unbiased MEPA analysis, and the rationale must be included in the RECORD OF DECISION (ROD).

## WHAT ARE THE PROCEDURAL REQUIREMENTS?

The MEPA Model Rules require a ROD for actions requiring an EIS (MEPA Model Rule XVIII). The ROD is a concise public notice that announces the decision, explains the reasons for the decision, and explains any special conditions surrounding the decision or its implementation. Although the MEPA Model Rules do not specify how an agency will use the EIS, the rules do require the agency to inform the public about how it used the EIS.

The MEPA Model Rules do not require a detailed ROD for EAs. However, some form of documentation for the decision is advisable. The Model Rules do require, at least, that the agency make a finding on the need for an EIS (MEPA Model Rule V(3)(j) and Rule VI(6)).

# RELATIONSHIP BETWEEN MEPA AND OTHER ENVIRONMENTAL STATUTES

MEPA applies to all state agency actions that may affect people and their environment. It is intended to change the way in which agencies approach their duties under other statutes. The Legislature directed that all policies, regulations, and laws of the state are to be interpreted and administered in accordance with the policies of MEPA. For state-sponsored projects, the agency is required to develop methods and procedures for giving appropriate consideration to "presently unquantified environmental amenities and values", along with economic and technical factors. However, MEPA also states explicitly that the policies and goals of MEPA are supplementary to those set forth in the existing authorizations of all state agencies.

If an agency is the sponsor of a project subject to MEPA review, the agency usually has enough latitude in its decisionmaking to incorporate MEPA policies and goals into its final decision. When an agency is making a decision requested by an outside entity, the permitting or authorizing statutes enacted by the Legislature in accordance with the constitution's environmental provisions take precedence. Legislative changes to MEPA in 2001 state that "the agency may not withhold, deny, or impose conditions on any permit or other authority to act based on" MEPA without the concurrence of the project sponsor. The 2011 Legislature amended MEPA such that the sponsor of a project that is not state-sponsored may voluntarily implement an alternative to the project but is not required to do so. Both changes make agencies less able to incorporate the goals and directives of MEPA into final decisions that are subject to other laws and rules.

All of MEPA's directives are to be pursued “to the fullest extent possible”, and agencies are directed “to use all practicable means consistent with other essential considerations of state policy” in achieving the goals of MEPA. Given these sweeping mandates, it is as if the policy statements and goals of MEPA are incorporated in the policy of every other state statute. Only when MEPA is in direct and unavoidable conflict with another statute may environmental concerns play a subordinate role in agency considerations, and these exceptions must be narrowly construed. The language “to the fullest extent possible” creates a presumption that MEPA applies, and an agency should bear the burden of proving that it does not.

The challenge, of course, is to incorporate and implement MEPA’s broad policies within the context of each agency’s statutory mandates. Most agencies took a significant step in that direction by adopting MEPA Model Rules. These rules reiterate MEPA’s umbrella requirements. Agencies that adopted the model rules committed to conform with those rules prior to reaching a final decision on proposed actions covered by MEPA (MEPA Model Rule I).

The MEPA Model Rules also clarify how an agency must proceed when statutory conflicts arise. If there is a conflict between the MEPA Rules and another provision of state law, the agency must: (1) notify the Governor and the EQC of the nature of the conflict; and (2) “suggest a proposed course of action that will enable the agency to comply to the fullest extent possible with the provisions of MEPA”. It is the responsibility of the agency to continually “review its programs and activities to evaluate known or anticipated conflicts between the MEPA Rules and other statutory or regulatory requirements”. Each agency must “make such adjustments or recommendations as may be required to ensure maximum compliance with MEPA and these rules” (MEPA Model Rule XXI (2)).

Obviously, the burden is on state agencies to evaluate their own statutory mandates and come up with a plan to achieve maximum compliance with MEPA. The MEPA Model Rules provide the necessary flexibility for each agency to define “maximum compliance” in a manner that reduces conflicts between MEPA and other statutory requirements.

# COMPARISON OF NEPA AND MEPA

**WHAT ARE THE DIFFERENCES BETWEEN NEPA AND MEPA?**

Montana and 14 states plus the District of Columbia adopted environmental policy acts modeled on the national act. The 1971 Montana Environmental Policy Act was patterned almost word for word after NEPA. The most fundamental distinction between the two statutes is that NEPA applies specifically to federal actions, while MEPA applies strictly to state actions.

An important substantive difference is highlighted in the policy statements of each statute. MEPA recognizes that “each person is entitled to a healthful environment”. To be *entitled* to a healthful environment implies that each person in the State of Montana has a right or claim to a healthful environment. Such entitlement language is purposely absent in NEPA. NEPA only notes that “each person should enjoy a healthful environment”. To *enjoy* a healthful environment is to be happy or satisfied that the environment is healthful.

NEPA is much broader than MEPA in its application. NEPA commits federal agencies to “recognize the worldwide and long-range character of environmental problems” in order to prevent a “decline in the quality of mankind's world environment”. MEPA is silent on global environmental problems and impacts.

MEPA requires state agencies to prepare a regulatory restriction analysis whenever the agency prepares an EA or an EIS for a proposed action on private property that appears to restrict the use of the private property. NEPA has no such requirement. However, the analysis of social and economic impacts would produce similar information.

MEPA requires a review of the beneficial aspects and the economic advantages and disadvantages of a proposed project and a discussion of

the beneficial and adverse environmental, social, and economic impacts of a project's noncompletion.

MEPA narrows the scope of alternatives that may be analyzed in an environmental review. For projects that are not state-sponsored, an alternatives analysis may not include an alternative facility or an alternative to the proposed project itself. The sponsor of a project that is not state-sponsored is not required to implement a recommended alternative.

MEPA allows project sponsors to request a review of certain agency determinations by a third-party board. Determinations regarding the significance of impacts, general problems with environmental review consultants or agency staff, agency decisions to extend time limits for the

preparation of environmental reviews, and disputes over the level of design information requested from the project sponsor may all be taken to an agency oversight board for an advisory opinion.

MEPA states that it may not be used to withhold, deny, or impose conditions on a permit or other authority to act without the concurrence of the project sponsor. NEPA makes no such statement.

MEPA imposes specific timeframes for the completion of environmental reviews. NEPA rules do not impose limits but state that agencies should adopt rules that establish timeframes for the various elements of the environmental review process.

MEPA provides some statutory definitions. NEPA's definitions are in federal regulations.

NEPA and MEPA differ in the type of entities created to oversee the implementation of each statute. NEPA's Council on Environmental Quality (CEQ) is an executive agency within the Executive Office of the President. It is the principal agency responsible for the administration of NEPA. Other federal agencies generally adopt interpretive NEPA regulations promulgated by the CEQ. NEPA accorded only advisory duties to the CEQ. NEPA gives the CEQ environmental research, review, and reporting responsibilities.

MEPA created the Environmental Quality Council. The EQC is closely patterned after the CEQ except for a couple of significant variations. First, the EQC is a legislative committee, rather than an executive agency. The EQC is made up of citizen legislators and public-at-large members who have legislative oversight responsibility for the implementation of MEPA. As a legislative entity, the EQC has only advisory authority when making recommendations to Executive Branch agencies. Like the CEQ, the EQC worked with Executive Branch agencies in the promulgation of MEPA administrative rules. The EQC staff is charged with environmental research and reporting responsibilities, appraising various state programs in light of MEPA's policies, documenting and defining changes in the natural environment, and, among other duties, assisting legislators with environmental legislation.

Procedurally, NEPA and MEPA also are similar. The 1988 MEPA Model Rules were patterned after the regulations that the CEQ developed for NEPA. Both sets of regulations establish similar triggers and similar frameworks for environmental review.

When a proposed action may significantly affect the quality of the human environment, both NEPA and MEPA require the agency to prepare an EIS. The MEPA Model Rules define two exceptions that are not authorized by the CEQ regulations. The MEPA Model Rules allow agencies to prepare a generic EA when the proposed action has significant impacts but agency statutory requirements do not allow sufficient time for an agency to prepare an EIS. The MEPA Model Rules also include provisions for the preparation of a mitigated EA.

