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A Guide to the

MONTANA ENVIRONMENTAL POLICY ACT

produced by

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Disclaimer: The *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.

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

THE MONTANA ENVIRONMENTAL POLICY ACT

WHAT IS THE PURPOSE OF MEPA?

The purpose of the Montana Environmental Policy Act (MEPA) 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 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 . . . .*

MEPA is patterned after the NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 (NEPA)[1] 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 the 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.

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.

[1]Terms that are capitalized and underlined are further defined or explained in the Glossary and Index section beginning on page 39.

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?

MEPA was adopted during the 1971 session of the Montana State Legislature. During that session, the Legislature also considered amendments to the Montana Constitution. Montana’s Constitution subsequently was ratified in 1972.

A noteworthy amendment to Montana’s Constitution was a change in the definition of “*inalienable rights*”:

> **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)

In addition, a new section was added to Montana’s Constitution that included the following language:

> **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.

These constitutional amendments reflect the “spirit” of MEPA. The Supreme Court has ruled that the inalienable right is a fundamental right, that the above two constitutional provisions 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. MEPA encourages state agencies to make better decisions. Better decisions are BALANCED DECISIONS. Balanced decisions maintain Montana's clean and healthful environment without compromising the ability of people to pursue their livelihoods. Better decisions are ACCOUNTABLE DECISIONS. Accountable decisions 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. The Montana Constitution also recognizes that people have the responsibility to participate in decisions that may affect them.

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 Legislature. There seems to have been 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 had 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 was killed by 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 have reflected a true consensus on the direction of the state's environmental policy. However, at the end of the 1971 regular session, MEPA's $250,000 appropriation was removed from the state budget, leaving Montana with an environmental policy but no means to implement it. Later, during a second special legislative session in the summer of 1971, and after much debate, the MEPA appropriation was restored, but at a lower level--$100,000. 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.

Since MEPA's enactment, successive Legislatures have struggled to achieve a consensus regarding the role of MEPA in directing state environmental policy. Prior to 2001, proposed legislation ranging from limiting the scope and practical effectiveness of MEPA to expanding its breadth and influence, was frequently introduced and subsequently killed. Except for some minor amendments in 1975, 1977, 1979, 1987, 1989, and 1995, MEPA remained relatively unchanged from the 1971 version. However, concerned with MEPA reviews of some permitting processes, the 2001 Legislature approved seven amendments to Part 2 of MEPA that address how state agencies implement the statutes.

The most significant changes established time limits for the preparation of environmental reviews, provided MEPA's first statutory definitions, and declared that MEPA could not be used to withhold, deny, or impose conditions on any permit or other state government authorization. Although the mechanics of MEPA implementation have been adjusted over the years, Montana's 1971 environmental policy and purpose declared in Part 1 of MEPA and the 1972 constitutional environmental provisions remain guiding principles for how people relate to their environment.

WHAT REQUIREMENTS DOES MEPA IMPOSE ON STATE AGENCIES?

MEPA is a PROBLEMSOLVING 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 decisionmaking 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 decisionmaking.

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);
- 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 amendments to MEPA make it clear that the permitting or authorizing statutes form the basis for whether or not 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 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 decisionmaking 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), ENVIRONMENTAL ASSESSMENT (EA), or ENVIRONMENTAL IMPACT STATEMENT (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: six are state senators; six are state representatives; four are members of the public; and one, a nonvoting member, represents the Governor.

The EQC is evenly bipartisan. The House, Senate, and public members are all chosen by the majority and minority leaders of each house.

Council members serve 2-year terms, concurrent with the state legislative bienniums. Members may serve no more than three terms.

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 the MEPA Model 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:

- 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; and
- actions that qualify for a categorical exclusion.

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)).

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 the MEPA Model 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 ENVIRONMENTAL 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 (section 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 have been 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 has been 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 (MEPA Model Rule XIX) . Note that even if the action constitutes an emergency, the agency must, within 30 days, conduct some

level of environmental review to determine the impacts that resulted from the action. Also 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 that have been 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. A PROJECT SPONSOR may comment on the agency's selection and analysis of alternatives and may request a third-party determination of whether or not a particular alternative is reasonable.

Depending on the proposal, 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.

WHAT IS THE "NO ACTION ALTERNATIVE"?

The MEPA Model Rules require an analysis of the no action alternative for all environmental reviews that include an alternative 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.

For any environmental review, the appropriate interpretation of the no action alternative is the action that results in the least change (favorable or unfavorable) to the environment from the current situation.