The criteria for significance of the impacts of a proposed action are almost identical under the MEPA Model Rules and the CEQ regulations. However, one important difference to note is that the CEQ regulations include public controversy as one factor to consider in determining significance. Under the MEPA Model Rules, the public controversy that a proposed action will generate is not considered in determining significance.

## WHICH LAW APPLIES WHEN BOTH STATE AND FEDERAL AGENCIES SHARE RESPONSIBILITY FOR THE DECISION?

Many state projects and permits are funded from federal sources or fall under joint state and federal jurisdiction. These actions typically require an environmental review for compliance with NEPA and MEPA. Examples include state maintenance and construction of federal highways and state permitting of mine projects on federal land.

Although NEPA and MEPA are virtually identical in their mandates, the implementation of each Act is a separate and distinct federal and state function. Federal and state agencies are required to coordinate with each other, and each may TIER to or adopt by reference the other's environmental review. The federal and state agencies also may cooperate in the preparation of a single environmental review that is legally sufficient for both NEPA and MEPA.

# INFORMATION SOURCES AND AGENCY REFERENCES

## DEPARTMENT OF AGRICULTURE

302 North Roberts
P.O. Box 200201
Helena, Montana 59620-0201
(406) 444-3144
http://agr.mt.gov/

Rule: ARM 4.2.312, *et seq*.

## DEPARTMENT OF COMMERCE

301 South Park Ave.
P.O. Box 200501
Helena, Montana 59620-0501
(406) 841-2700
http://commerce.mt.gov/

Rule: ARM 8.2.302, *et seq*.

## DEPARTMENT OF ENVIRONMENTAL QUALITY

1520 East Sixth Ave.
P.O. Box 200901
Helena, Montana 59620-0901
(406) 444-2544
http://deq.mt.gov/

Rule: ARM 17.4.601, *et seq.*

## DEPARTMENT OF FISH, WILDLIFE, AND PARKS

1420 East Sixth Ave.
P.O. Box 200701
Helena, Montana 59620-0701
(406) 444-2535
http://fwp.mt.gov/

Rule: ARM 12.2.428, *et seq*.

## DEPARTMENT OF LIVESTOCK

301 North Roberts
P.O. Box 202001
Helena, Montana 59620-2001
(406) 444-7323
http://liv.mt.gov

Rule: ARM 32.2.221, *et seq*.

## DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

1539 Eleventh Ave.
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-2074
http://dnrc.mt.gov/

Rule: ARM 36.2.521, *et seq*.

## DEPARTMENT OF TRANSPORTATION

2701 Prospect Ave.
P.O. Box 201001
Helena, Montana 59620-1001
(406) 444-6200
http://mdt.mt.gov/

Rule: ARM 18.2.235, *et seq*.

# GLOSSARY AND INDEX TO DEFINITIONS OF MEPA TERMS

ACCOUNTABLE DECISIONS - Decisions that are made with an adequate understanding of the consequences of the agency's action and that clearly communicate the agency's reasons for selecting a particular course of action.

ACTION - An activity that is undertaken, supported, granted, or approved by a state agency.

ADMINISTRATIVE ACTION - An agency action that is exempt from MEPA review because it involves only routine procurement, personnel, clerical, or other similar functions.

AFFECTED ENVIRONMENT - The aspects of the human environment that may change as a result of an agency action.

AGENCY - Any state governmental body, office, department, board, quasi-judicial board, council, commission, committee, bureau, section, or any other unit of state government that is authorized to take actions.

ALTERNATIVE - A different approach to achieve the same objective or result as the proposed action.

ALTERNATIVES ANALYSIS - An evaluation of different parameters, mitigation measures, or control measures that would accomplish the same objectives as those included in the proposed action by the applicant. For a project that is not a state-sponsored project, it does not include an alternative facility or an alternative to the proposed project itself. The term includes alternatives required pursuant to Title 75, chapter 20 (75-1-220(1)), MCA.

APPLICANT - A person, organization, company, or other entity that applies to an agency for a grant, loan, subsidy, or other funding assistance or for a lease, permit, license, certificate, or other entitlement for use or permission.

APPROPRIATE BOARD - For administrative actions taken under MEPA, those boards and commissions statutorily described in 75-1-220(2), MCA.

BALANCED DECISION - Decisions made only after careful consideration of the consequences that may result from an agency's decision and the tradeoffs that may be necessary to implement the decision.

CATEGORICAL EXCLUSION (CE) - A level of environmental review for agency actions that do not individually, collectively, or cumulatively cause significant impacts to the human environment, as determined by rulemaking or programmatic review, and for which an EA or EIS is not required.

COMPENSATION - The replacement or provision of substitute resources or environments to offset an impact on the quality of the human environment.

COMPLETE APPLICATION - For the purpose of complying with Part 2 of MEPA, an application for a permit, license, or other authorization that contains all data, studies, plans, information, forms, fees, and signatures required to be included with the application sufficient for the agency to approve the application under the applicable statutes and rules (75-1-220(3), MCA).

CUMULATIVE IMPACTS - The collective impacts on the human environment of the proposed action within the borders of Montana when considered in conjunction with other past, present, and future actions related to the proposed action by location or generic type (75-1-220(4), MCA).

CUSTODIAL RESPONSIBILITY - The responsibility of the current generation of Montanans to act as trustees of the environment for the benefit of future generations of Montanans.

DECISIONMAKER - An agency employee who holds sufficient authority to make commitments on behalf of the agency and who is responsible to approve the environmental review document and decide which course of action to implement.

DIRECT IMPACTS - Primary impacts that have a direct cause and effect relationship with a specific action, i.e., they occur at the same time and place as the action that causes the impact.

DISCLOSURE - Open communication of all information that is pertinent to a pending agency decision.

EMERGENCY ACTIONS - Actions that an agency may take or permit in an emergency situation, specifically to control the impacts of the emergency, without first completing an environmental review. Note that within 30 days following the action, the agency must document the need for and the impact of the emergency action.

ENVIRONMENTAL ASSESSMENT (EA) - The appropriate level of environmental review for actions either that do not significantly affect the human environment or for which the agency is uncertain whether an environmental impact statement (EIS) is required.

ENVIRONMENTAL ASSESSMENT CHECKLIST - A standard form of an EA, developed by an agency for actions that generally produce minimal impacts.

ENVIRONMENTAL IMPACT STATEMENT (EIS) - A comprehensive evaluation of the impacts to the human environment that likely would result from an agency action or reasonable alternatives to that action. An EIS also serves as a public disclosure of agency decisionmaking. Typically, an EIS is prepared in two steps. The draft EIS is a preliminary, detailed written statement that facilitates public review and comment. The final EIS is a completed, written statement that includes a summary of major conclusions and supporting information from the draft EIS, responses to substantive comments received on the draft EIS, a list of all comments on the draft

EIS and any revisions made to the draft EIS, and an explanation of the agency's reasons for its decision.

ENVIRONMENTAL QUALITY COUNCIL (EQC) - An agency of the Legislative Branch of Montana state government, created by MEPA to coordinate and monitor state policies and activities that affect the quality of the human environment.

ENVIRONMENTAL REVIEW - Any environmental assessment, environmental impact statement, or other written analysis required under Part 2 of MEPA by a state agency of a proposed action to determine, examine, or document the effects and impacts of the proposed action on the quality of the human and physical environment within the borders of Montana (75-1-220(5), MCA).

EXEMPT ACTIONS - The category of actions that do not require review under MEPA because of their special nature.

HUMAN ENVIRONMENT - Those attributes, including but not limited to biological, physical, social, economic, cultural, and aesthetic factors, that interrelate to form the environment.

INFORMED DECISIONS - Agency decisions that are made with an understanding of the consequences of the pending decision, an evaluation of a reasonable range of alternatives, and an understanding of public concerns.

INTERDISCIPLINARY ANALYSIS - A process for environmental review that incorporates all of the appropriate perspectives and disciplines from the various sciences and the environmental design arts in the agency's analysis.

LEAD AGENCY - The single state agency that is designated to supervise the preparation of an environmental assessment or environmental impact statement on behalf of two or more agencies that are responsible for the action.

LEGISLATIVE ENVIRONMENTAL POLICY OFFICE (LEPO) - Legislative Services Division staff that is assigned to the EQC and is responsible for assisting the EQC in the fulfillment of its statutory duties.