WHAT IS THE "AFFECTED ENVIRONMENT"?

The affected environment describes those aspects of the existing environment that are relevant to the issues that have been identified. 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)

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 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.

The expansiveness of cumulative impact analysis is daunting. Taken literally, the study of cumulative impacts is an analysis without an ending point. The key to an effective cumulative impact analysis is the definition of reasonable and rational boundaries to a meaningful and realistic evaluation.

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 the 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 *plebiscite*, which 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.

WHAT ARE THE BENEFITS OF PUBLIC PARTICIPATION?

One of MEPA's twin objectives is to ensure that the public is informed of and participates in the decisionmaking process. Public involvement is not a separate component of the MEPA process. Rather, public involvement is integral to each step of environmental review. 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 a 15-day public comment period for the final EIS; and
- include public comments and the agency's *response to public comments* in the final EIS.

WHAT IS SCOPING?

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 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 has been circulated and prior to preparation of the final EIS or after an EA has been 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 no hearing has been 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 XXII).

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)).

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 less 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. The decisionmaker is a person with sufficient authority to make commitments on behalf of the 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. The agencies are required to develop methods and procedures for giving appropriate consideration to “presently unquantified environmental amenities and values” that previously had not been weighed, along with economic and technical factors. However, MEPA also states explicitly that 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 on the project. When an agency is making a decision on a permit or other approval authorization requested by an entity outside the agency, 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 agency is less able to incorporate the goals and directives of MEPA into final decisions that are subject to specific permitting and authorization laws and rules. However, the agency can incorporate the goals and directives of MEPA into the environmental review analysis of the project's alternatives.

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 have been incorporated into 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 have taken a significant step in that direction by adopting MEPA Model Rules. These rules reiterate MEPA’s umbrella requirements. Agencies that have adopted the model rules have 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 that prevents the agency from fully complying with MEPA, 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?

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 allows project sponsors to request a review of certain agency determinations by a third-party board. For example, disputes over the reasonableness of an alternative selected for analysis, 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 narrows the scope of alternatives that may be analyzed in an environmental review and includes the comments of the project sponsor in the determination of reasonableness and feasibility. It also 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 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. The CEQ has promulgated interpretive NEPA regulations that other federal agencies have generally adopted. NEPA accorded only advisory duties to the CEQ. NEPA gives the CEQ environmental research, review, and reporting responsibilities.

MEPA created the Environmental Quality Council. NEPA created the Council on Environmental Quality. 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 has 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

Agriculture and Livestock Building
303 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

1424 Ninth Ave.
P.O. Box 200501
Helena, Montana 59620-0501
(406) 444-3797
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) 444-3186
http://fwp.mt.gov/

Rule: ARM 12.2.428, *et seq*.

DEPARTMENT OF LIVESTOCK

Scott Hart Building, 3rd Floor
310 North Roberts
P.O. 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

1625 Eleventh Ave.
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-2074
http://dnrc.mt.gov/index.htm

Rule: ARM 36.2.521, *et seq*.

DEPARTMENT OF TRANSPORTATION

2701 Prospect Ave.
P.O. Box 201001
Helena, Montana 59620-1001
(406) 444-6201
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.

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 - Means, for administrative actions taken under MEPA, those boards and commissions statutorily described in section 75-1-220(1), 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 - Means, 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 (section 75-1-220(2), MCA).

CUMULATIVE IMPACTS - Means the collective impacts on the human environment 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 (section 75-1-220(3), 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 with 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 - Means 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 (section 75-1-220(4), 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 mutually 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.

PROBLEMSOLVING - 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 - Means 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 (section 75-1-220(5), 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 - Means any process to determine the scope of an environmental review (section 75-1-220(6), 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 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.

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.

Title 75
ENVIRONMENTAL PROTECTION

CHAPTER 1
ENVIRONMENTAL POLICY AND PROTECTION GENERALLY

Part 1
General Provisions

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

History: En. Sec. 1, Ch. 238, L. 1971; R.C.M. 1947, 69-6501.

Cross-References

State policy of consistency and continuity in adoption and application of environmental rules, 90-1-101.

75-1-102. Purpose. The purpose of parts 1 through 3 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 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.

History: En. Sec. 2, Ch. 238, L. 1971; R.C.M. 1947, 69-6502; amd. Sec. 1, Ch. 352, L. 1995.

Cross-References

Right to clean and healthful environment, Art. II, sec. 3, Mont. Const.

Duty to maintain clean and healthful environment, Art. IX, sec. 1, Mont. Const.

Department of Public Service Regulation, 2-15-2601.

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, and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

History: En. Sec. 3, Ch. 238, L. 1971; R.C.M. 1947, 69-6503; amd. Sec. 2, Ch. 352, L. 1995.

Cross-References

Right to clean and healthful environment, Art. II, sec. 3, Mont. Const.

Duty to maintain clean and healthful environment, Art. IX, sec. 1, Mont. Const.

Private Property Assessment Act, Title 2, ch. 10, part 1.

Comments of historic preservation officer, 22-3-433.

Renewable resource development, Title 90, ch. 2.

75-1-104. Specific statutory obligations unimpaired. Nothing in 75-1-103 or 75-1-201 shall in any way 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 other state or federal agency; or

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

History: En. Sec. 6, Ch. 238, L. 1971; R.C.M. 1947, 69-6506.

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.

History: En. Sec. 7, Ch. 238, L. 1971; R.C.M. 1947, 69-6507.

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.

History: En. Sec. 4, Ch. 352, L. 1995.

75-1-107 through 75-1-109 reserved.

75-1-110. Environmental rehabilitation and response account. (1) There is an environmental rehabilitation and response account in the state special revenue fund provided for in 17-2-102.

(2) There must be deposited in the account:

(a) fine and penalty money received pursuant to 75-10-1223, 82-4-311, and 82-4-424 and other funds or contributions designated for deposit to the account;

(b) unclaimed or excess reclamation bond money received pursuant to 82-4-241, 82-4-311, 82-4-424, and 82-4-426; and

(c) interest earned on the account.

(3) Money in the account is available to the department of environmental quality by appropriation and must be used to pay for:

(a) reclamation and revegetation of land affected by mining activities, research pertaining to the reclamation and revegetation of land, and the rehabilitation of water affected by mining activities;

(b) reclamation and revegetation of unreclaimed mine lands for which the department may not require reclamation by, or obtain costs of reclamation from, a legally responsible party;

(c) remediation of sites containing hazardous wastes or hazardous substances for which the department may not recover costs from a legally responsible party; or

(d) response to an imminent threat of substantial harm to the environment, to public health, or to public safety for which no funding or insufficient funding is available pursuant to 75-1-1101.

(4) Any unspent or unencumbered money in the account at the end of a fiscal year must remain in the account until spent or appropriated by the legislature.

History: En. Sec. 1, Ch. 338, L. 2001.

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 subsection (2), 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 that may have an impact on the human environment; 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) through (1)(b)(iv)(C)(III) and, if requested by the project sponsor or if determined by the agency to be necessary, subsection (1)(b)(iv)(C)(IV);

(ii) identify and develop methods and procedures that will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking, 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 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 a detailed statement on:

(A) the environmental impact of the proposed action;

(B) any adverse environmental effects 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) if the project sponsor believes that an alternative is not reasonable as provided in subsection (1)(b)(iv)(C)(I), the project sponsor may request a review by the appropriate board, if any, of the agency's

determination regarding the reasonableness of the alternative. The appropriate board may, at its discretion, submit an advisory recommendation to the agency regarding the issue. The agency may not charge the project sponsor for any of its activities associated with any review under this section. 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.

(IV) 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 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; and

(G) 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;

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

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

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

(ix) assist 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. The responsible state official shall also consult with and obtain comments from any state agency 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) 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.

(3) (a) In any action challenging or seeking review of an agency's decision that a statement pursuant to subsection (1)(b)(iv) is not required or that the statement is inadequate, the burden of proof is on the person challenging the decision. Except as provided in subsection (3)(b), in a challenge to the adequacy of a statement, a court may not consider any issue relating to the adequacy or content of the agency's environmental review document or evidence that was not first presented to the agency for the agency's consideration prior to the agency's decision. A court may not set aside the agency's decision unless it finds that there is clear and convincing evidence that the decision was arbitrary or capricious or not in compliance with law.

(b) When new, material, and significant evidence or issues relating to the adequacy or content of the agency's environmental review document are presented to the district court that had not previously been presented to the agency for its consideration, the district court shall remand the new evidence or issue relating to the adequacy or content of the agency's environmental review document back to the agency for the agency's consideration and an opportunity to modify its findings of fact and administrative decision before the district court considers the evidence or issue relating to the adequacy or content of the agency's environmental review document within the administrative record under review. Immaterial or insignificant evidence or issues relating to the adequacy or content of the agency's environmental review document may not be remanded to the agency. The district court shall review the agency's findings and decision to determine whether they are supported

by substantial, credible evidence within the administrative record under review.