MINISTERIAL ACTION - An agency action that is exempt from MEPA review because the agency acts upon only a given state of facts in a prescribed manner and exercises no discretion.

MITIGATED ENVIRONMENTAL ASSESSMENT (MITIGATED EA) - The appropriate level of environmental review for actions that normally would require an EIS, except that the state agency can impose designs, enforceable controls, or stipulations to reduce the otherwise significant impacts to below the level of significance. A mitigated EA must demonstrate that: (1) all impacts have been identified; (2) all impacts can be mitigated below the level of significance; and (3) no significant impact is likely to occur.

MITIGATION - An enforceable measure(s), within the authority of the agency or agreed to by the project sponsor, designed to reduce or prevent undesirable effects or impacts of the proposed action.

MONTANA ENVIRONMENTAL POLICY ACT (MEPA) - A state law that requires state agencies to identify and describe the impacts of proposed state actions on the human environment in an effort to further the purpose and policy of the law.

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 (NEPA) - The federal counterpart of MEPA that applies only to federal actions.

NO ACTION ALTERNATIVE - An alternative, required by the MEPA Model Rules for purposes of analysis, that describes the agency action that would result in the least change to the human environment.

PROBLEM SOLVING - A systematic approach by which agencies correctly define the problem, discover the consequences of the pending decision, and fairly consider a reasonable range of solutions before selecting the final course of action.

PROGRAMMATIC REVIEW - An environmental review (EA or EIS) that evaluates the impacts on the human environment of related actions, programs, or policies.

PROJECT SPONSOR - Any applicant, owner, operator, agency , or other entity that is proposing an action that requires an environmental review. It can also include certain institutional trust beneficiaries for state agency-initiated actions on state trust lands (75-1-220(6), MCA).

PROPOSED ACTION - A proposal by an agency to authorize, recommend, or implement an action to serve an identified need or solve a recognized problem. Clarification of the proposed action is the logical place to begin an environmental review.

PUBLIC PARTICIPATION - The process by which an agency includes interested and affected individuals, organizations, and agencies in decisionmaking.

PUBLIC SCOPING PROCESS - Any process to determine the scope of an environmental review (75-1-220(7), MCA).

PURPOSE AND NEED - The problem that the agency intends to solve or the reason why the agency is compelled to make a decision to implement an action.

RECORD OF DECISION (ROD) - A concise public notice that announces the agency’s decision, explains the reason for that decision, and describes any special conditions related to implementation of the decision.

REGULATORY RESTRICTION ANALYSIS - An analysis of the impact of the restriction on the use of private property that may result from the agency action and consideration of reasonable alternatives that reduce, minimize, or eliminate the restriction on the use of private property while satisfying federal or state laws.

RESIDUAL IMPACT - An impact that is not eliminated by mitigation.

RESPONSE TO PUBLIC COMMENT - Disclosure of the concerns of all people who reviewed an environmental document (EA or draft EIS) and an explanation of how the comments were incorporated in the environmental review.

SCOPE - The range of issues and corresponding reasonable alternatives, mitigation, issues, and potential impacts to be considered in an EA or EIS.

SCOPING - The process, including public participation, that an agency uses to define the scope of the environmental review.

SECONDARY IMPACTS - Impacts to the human environment that are indirectly related to the agency action, i.e., they are induced by a direct impact and occur at a later time or at a distance from the triggering action.

SIGNIFICANCE - The process of determining whether the impacts of a proposed action are serious enough to warrant the preparation of an EIS. An impact may be adverse, beneficial, or both. If none of the adverse impacts are significant, an EIS is not required.

STATE-SPONSORED PROJECT - A project, program, or activity initiated and directly undertaken by a state agency; a project or activity supported through a contract, grant, subsidy, loan, or other form of funding assistance from a state agency, either singly or in combination with one or more other state agencies; or a project or activity authorized by a state agency acting in a land management capacity for a lease, easement, license, or other authorization to act. The term does not include a project or activity undertaken by a private entity that is made possible by the issuance of permits, licenses, leases, easements, grants, loans, or other authorizations to act by the Department of Environmental Quality pursuant to Titles 75, 76, or 82, the Department of Fish, Wildlife, and Parks pursuant to Title 87, chapter 4, part 4, the Board of Oil and Gas Conservation pursuant to Title 82, chapter 11, or the Department of Natural Resources and Conservation or the Board of Land Commissioners pursuant to Titles 76, 77, 82, and 85. The term also does not include a project or activity involving the issuance of a permit, license, certificate, or other entitlement for permission to act by another agency acting in a regulatory capacity, either singly or in combination with other state agencies (75-1-220(8), MCA).

SUPPLEMENTAL REVIEW - A modification of a previous environmental review document (EA or EIS) based on changes in the proposed action, the discovery of new information, or the need for additional evaluation.

TIER or TIERING - Preparing an environmental review by focusing specifically on a narrow scope of issues because the broader scope of issues was adequately addressed in previous environmental review document(s) that may be incorporated by reference.

# APPENDIX A: MEPA STATUTES

Montana Code Annotated (MCA) 2024

## CHAPTER 1

## Part 1
## General Provisions

**75-1-101. Short title.** Parts 1 through 3 may be cited as the "Montana Environmental Policy Act".

**75-1-102. Intent — purpose.** (1) The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Montana Environmental Policy Act. The Montana Environmental Policy Act is procedural, and it is the legislature's intent that the requirements of parts 1 through 3 of this chapter provide for the adequate review of state actions in order to ensure that:

(a) environmental attributes are fully considered by the legislature in enacting laws to fulfill constitutional obligations; and

(b) the public is informed of the anticipated impacts in Montana of potential state actions.

(2) The purpose of parts 1 through 3 of this chapter is to declare a state policy that will encourage productive and enjoyable harmony between humans and their environment, to protect the right to use and enjoy private property free of undue government regulation, to promote efforts that will prevent, mitigate, or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans, to enrich the understanding of the ecological systems and natural resources important to the state, and to establish an environmental quality council.

(3) (a) The purpose of requiring an environmental assessment and an environmental impact statement under part 2 of this chapter is to assist the legislature in determining whether laws are adequate to address impacts to Montana's environment and to inform the public and public officials of potential impacts resulting from decisions made by state agencies.

(b) Except to the extent that an applicant agrees to the incorporation of measures in a permit pursuant to 75-1-201(4)(b), it is not the purpose of parts 1 through 3 of this chapter to provide for regulatory authority, beyond authority explicitly provided for in existing statute, to a state agency.

**75-1-103. Policy.** (1) The legislature, recognizing the profound impact of human activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances, recognizing the critical importance of restoring and maintaining environmental quality to the overall welfare and human development, and further recognizing that governmental regulation may unnecessarily restrict the use and enjoyment of private property, declares that it is the continuing policy of the state of Montana, in cooperation with the federal government, local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which humans and nature can coexist in productive harmony, to recognize the right to use and enjoy private property free of undue government regulation, and to fulfill the social, economic, and other requirements of present and future generations of Montanans.

(2) In order to carry out the policy set forth in parts 1 through 3, 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 so that the state may:

(a) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(b) ensure for all Montanans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

(c) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(d) protect the right to use and enjoy private property free of undue government regulation;

(e) preserve important historic, cultural, and natural aspects of our unique heritage and maintain, wherever possible, an environment that supports diversity and variety of individual choice;

(f) achieve a balance between population and resource use that will permit high standards of living and a wide sharing of life's amenities; and

(g) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(3) The legislature recognizes that each person is entitled to a healthful environment, that each person is entitled to use and enjoy that person's private property free of undue government regulation, that each person has the right to pursue life's basic necessities, and that each person has a responsibility to contribute to the preservation and enhancement of the environment. The implementation of these rights requires the balancing of the competing interests associated with the rights by the legislature in order to protect the public health, safety, and welfare.

**75-1-104. Specific statutory obligations unimpaired.** Sections 75-1-103 and 75-1-201 do not affect the specific statutory obligations of any agency of the state to:

(1) comply with criteria or standards of environmental quality;

(2) coordinate or consult with any local government, other state agency, or federal agency; or

(3) act or refrain from acting contingent upon the recommendations or certification of any other state or federal agency.

**75-1-105. Policies and goals supplementary.** The policies and goals set forth in parts 1 through 3 are supplementary to those set forth in existing authorizations of all boards, commissions, and agencies of the state.

**75-1-106. Private property protection — ongoing programs of state government.** Nothing in 75-1-102, 75-1-103, or 75-1-201 expands or diminishes private property protection afforded in the U.S. or Montana constitutions. Nothing in 75-1-102, 75-1-103, or 75-1-201 may be construed to preclude ongoing programs of state government pending the completion of any statements that may be required by 75-1-102, 75-1-103, or 75-1-201.

**75-1-107. Determination of constitutionality.** In any action filed in district court invoking the court's original jurisdiction to challenge the constitutionality of a licensing or permitting decision made pursuant to Title 75 or Title 82 or activities taken pursuant to a license or permit issued under Title 75 or Title 82, the plaintiff shall first establish the unconstitutionality of the underlying statute.

**75-1-108. Venue.** A proceeding to challenge an action taken pursuant to parts 1 through 3, 10, and 11 must be brought in the county in which the activity that is the subject of the action is proposed to occur or will occur. If an activity is proposed to occur or will occur in more than one county, the proceeding may be brought in any of the counties in which the activity is proposed to occur or will occur.

# Part 2
# Environmental Impact Statements

**75-1-201. General directions — environmental impact statements.** (1) The legislature authorizes and directs that, to the fullest extent possible:

(a) the policies, regulations, and laws of the state must be interpreted and administered in accordance with the policies set forth in parts 1 through 3;

(b) under this part, all agencies of the state, except the legislature and except as provided in subsections (2) and (3), shall:

(i) use a systematic, interdisciplinary approach that will ensure:

(A) the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking for a state-sponsored project that may have an impact on the Montana human environment by projects in Montana; and

(B) that in any environmental review that is not subject to subsection (1)(b)(iv), when an agency considers alternatives, the alternative analysis will be in compliance with the provisions of subsections (1)(b)(iv)(C)(I) and (1)(b)(iv)(C)(II) and, if requested by the project sponsor or if determined by the agency to be necessary, subsection (1)(b)(iv)(C)(III);

(ii) identify and develop methods and procedures that will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking for state-sponsored projects, along with economic and technical considerations;

(iii) identify and develop methods and procedures that will ensure that state government actions that may impact the human environment in Montana are evaluated for regulatory restrictions on private property, as provided in subsection (1)(b)(iv)(D);

(iv) include in each recommendation or report on proposals for projects, programs, and other major actions of state government significantly affecting the quality of the human environment in Montana a detailed statement on:

(A) the environmental impact of the proposed action;

(B) any adverse effects on Montana's environment that cannot be avoided if the proposal is implemented;

(C) alternatives to the proposed action. An analysis of any alternative included in the environmental review must comply with the following criteria:

(I) any alternative proposed must be reasonable, in that the alternative must be achievable under current technology and the alternative must be economically feasible as determined solely by the economic viability for similar projects having similar conditions and physical locations and determined without regard to the economic strength of the specific project sponsor;

(II) the agency proposing the alternative shall consult with the project sponsor regarding any proposed alternative, and the agency shall give due weight and consideration to the project sponsor's comments regarding the proposed alternative;

(III) the agency shall complete a meaningful no-action alternative analysis. The no-action alternative analysis must include the projected beneficial and adverse environmental, social, and economic impact of the project's noncompletion.

(D) any regulatory impacts on private property rights, including whether alternatives that reduce, minimize, or eliminate the regulation of private property rights have been analyzed. The analysis in this subsection (1)(b)(iv)(D) need not be prepared if the proposed action does not involve the regulation of private property.

(E) the relationship between local short-term uses of the Montana human environment and the maintenance and enhancement of long-term productivity;

(F) any irreversible and irretrievable commitments of resources that would be involved in the proposed action if it is implemented;

(G) the customer fiscal impact analysis, if required by 69-2-216; and

(H) the details of the beneficial aspects of the proposed project, both short-term and long-term, and the economic advantages and disadvantages of the proposal;

(v) in accordance with the criteria set forth in subsection (1)(b)(iv)(C), study, develop, and describe appropriate alternatives to recommend courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources. If the alternatives analysis is conducted for a project that is not a state-sponsored project and alternatives are recommended, the project sponsor may volunteer to implement the alternative. Neither the alternatives analysis nor the resulting recommendations bind the project sponsor to take a recommended course of action, but the project sponsor may agree pursuant to subsection (4)(b) to a specific course of action.

(vi) recognize the potential long-range character of environmental impacts in Montana and, when consistent with the policies of the state, lend appropriate support to initiatives, resolutions, and programs designed to maximize cooperation in anticipating and preventing a decline in the quality of Montana's environment;

(vii) make available to counties, municipalities, institutions, and individuals advice and information useful in restoring, maintaining, and enhancing the quality of Montana's environment;

(viii) initiate and use ecological information in the planning and development of resource-oriented projects; and

(ix) assist the legislature and the environmental quality council established by 5-16-101;

(c) prior to making any detailed statement as provided in subsection (1)(b)(iv), the responsible state official shall consult with and obtain the comments of any state agency that has jurisdiction by law or special expertise with respect to any environmental impact involved in Montana and with any Montana local government, as defined in 7-12-1103, that may be directly impacted by the project. The responsible state official shall also consult with and obtain comments from any state agency in Montana with respect to any regulation of private property involved. Copies of the statement and the comments and views of the appropriate state, federal, and local agencies that are authorized to develop and enforce environmental standards must be made available to the governor, the environmental quality council, and the public and must accompany the proposal through the existing agency review processes.

(d) a transfer of an ownership interest in a lease, permit, license, certificate, or other entitlement for use or permission to act by an agency, either singly or in combination with other state agencies, does not trigger review under subsection (1)(b)(iv) if there is not a material change in terms or conditions of the entitlement or unless otherwise provided by law.

(2) (a) Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) may not include an evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders.

(b) An environmental review conducted pursuant to subsection (1) may include an evaluation if:

(i) conducted jointly by a state agency and a federal agency to the extent the review is required by the federal agency; or

(ii) the United States congress amends the federal Clean Air Act to include carbon dioxide emissions as a regulated pollutant.

(3) The department of public service regulation, in the exercise of its regulatory authority over rates and charges of railroads, motor carriers, and public utilities, is exempt from the provisions of parts 1 through 3.

(4) (a) The agency may not withhold, deny, or impose conditions on any permit or other authority to act based on parts 1 through 3 of this chapter.

(b) Nothing in this subsection (4) prevents a project sponsor and an agency from mutually developing measures that may, at the request of a project sponsor, be incorporated into a permit or other authority to act.

(c) Parts 1 through 3 of this chapter do not confer authority to an agency that is a project sponsor to modify a proposed project or action.

(5) (a) (i) A challenge to an agency's environmental review under this part may only be brought against a final agency action decision and may only be brought in district court or in federal court, whichever is appropriate. A challenge may only be brought by a person who submits formal comments on the agency's environmental review prior to the agency's final decision, and the challenge must be limited to those issues addressed in those comments.

(ii) Any action or proceeding challenging a final agency action alleging failure to comply with or inadequate compliance with a requirement under this part must be brought within 60 days of the action that is the subject of the challenge.

(iii) For an action taken by the board of land commissioners or the department of natural resources and conservation under Title 77, "final agency action" means the date that the board of land commissioners or the department of natural resources and conservation issues a final environmental review document under this part or the date that the board approves the action that is subject to this part, whichever is later.

(b) Any action or proceeding under subsection (5)(a)(ii) must take precedence over other cases or matters in the district court unless otherwise provided by law.

(c) Any judicial action or proceeding brought in district court under subsection (5)(a) involving an equine slaughter or processing facility must comply with 81-9-240 and 81-9-241.

(6) (a) (i) In an action alleging noncompliance or inadequate compliance with a requirement of parts 1 through 3, including a challenge to an agency's decision that an environmental review is not required or a claim that the environmental review is inadequate, the agency shall compile and submit to the court the certified record of its decision at issue. The agency, prior to submitting the certified record to the court, shall assess and collect from the person challenging the decision a fee to pay for actual costs to compile and submit the certified record. Except as provided in subsection (6)(b), the person challenging the decision has the burden of proving the claim by clear and convincing evidence contained in the record.