(4) To the extent that the requirements of subsections (1)(b)(iv)(C)(I) and (1)(b)(iv)(C)(III) are inconsistent with federal requirements, the requirements of subsections (1)(b)(iv)(C)(I) and (1)(b)(iv)(C)(III) do not apply to an environmental review that is being prepared 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 is being prepared by a state agency to comply with the requirements of the National Environmental Policy Act.

(5) (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 (5) 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.

(6) (a) A challenge to an agency action under this part may only be brought against a final agency action and may only be brought in district court or in federal court, whichever is appropriate. 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.

(b) Any action or proceeding under subsection (6)(a) must take precedence over other cases or matters in the district court unless otherwise provided by law.

(7) 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.

(8) A project sponsor may request a review of the significance determination or recommendation made under subsection (7) 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.

History: En. Sec. 4, Ch. 238, L. 1971; R.C.M. 1947, 69-6504; amd. Sec. 1, Ch. 391, L. 1979; amd. Sec. 1, Ch. 473, L. 1987; amd. Sec. 1,

Ch. 566, L. 1989; amd. Sec. 1, Ch. 331, L. 1995; amd. Sec. 3, Ch. 352, L. 1995; amd. Sec. 177, Ch. 418, L. 1995; amd. Sec. 67, Ch. 545, L. 1995; amd. Sec. 1, Ch. 223, L. 1999; amd. Sec. 1, Ch. 186, L. 2001; amd. Sec. 1, Ch. 267, L. 2001; amd. Sec. 1, Ch. 268, L. 2001; amd. Sec. 3, Ch. 299, L. 2001; amd. Sec. 1, Ch. 300, L. 2001.

Cross-References

Citizens' right to participate satisfied if environmental impact statement filed, 2-3-104.

Statement to contain information regarding heritage properties and paleontological remains, 22-3-433.

Public Service Commission, Title 69, ch. 1, part 1.

Statement under lakeshore protection provisions required, 75-7-213.

Impact statement for facility siting, 75-20-211.

Fees for impact statements concerning water permits, 85-2-124.

Energy emergency provisions -- exclusion, 90-4-310.

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 which shall 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. An agency must determine within 30 days after a completed application is filed whether it will be necessary to compile an environmental impact statement and assess a fee as prescribed by this part. The fee assessed under this part shall be used only to gather data and information necessary to compile an environmental impact statement as defined in parts 1 through 3. No fee may 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.

History: En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(1).

Cross-References

Fees authorized for environmental review of subdivision plats, 76-4-105.

Fees in connection with environmental impact statement required before issuing permits to appropriate water, 85-2-124.

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 $2,500 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.

History: En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(2), (7); amd. Sec. 47, Ch. 112, L. 1991; amd. Sec. 41, Ch. 349, L. 1993; amd. Sec. 1, Ch. 251, L. 2001.

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.

History: En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(4).

Cross-References

Montana Administrative Procedure Act -- adoption and publication of rules, Title 2, ch. 4, part 3.

75-1-205. Use of fees. All fees collected under this part shall be deposited in the state special revenue fund as provided in 17-2-102. All fees paid pursuant to this part shall be used as herein provided. Upon completion of the necessary work, each agency will make an accounting to the applicant of the funds expended and refund all unexpended funds without interest.

History: En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(5); amd. Sec. 1, Ch. 277, L. 1983.

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.

History: En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(6).

75-1-207. Major facility siting applications excepted. No fee as prescribed by this part may 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, chapter 20 of this title.

History: En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(3).

75-1-208. Environmental review procedure. (1) (a) Except as provided in subsection (1)(b), 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 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.

(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) 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(1)(b)(iv)(C)(III) or (8) 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, 75-10-922, 75-20-216, 75-20-231, 76-4-125, 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 that 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, consider 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.

History: En. Sec. 1, Ch. 299, L. 2001.

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

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

(1) "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, wildlife, and parks commission, as provided for in 2-15-3402;

(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.

(2) "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.

(3) "Cumulative impacts" means the collective impacts on the human environment 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.

(4) "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 as required under this part.

(5) "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 328).

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

History: En. Sec. 2, Ch. 267, L. 2001; en. Sec. 2, Ch. 268, L. 2001; en. Sec. 2, Ch. 299, L. 2001; en. Sec. 2, Ch. 300, L. 2001; amd. Sec. 15(3), (4), Ch. 299, L. 2001.