(ii) An action alleging noncompliance or inadequate compliance with a requirement of parts 1 through 3, including a challenge to an agency's decision that an environmental review is not required or a claim that the environmental review is inadequate based in whole or in part upon greenhouse gas emissions and impacts to the climate in Montana or beyond Montana's borders, cannot vacate, void, or delay a lease, permit, license, certificate, authorization, or other entitlement or authority unless the review is required by a federal agency or the United States congress amends the federal Clean Air Act to include carbon dioxide as a regulated pollutant.

(iii) Except as provided in subsection (6)(b), in a challenge to the agency's decision or the adequacy of an environmental review, a court may not consider any information, including but not limited to an issue, comment, argument, proposed alternative, analysis, or evidence, that was not first presented to the agency for the agency's consideration prior to the agency's decision or within the time allowed for comments to be submitted.

(iv) Except as provided in subsection (6)(b), the court shall confine its review to the record certified by the agency. The court shall affirm the agency's decision or the environmental review unless the court specifically finds that the agency's decision was arbitrary and capricious.

(v) A customer fiscal impact analysis pursuant to 69-2-216 or an allegation that the customer fiscal impact analysis is inadequate may not be used as the basis of an action challenging or seeking review of the agency's decision.

(b) (i) When a party challenging the decision or the adequacy of the environmental review or decision presents information not in the record certified by the agency, the challenging party shall certify under oath in an affidavit that the information is new, material, and significant evidence that was not publicly available before the agency's decision and that is relevant to the decision or the adequacy of the agency's environmental review.

(ii) If upon reviewing the affidavit the court finds that the proffered information is new, material, and significant evidence that was not publicly available before the agency's decision and that is relevant to the decision or to the adequacy of the agency's environmental review, the court shall remand the new evidence to the agency for the agency's consideration and an opportunity to modify its decision or environmental review before the court considers the evidence as a part of the administrative record under review.

(iii) If the court finds that the information in the affidavit does not meet the requirements of subsection (6)(b)(i), the court may not remand the matter to the agency or consider the proffered information in making its decision.

(c) (i) The remedies provided in this section for successful challenges to a decision of the agency or the adequacy of the statement are exclusive.

(ii) Notwithstanding the provisions of 27-19-201 and 27-19-314, a court having considered the pleadings of parties and intervenors opposing a request for a temporary restraining order, preliminary injunction, permanent injunction, or other equitable relief may not enjoin the issuance or effectiveness of a license or permit or a part of a license or permit issued pursuant to Title 75 or Title 82 unless the court specifically finds that the party requesting the relief is more likely than not to prevail on the merits of its complaint given the uncontroverted facts in the record and applicable law and, in the absence of a temporary restraining order, a preliminary injunction, a permanent injunction, or other equitable relief, that the:

(A) party requesting the relief will suffer irreparable harm in the absence of the relief;

(B) issuance of the relief is in the public interest. In determining whether the grant of the relief is in the public interest, a court:

(I) may not consider the legal nature or character of any party; and

(II) shall consider the implications of the relief on the local and state economy and make written findings with respect to both.

(C) relief is as narrowly tailored as the facts allow to address both the alleged noncompliance and the irreparable harm the party asking for the relief will suffer. In tailoring the relief, the court shall ensure, to the extent possible, that the project or as much of the project as possible can go forward while also providing the relief to which the applicant has been determined to be entitled.

(d) The court may issue a temporary restraining order, preliminary injunction, permanent injunction, or other injunctive relief only if the party seeking the relief provides a written undertaking to the court in an amount reasonably calculated by the court as adequate to pay the costs and damages sustained by any party that may be found to have been wrongfully enjoined or restrained by a court through a subsequent judicial decision in the case, including but not limited to lost wages of employees and lost project revenues for 1 year. If the party seeking an injunction or a temporary restraining order objects to the amount of the written undertaking for any reason, including but not limited to its asserted inability to pay, that party shall file an affidavit with the court that states the party's income, assets, and liabilities in order to facilitate the court's consideration of the amount of the written undertaking that is required. The affidavit must be served on the party enjoined. If a challenge for noncompliance or inadequate compliance with a requirement of parts 1 through 3 seeks to vacate, void, or delay a lease, permit, license, certificate, or other entitlement or authority, the party shall, as an initial matter, seek an injunction related to a lease, permit, license, certificate, or other entitlement or authority, and an injunction may only be issued if the challenger:

(i) proves there is a likelihood of succeeding on the merits;

(ii) proves there is a violation of an established law or regulation on which the lease, permit, license, certificate, or other entitlement or authority is based; and

(iii) subject to the demonstration of the inability to pay, posts the appropriate written undertaking.

(e) An individual or entity seeking a lease, permit, license, certificate, or other entitlement or authority to act may intervene in a lawsuit in court challenging a decision or statement by a department or agency of the state as a matter of right if the individual or entity has not been named as a defendant.

(f) Attorney fees or costs may not be awarded to the prevailing party in an action alleging noncompliance or inadequate compliance with a requirement of parts 1 through 3.

(7) For purposes of judicial review, to the extent that the requirements of this section are inconsistent with the provisions of the National Environmental Policy Act, the requirements of this section apply to an environmental review or any severable portion of an environmental review within the state's jurisdiction that is being prepared by a state agency pursuant to this part in conjunction with a federal agency proceeding pursuant to the National Environmental Policy Act.

(8) The director of the agency responsible for the determination or recommendation shall endorse in writing any determination of significance made under subsection (1)(b)(iv) or any recommendation that a determination of significance be made.

(9) A project sponsor may request a review of the significance determination or recommendation made under subsection (8) by the appropriate board, if any. The appropriate board may, at its discretion, submit an advisory recommendation to the agency regarding the issue. The period of time between the request for a review and completion of a review under this subsection may not be included for the purposes of determining compliance with the time limits established for environmental review in 75-1-208.

**75-1-202. Agency rules to prescribe fees.** Each agency of state government charged with the responsibility of issuing a lease, permit, contract, license, or certificate under any provision of state law may adopt rules prescribing fees that must be paid by a person, corporation, partnership, firm, association, or other private entity when an application for a lease, permit, contract, license, or certificate

will require an agency to compile an environmental impact statement as prescribed by 75-1-201 and the agency has not made the finding under 75-1-205(1)(a). An agency shall determine whether it will be necessary to compile an environmental impact statement and assess a fee as prescribed by this section within any statutory timeframe for issuance of the lease, permit, contract, license, or certificate or, if no statutory timeframe is provided, within 90 days. Except as provided in 85-2-124, the fee assessed under this section may be used only to gather data and information necessary to compile an environmental impact statement as defined in parts 1 through 3. A fee may not be assessed if an agency intends only to file a negative declaration stating that the proposed project will not have a significant impact on the human environment.

**75-1-203. Fee schedule — maximums.** (1) In prescribing fees to be assessed against applicants for a lease, permit, contract, license, or certificate as specified in 75-1-202, an agency may adopt a fee schedule that may be adjusted depending upon the size and complexity of the proposed project. A fee may not be assessed unless the application for a lease, permit, contract, license, or certificate will result in the agency incurring expenses in excess of $2,501 to compile an environmental impact statement.

(2) The maximum fee that may be imposed by an agency may not exceed 2% of any estimated cost up to $1 million, plus 1% of any estimated cost over $1 million and up to $20 million, plus 1/2 of 1% of any estimated cost over $20 million and up to $100 million, plus 1/4 of 1% of any estimated cost over $100 million and up to $300 million, plus 1/8 of 1% of any estimated cost in excess of $300 million.

(3) If an application consists of two or more facilities, the filing fee must be based on the total estimated cost of the combined facilities. The estimated cost must be determined by the agency and the applicant at the time the application is filed.

(4) Each agency shall review and revise its rules imposing fees as authorized by this part at least every 2 years.

(5) In calculating fees under this section, the agency may not include in the estimated project cost the project sponsor's property or other interests already owned by the project sponsor at the time the application is submitted. Any fee assessed may be based only on the projected cost of acquiring all of the information and data needed for the environmental impact statement.

**75-1-204. Application of administrative procedure act.** In adopting rules prescribing fees as authorized by this part, an agency shall comply with the provisions of the Montana Administrative Procedure Act.

**75-1-205. Collection and use of fees and costs.** (1) A person who applies to a state agency for a permit, license, or other authorization that the agency determines requires preparation of an environmental impact statement is responsible for paying:

(a) the agency's costs of preparing the environmental impact statement and conducting the environmental impact statement process if the agency makes a written determination, based on material evidence identified in the determination, that there will be a significant environmental impact or a potential for a significant environmental impact. If a customer fiscal impact analysis is required under 69-2-216, the applicant shall also pay the staff and consultant costs incurred by the office of consumer counsel in preparing the analysis.

(b) a fee as provided in 75-1-202 if the agency does not make the determination provided for in subsection (1)(a).

(2) Costs payable under subsection (1) include:

(a) the costs of generating, gathering, and compiling data and information that is not available from the applicant to prepare the draft environmental impact statement, any supplemental draft environmental impact statement, and the final environmental impact statement;

(b) the costs of writing, reviewing, editing, printing, and distributing a reasonable number of copies of the draft environmental impact statement;

(c) the costs of attending meetings and hearings on the environmental impact statement, including meetings and hearings held to determine the scope of the environmental impact statement; and

(d) the costs of preparing, printing, and distributing a reasonable number of copies of any supplemental draft environmental impact statement and the final environmental impact statement, including the cost of reviewing and preparing responses to public comment.

(3) Costs payable under subsection (1) include:

(a) payments to contractors hired to work on the environmental impact statement;

(b) salaries and expenses of an agency employee who is designated as the agency's coordinator for preparation of the environmental impact statement for time spent performing the activities described in subsection (2) or for managing those activities; and

(c) travel and per diem expenses for other agency personnel for attendance at meetings and hearings on the environmental impact statement.

(4) (a) Whenever the agency makes the determination in subsection (1)(a), it shall notify the applicant of the cost of conducting the process to determine the scope of the environmental impact statement. The applicant shall pay that cost, and the agency shall then conduct the scoping process. The timeframe in 75-1-208(4)(a)(i) and any statutory timeframe for a decision on the application are tolled until the applicant pays the cost of the scoping process.

(b) If the agency decides to hire a third-party contractor to prepare the environmental impact statement, the agency shall prepare a list of no fewer than four contractors acceptable to the agency and shall provide the applicant with a copy of the list. If fewer than four acceptable contractors are available, the agency shall include all acceptable contractors on the list. The applicant shall provide the agency with a list of at least 50% of the contractors from the agency's list. The agency shall select its contractor from the list provided by the applicant.

(c) Upon completion of the scoping process and subject to subsection (1)(d), the agency and the applicant shall negotiate an agreement for the preparation of the environmental impact statement. The agreement must provide that:

(i) the applicant shall pay the cost of the environmental impact statement as determined by the agency after consultation with the applicant. In determining the cost, the agency shall identify and consult with the applicant regarding the data and information that must be gathered and studies that must be conducted.

(ii) the agency shall prepare the environmental impact statement within a reasonable time determined by the agency after consultation with the applicant and set out in the agreement. This timeframe supersedes any timeframe in statute or rule. If the applicant and the agency cannot agree on a timeframe, the agency shall prepare the environmental impact statement within any timeframe provided by statute or rule.

(iii) the applicant shall make periodic advance payments to cover work to be performed;

(iv) the agency may order work on the environmental impact statement to stop if the applicant fails to make advance payment as required by the agreement. The time for preparation of the environmental impact statement is tolled for any period during which a stop-work order is in effect for failure to make advance payment.

(v) (A) if the agency determines that the actual cost of preparing the environmental impact statement will exceed the cost set out in the agreement or that more time is necessary to prepare the environmental impact statement, the agency shall submit proposed modifications to the agreement to the applicant;

(B) if the applicant does not agree to an extension of the time for preparation of the environmental impact statement, the agency may initiate the informal review process under subsection (4)(d). Upon completion of the informal review process, the agreement may be amended only with the consent of the applicant.

(C) if the applicant does not agree with the increased costs proposed by the agency, the applicant may refuse to agree to the modification and may also provide the agency with a written statement providing the reason that payment of the increased cost is not justified or, if applicable, the reason that a portion of the increased cost is not justified. The applicant may also request an informal review as provided in subsection (4)(d). If the applicant provides a written statement pursuant to this subsection (4)(c)(v)(C), the agreement must be amended to require the applicant to pay all undisputed increased cost and 75% of the disputed increased cost and to provide that the agency is responsible for 25% of the

disputed increased cost. If the applicant does not provide the statement, the agreement must be amended to require the applicant to pay all increased costs.

(d) If the applicant does not agree with costs determined under subsection (4)(c)(i) or proposed under subsection (4)(c)(v), the applicant may initiate the informal review process pursuant to 75-1-208(3). If the applicant does not agree to a time extension proposed by the agency under subsection (4)(c)(v), the agency may initiate an informal review by an appropriate board under 75-1-208(3). The period of time for completion of the environmental impact statement provided in the agreement is tolled from the date of submission of a request for a review by the appropriate board until the date of completion of the review by the appropriate board. However, the agency shall continue to work on preparation of the environmental impact statement during this period if the applicant has advanced money to pay for this work.

(5) All fees and costs collected under this part must be deposited in the state special revenue fund as provided in 17-2-102. All fees and costs paid pursuant to this part must be used as provided in this part. Upon completion of the necessary work, each agency shall make an accounting to the applicant of the funds expended and refund all unexpended funds without interest.

**75-1-206. Multiple applications or combined facility.** In cases where a combined facility proposed by an applicant requires action by more than one agency or multiple applications for the same facility, the governor shall designate a lead agency to collect one fee pursuant to this part, to coordinate the preparation of information required for all environmental impact statements which may be required, and to allocate and disburse the necessary funds to the other agencies which require funds for the completion of the necessary work.

**75-1-207. Major facility siting applications excepted.** (1) Except as provided in subsection (2), a fee as prescribed by this part may not be assessed against any person, corporation, partnership, firm, association, or other private entity filing an application for a certificate under the provisions of the Montana Major Facility Siting Act, Title 75, chapter 20.

(2) The department of environmental quality may require payment of costs under 75-1-205(1)(a) by a person who files a petition under 75-20-201(4).

**75-1-208. Environmental review procedure.** (1) (a) Except as provided in 75-1-205(4) and subsection (1)(b) of this section, an agency shall comply with this section when completing any environmental review required under this part.

(b) To the extent that the requirements of this section are inconsistent with federal requirements, the requirements of this section do not apply to an environmental review that is being prepared jointly by a state agency pursuant to this part and a federal agency pursuant to the National Environmental Policy Act or to an environmental review that must comply with the requirements of the National Environmental Policy Act.

(2) (a) Except as provided in subsection (2)(b), a project sponsor may, after providing a 30-day notice, appear before the environmental quality council at any regularly scheduled meeting to discuss issues regarding the agency's environmental review of the project. The environmental quality council shall ensure that the appropriate agency personnel are available to answer questions.

(b) If the primary concern of the agency's environmental review of a project is the quality or quantity of water, a project sponsor may, after providing a 30-day notice, appear before the water policy committee established in 5-5-231 at any regularly scheduled meeting to discuss issues regarding the agency's environmental review of the project. The water policy committee shall ensure that the appropriate agency personnel are available to answer questions.

(3) If a project sponsor experiences problems in dealing with the agency or any consultant hired by the agency regarding an environmental review, the project sponsor may submit a written request to the agency director requesting a meeting to discuss the issues. The written request must sufficiently state the issues to allow the agency to prepare for the meeting. If the issues remain unresolved after the meeting with the agency director, the project sponsor may submit a written request to appear before the appropriate board, if any, to discuss the remaining issues. A written request to the appropriate board must sufficiently state the issues to allow the agency and the board to prepare for the meeting.