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.

History: En. by Code Commissioner, 1979.

Cross-References

Qualifications, 5-16-102.
Term of membership, 5-16-103.
Officers, 5-16-105.

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.

History: En. Sec. 10, Ch. 238, L. 1971; amd. Sec. 6, Ch. 103, L. 1977; R.C.M. 1947, 69-6510.

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.

History: En. Sec. 15, Ch. 238, L. 1971; R.C.M. 1947, 69-6515.

75-1-312. Hearings -- council subpoena power -- contempt proceedings. In the discharge of its duties the council shall have authority to hold hearings, administer oaths, issue subpoenas, compel the attendance of witnesses and the production of any papers, books, accounts, documents, and testimony, and to 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 any person to comply with any subpoena issued on behalf of the council or any committee thereof or of the refusal of any witness to testify on any matters regarding which he may be lawfully interrogated, it

shall be the duty of the district court of any county or the judge thereof, 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 such court on a refusal to testify therein.

History: En. Sec. 16, Ch. 238, L. 1971; R.C.M. 1947, 69-6516.

Cross-References

Warrant of attachment or commitment for contempt, 3-1-513.

Depositions upon oral examinations, Rules 30(a) through 30(g) and 31(a) through 31(c), M.R.Civ.P. (see Title 25, ch. 20).

Subpoena -- disobedience, 26-2-104 through 26-2-107.

Criminal contempt, 45-7-309.

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.

History: En. Sec. 17, Ch. 238, L. 1971; R.C.M. 1947, 69-6517.

75-1-314. Reporting requirements. (1) The departments of environmental quality, agriculture, and natural resources and conservation shall biennially report to the council 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.

History: En. Sec. 1, Ch. 38, L. 1997.

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

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

History: En. Sec. 11, Ch. 238, L. 1971; R.C.M. 1947, 69-6511.

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

History: En. Sec. 13, Ch. 238, L. 1971; R.C.M. 1947, 69-6513.

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.

History: En. Sec. 12, Ch. 238, L. 1971; R.C.M. 1947, 69-6512; amd. Sec. 68, Ch. 545, L. 1995.

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) perform the administrative rule review, draft legislation review, program evaluation, and monitoring functions of an interim committee for the:

(a) department of environmental quality;

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

(c) department of natural resources and conservation.

History: En. Sec. 14, Ch. 238, L. 1971; R.C.M. 1947, 69-6514; amd. Sec. 42, Ch. 349, L. 1993; amd. Sec. 69, Ch. 545, L. 1995; amd. Sec. 47, Ch. 19, L. 1999; amd. Sec. 19, Ch. 210, L. 2001.

APPENDIX B: MEPA MODEL RULES

With Cross References

In 1988, the EQC facilitated a rewriting of the agency MEPA administrative rules. That rule revision process produced the MEPA Model Rules. Each state agency (with a few exceptions) adopted the model rules through its own individual rulemaking procedures. There may be some differences between the MEPA Model Rules and individual agency administrative MEPA rules. The MEPA Model Rules are included in this Appendix for informational purposes only. A cross-reference list of MEPA Model Rules to comparable agency Administrative Rules of Montana (ARM) begins on page 84.

MEPA MODEL RULES

"I. POLICY STATEMENT CONCERNING MEPA RULES The purpose of [these rules] is to implement Title 75, chapter 1, MCA, the Montana Environmental Policy Act (MEPA), through the establishment of administrative procedures. MEPA requires that state agencies comply with its terms "to the fullest extent possible." In order to fulfill the stated policy of that act, the agency shall conform to the following rules prior to reaching a final decision on proposed actions covered by MEPA." (**History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.**)

"II. DEFINITIONS (1) `Action' means a project, program or activity directly undertaken by the agency; a project or activity supported through a 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

(2)(a) `Alternative' means:

(i) an alternate approach or course of action that would appreciably accomplish the same objectives or results as the proposed action;

(ii) design parameters, mitigation, or controls other than those incorporated into a proposed action by an applicant or by an agency prior to preparation of an EA or draft EIS;

(iii) no action or denial; and

(iv) for agency-initiated actions, a different program or series of activities that would accomplish other objectives or a different use of

resources than the proposed program or series of activities.

(b) The agency is required to consider only alternatives that are realistic, technologically available, and that represent a course of action that bears a logical relationship to the proposal being evaluated.