(4) (a) Subject to the requirements of subsection (5), to ensure a timely completion of the environmental review process, an agency is subject to the time limits listed in this subsection (4) unless other time limits are provided by law. All time limits are measured from the date the agency receives a complete application. An agency has:

(i) 60 days to complete a public scoping process, if any;

(ii) 90 days to complete an environmental review unless a detailed statement pursuant to 75-1-201(1)(b)(iv) or 75-1-205(4) is required; and

(iii) 180 days to complete a detailed statement pursuant to 75-1-201(1)(b)(iv).

(b) The period of time between the request for a review by a board and the completion of a review by a board under 75-1-201(9) or subsection (10) of this section may not be included for the purposes of determining compliance with the time limits established for conducting an environmental review under this subsection or the time limits established for permitting in 75-2-211, 75-2-218, 75-20-216, 75-20-231, 76-4-114, 82-4-122, 82-4-231, 82-4-337, and 82-4-432.

(5) An agency may extend the time limits in subsection (4) by notifying the project sponsor in writing that an extension is necessary and stating the basis for the extension. The agency may extend the time limit one time, and the extension may not exceed 50% of the original time period as listed in subsection (4). After one extension, the agency may not extend the time limit unless the agency and the project sponsor mutually agree to the extension.

(6) If the project sponsor disagrees with the need for the extension, the project sponsor may request that the appropriate board, if any, conduct a review of the agency's decision to extend the time period. The appropriate board may, at its discretion, submit an advisory recommendation to the agency regarding the issue.

(7) (a) Except as provided in subsection (7)(b), if an agency has not completed the environmental review by the expiration of the original or extended time period, the agency may not withhold a permit or other authority to act unless the agency makes a written finding that there is a likelihood that permit issuance or other approval to act would result in the violation of a statutory or regulatory requirement.

(b) Subsection (7)(a) does not apply to a permit granted under Title 75, chapter 2, or under Title 82, chapter 4, parts 1 and 2.

(8) Under this part, an agency may only request information from the project sponsor that is relevant to the environmental review required under this part.

(9) An agency shall ensure that the notification for any public scoping process associated with an environmental review conducted by the agency is presented in an objective and neutral manner and that the notification does not speculate on the potential impacts of the project.

(10) An agency may not require the project sponsor to provide engineering designs in greater detail than that necessary to fairly evaluate the proposed project. The project sponsor may request that the appropriate board, if any, review an agency's request regarding the level of design detail information that the agency believes is necessary to conduct the environmental review. The appropriate board may, at its discretion, submit an advisory recommendation to the agency regarding the issue.

(11) An agency shall, when appropriate, evaluate the cumulative impacts of a proposed project. However, related future actions may only be considered when these actions are under concurrent consideration by any agency through preimpact statement studies, separate impact statement evaluations, or permit processing procedures.

**75-1-209 through 75-1-219 reserved.**

**75-1-220. Definitions.** For the purposes of this part, the following definitions apply:

(1) "Alternatives analysis" means an evaluation of different parameters, mitigation measures, or control measures that would accomplish the same objectives as those included in the proposed action by the applicant. For a project that is not a state-sponsored project, it does not include an alternative facility or an alternative to the proposed project itself. The term includes alternatives required pursuant to Title 75, chapter 20.

(2) "Appropriate board" means, for administrative actions taken under this part by the:

(a) department of environmental quality, the board of environmental review, as provided for in 2-15-3502;

(b) department of fish, wildlife, and parks, the fish and wildlife commission, as provided for in 2-15-3402, and the state parks and recreation board, as provided for in 2-15-3406;

(c) department of transportation, the transportation commission, as provided for in 2-15-2502;

(d) department of natural resources and conservation for state trust land issues, the board of land commissioners, as provided for in Article X, section 4, of the Montana constitution;

(e) department of natural resources and conservation for oil and gas issues, the board of oil and gas conservation, as provided for in 2-15-3303; and

(f) department of livestock, the board of livestock, as provided for in 2-15-3102.

(3) "Complete application" means, for the purpose of complying with this part, an application for a permit, license, or other authorization that contains all data, studies, plans, information, forms, fees, and signatures required to be included with the application sufficient for the agency to approve the application under the applicable statutes and rules.

(4) "Cumulative impacts" means the collective impacts on the human environment within the borders of Montana of the proposed action when considered in conjunction with other past, present, and future actions related to the proposed action by location or generic type.

(5) "Environmental review" means any environmental assessment, environmental impact statement, or other written analysis required under this part by a state agency of a proposed action to determine, examine, or document the effects and impacts of the proposed action on the quality of the human and physical environment within the borders of Montana as required under this part.

(6) "Project sponsor" means any applicant, owner, operator, agency, or other entity that is proposing an action that requires an environmental review. If the action involves state agency-initiated actions on state trust lands, the term also includes each institutional beneficiary of any trust as described in The Enabling Act of Congress, approved February 22, 1899, 25 Stat. 676, as amended, the Morrill Act of 1862, 7 U.S.C. 301 through 308, and the Morrill Act of 1890, 7 U.S.C. 321 through 329.

(7) "Public scoping process" means any process to determine the scope of an environmental review.

(8) (a) "State-sponsored project" means:

(i) a project, program, or activity initiated and directly undertaken by a state agency;

(ii) except as provided in subsection (8)(b)(i), a project or activity supported through a contract, grant, subsidy, loan, or other form of funding assistance from a state agency, either singly or in combination with one or more other state agencies; or

(iii) except as provided in subsection (8)(b)(i), a project or activity authorized by a state agency acting in a land management capacity for a lease, easement, license, or other authorization to act.

(b) The term does not include:

(i) a project or activity undertaken by a private entity that is made possible by the issuance of permits, licenses, leases, easements, grants, loans, or other authorizations to act by the:

(A) department of environmental quality pursuant to Titles 75, 76, or 82;

(B) department of fish, wildlife, and parks pursuant to Title 87, chapter 4, part 4;

(C) board of oil and gas conservation pursuant to Title 82, chapter 11; or

(D) department of natural resources and conservation or the board of land commissioners pursuant to Titles 76, 77, 82, and 85; or

(ii) a project or activity involving the issuance of a permit, license, certificate, or other entitlement for permission to act by another agency acting in a regulatory capacity, either singly or in combination with other state agencies.

# Part 3
# Environmental Quality Council

**75-1-301. Definition of council.** In this part "council" means the environmental quality council provided for in 5-16-101.

**75-1-302. Meetings.** The council may determine the time and place of its meetings but shall meet at least once each quarter. Each member of the council is entitled to receive compensation and expenses as provided in 5-2-302. Members who are full-time salaried officers or employees of this state may not be compensated for their service as members but shall be reimbursed for their expenses.

**75-1-303 through 75-1-310 reserved.**

**75-1-311. Examination of records of government agencies.** The council shall have the authority to investigate, examine, and inspect all records, books, and files of any department, agency, commission, board, or institution of the state of Montana.

**75-1-312. Hearings — council subpoena power — contempt proceedings.** In the discharge of its duties, the council may hold hearings, administer oaths, issue subpoenas, compel the attendance of witnesses and the production of any papers, books, accounts, documents, and testimony, and cause depositions of witnesses to be taken in the manner prescribed by law for taking depositions in civil actions in the district court. In case of disobedience on the part of a person to comply with a subpoena issued on behalf of the council or a committee of the council or of the refusal of a witness to testify on any matters regarding which the witness may be lawfully interrogated, it is the duty of the district court of any county or the judge of the district court, on application of the council, to compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from the court on a refusal to testify in the court.

**75-1-313. Consultation with other groups — utilization of services.** In exercising its powers, functions, and duties under parts 1 through 3, the council shall:

(1) consult with such representatives of science, industry, agriculture, labor, conservation organizations, educational institutions, local governments, and other groups as it deems advisable; and

(2) utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations and individuals in order that duplication of effort and expense may be avoided, thus assuring that the council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

**75-1-314. Reporting requirements.** (1) The departments of environmental quality, agriculture, and natural resources and conservation shall report to the council in accordance with 5-11-210 the following natural resource and environmental compliance and enforcement information:

(a) the activities and efforts taking place to promote compliance assistance and education;

(b) the size and description of the regulated community and the estimated proportion of that community that is in compliance;

(c) the number, description, method of discovery, and significance of noncompliances, including those noncompliances that are pending; and

(d) a description of how the department has addressed the noncompliances identified in subsection (1)(c) and a list of the noncompliances left unresolved.

(2) When practical, reporting required in subsection (1) should include quantitative trend information.

**75-1-315 through 75-1-320 reserved.**

**75-1-321. Repealed.** Sec. 82, Ch. 545, L. 1995.

**75-1-322. Repealed.** Sec. 82, Ch. 545, L. 1995.

**75-1-323. Staff for environmental quality council.** The legislative services division shall provide sufficient and appropriate support to the environmental quality council in order that it may carry out its statutory duties, within the limitations of legislative appropriations. The environmental quality council staff

is a principal subdivision within the legislative services division. There is within the legislative services division a legislative environmental analyst. The legislative environmental analyst is the primary staff person for the environmental quality council and shall supervise staff assigned to the environmental quality council. The environmental quality council shall select the legislative environmental analyst with the concurrence of the legislative council.

**75-1-324. Duties of environmental quality council.** The environmental quality council shall:

(1) gather timely and authoritative information concerning the conditions and trends in the quality of the environment, both current and prospective, analyze and interpret the information for the purpose of determining whether the conditions and trends are interfering or are likely to interfere with the achievement of the policy set forth in 75-1-103, and compile and submit to the governor and the legislature studies relating to the conditions and trends;

(2) review and appraise the various programs and activities of the state agencies, in the light of the policy set forth in 75-1-103, for the purpose of determining the extent to which the programs and activities are contributing to the achievement of the policy and make recommendations to the governor and the legislature with respect to the policy;

(3) develop and recommend to the governor and the legislature state policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the state;

(4) conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(5) document and define changes in the natural environment, including the plant and animal systems, and accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(6) make and furnish studies, reports on studies, and recommendations with respect to matters of policy and legislation as the legislature requests;

(7) analyze legislative proposals in clearly environmental areas and in other fields in which legislation might have environmental consequences and assist in preparation of reports for use by legislative committees, administrative agencies, and the public;

(8) consult with and assist legislators who are preparing environmental legislation to clarify any deficiencies or potential conflicts with an overall ecologic plan;

(9) review and evaluate operating programs in the environmental field in the several agencies to identify actual or potential conflicts, both among the activities and with a general ecologic perspective, and suggest legislation to remedy the situations; and

(10) except as provided in 5-5-231, perform the administrative rule review, draft legislation review, program evaluation, and monitoring functions of an interim committee for the following executive branch agencies and the entities attached to the agencies for administrative purposes:

(a) department of environmental quality;

(b) department of fish, wildlife, and parks; and

(c) department of natural resources and conservation.

# APPENDIX B: ACTIONS EXCLUDED OR EXEMPTED FROM ENVIRONMENTAL REVIEW

An agency is not required to prepare an EA or an EIS for the following categories of action.

## ACTIONS EXEMPTED BY STATUTE

- Small business licenses under the Montana Small Business Licensing Coordination Act (30-16-103(3)(b), MCA);
- Issuance of an oversized load permit when existing roads through existing rights-of-way are used (61-10-121, MCA);
- Emergency energy orders issued by the Governor (90-4-310(6), MCA);
- Legislation (75-1-201(1)(b), MCA);
- Transfer of an ownership interest in a lease, permit, license, certificate, or other entitlement for use or permission to act by an agency does not trigger review if there is not a material change in terms or conditions of the entitlement or unless otherwise provided by law (75-1-201(1)(d), MCA);
- Montana Public Service Commission activities (75-1-201(3), MCA);
- Coal Board grants for services and facilities, highways, and prepaid property taxes for major new industrial facility (90-6-213, MCA); and
- Dept. of Commerce grants for Montana Coal Endowment Program (90-6-716, MCA).

<u>Department of Environmental Quality (DEQ)</u>

- Transfer of permits for portable emission sources (75-2-211(5), MCA);
- Registration of certain animal or human crematoriums (75-2-215, MCA);
- Siting modifications within a major facility siting corridor (75-20-303(6)(c))(i), MCA);
- Coal-fired generation unit remediation plans (75-8-106, MCA);
- Sanitation review of certain subdivisions (76-4-136, MCA);

- Minor revisions to coal and uranium mine permits and reclamation plans (82-4-229, MCA);
- Transfer of certain coal mine operating permits (82-4-250(4), MCA);
- Small miners (82-4-305, MCA); and
- Certain actions that involve minor amendments to a hard-rock mine operating permit (82-4-342(5), MCA).

Department of Fish, Wildlife, and Parks (DFWP)

- When DFWP acts as a snowmobile area operator or awards funding to a snowmobile area operator if the action/award has previously been subject to environmental review (23-2-657(2), MCA); and
- Domestic livestock trailing on land owned or controlled by DFWP (87-1-303(3)(a), MCA).

Department of Natural Resources and Conservation (DNRC)

- Issuance of federal, state, or privately funded grants by DNRC for authorized grant activities on private, county, or municipal lands to conserve habitat, reduce wildfire risk, or improve forest health (76-13-119, MCA);
- Grants, loans, or bonds related to conservation district activities (76-15-107, MCA);
- Issuance by DNRC or the Montana Board of Land Commissioners (Board) of any lease or license subject to further permitting by the DEQ (77-1-121(2), MCA);
- Issuance of lease renewals (77-1-121(3),MCA);
- Nonaction on the part of the DNRC or the Board even though it has the authority to act (77-1-121(3), MCA);
- DNRC and Board action regarding to and compliance with local government actions on planning and zoning (77-1-121(4), MCA);
- DNRC and Board action on certain maintenance activities related to agricultural or grazing leases (77-1-121(5), MCA);
- Issuance of historic right-of-way deeds across state lands (77-1-130(6), MCA);
- A qualified exemption for reciprocal access agreements on state land (77-1-617(2), MCA);

- Authorization of historic use of navigable river beds (77-1-1112(7), MCA);
- Right-of-way easements on state lands (77-2-103, MCA);
- Sale of a parcel formerly leased as a cabin or home site (77-2-363(7), MCA);
- Certain emergency timber sale situations or time-dependent access situations involving timber (77-5-201(3)(c), MCA);
- Grants, loans, or bonds related to conservation, reclamation, and renewable resource activities pursuant to the Montana Aquatic Invasive Species Act (80-7-1031, MCA);
- Grants, loans, or bonds related to conservation, reclamation, and renewable resource activities related to Renewable Resource Grant and Loan Program (85-1-632, MCA);
- Sale of leased cabin or home site (85-1-812, MCA); and
- Grants, loans, or bonds related to conservation, reclamation, and renewable resource activities related to Reclamation and Development Grants Program (90-2-1122, MCA).

## CATEGORICAL EXCLUSIONS

Actions that qualify for a categorical exclusion as defined by rule or justified by a programmatic review are exempt from individual environmental review. In the rule or programmatic review, the agency must identify any extraordinary circumstances in which a normally excluded action requires an EA or EIS (MEPA Model Rule III(5)).

Agency rules providing categorical exclusions are:

- DEQ: ARM 17.4.607 (general requirements), 17.85.112, 17.40.318, 17.38.103
- DNRC: ARM 36.2.523 (general requirements), 36.17.614, 36.11.447
- DFWP: ARM 12.2.430 (general requirements), 12.2.454
- Dept. of Agriculture: ARM 4.2.314 (general requirements)
- Dept. of Transportation: ARM 18.2.237 (general requirements), 18.2.261
- Dept. of Livestock: ARM 32.2.223 (general requirements)

## ACTIONS OF A SPECIAL NATURE

The following categories of actions, because of their special nature, do not require any review under MEPA:

- Administrative actions (routine clerical or similar functions, including but not limited to administrative procurement, contracts for consulting services, or personnel actions);
- Minor repairs, operations, and maintenance of existing facilities;
- Investigation, enforcement, and data collection activities;
- Ministerial actions (actions in which the agency exercises no discretion and only acts upon a given state of facts in a prescribed manner, e.g., a decision by the Montana Department of Fish, Wildlife, and Parks to issue a fishing license); and
- Actions that are primarily social or economic in nature and that do not otherwise affect the human environment.