(3) `The agency' means [agency adopting rules].

(4) `Applicant' means a person or any other entity who applies to the agency for a grant, loan, subsidy, or other funding assistance, or for a lease, permit, license, certificate, or other entitlement for use or permission to act.

(5) `Categorical exclusion' refers to a type of action which does not individually, collectively, or cumulatively require an EA or EIS, as determined by rulemaking or programmatic review adopted by the agency, unless extraordinary circumstances, as defined by rulemaking or programmatic review, occur.

(6) `Compensation' means the replacement or provision of substitute resources or environments to offset an impact on the quality of the human environment. The agency may not consider compensation for purposes of determining the significance of impacts (see Rule III(4)).

(7) `Cumulative impact' means the collective impacts on the human environment of the proposed action when considered in conjunction with other past and present actions related to the proposed action by location or generic type. Related future actions must also be considered when these actions are under concurrent consideration by any state agency through pre-impact statement studies, separate impact statement evaluation, or permit processing procedures.

(8) `Emergency actions' include, but are not limited to:

(a) projects undertaken, carried out, or approved by the agency to repair or restore property or facilities damaged or destroyed as a result of a disaster when a disaster has been declared by the governor or other appropriate government entity;

(b) emergency repairs to public service facilities necessary to maintain service; and

(c) projects, whether public or private, undertaken to prevent or mitigate immediate threats to public health, safety, welfare, or the environment.

(9) `Environmental assessment' (EA) means a written analysis of a proposed action to determine whether an EIS is required or to serve one or more of the other purposes described in Rule III(2).

(10) `Environmental impact statement' (EIS) means the detailed written statement required by section 75-1-201, MCA, which may take several forms:

(a) `Draft environmental impact statement' means a detailed written statement prepared to the fullest extent possible in accordance with 75-1-

201(1)(b)(iii), MCA, and [these rules];

(b) `Final environmental impact statement' means a written statement prepared to the fullest extent possible in accordance with 75-1-201, MCA, and Rule X or XI and which responds to substantive comments received on the draft environmental impact statement;

(c) `Joint environmental impact statement' means an EIS prepared jointly by more than one agency, either state or federal, when the agencies are involved in the same or a closely related proposed action.

(11) `Environmental quality council' (EQC) means the council established pursuant to Title 75, chapter 1, MCA, and 5-16-101, MCA.

(12) `Human environment' includes, but is not limited to biological, physical, social, economic, cultural, and aesthetic factors that interrelate to form the environment. As the term applies to the agency's determination of whether an EIS is necessary (see Rule III(1)), economic and social impacts do not by themselves require an EIS. However, whenever an EIS is prepared, economic and social impacts and their relationship to biological, physical, cultural and aesthetic impacts must be discussed.

(13) `Lead agency' means the state agency that has primary authority for committing the government to a course of action or the agency designated by the governor to supervise the preparation of a joint environmental impact statement or environmental assessment.

(14) `Mitigation' means:

(a) avoiding an impact by not taking a certain action or parts of an action;

(b) minimizing impacts by limiting the degree or magnitude of an action and its implementation;

(c) rectifying an impact by repairing, rehabilitating, or restoring the affected environment; or

(d) 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.

(15) `Programmatic review' means an analysis (EIS or EA) of the impacts on the quality of the human environment of related actions, programs, or policies.

(16) `Residual impact' means an impact that is not eliminated by mitigation.

(17) `Scope' means the range of reasonable alternatives, mitigation, issues, and potential impacts to be considered in an environmental assessment or an environmental impact statement.

(18) `Secondary impact' means a further impact to the human environment that may be stimulated or induced by or otherwise result from a direct impact of the action.

(19) `State agency', means an office, commission, committee, board,

department, council, division, bureau, or section of the executive branch of state government." (**History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"III. GENERAL REQUIREMENTS OF THE ENVIRONMENTAL REVIEW PROCESS Section 75-1-201 requires state agencies to integrate use of the natural and social sciences and the environmental design arts in planning and in decision-making, and to prepare a detailed statement (an EIS) on each proposal for projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment. In order to determine the level of environmental review for each proposed action that is necessary to comply with 75-1-201, MCA, the agency shall apply the following criteria:

(1) The agency shall prepare an EIS as follows:

(a) whenever an EA indicates that an EIS is necessary; or

(b) whenever, based on the criteria in Rule IV, the proposed action is a major action of state government significantly affecting the quality of the human environment.

(2) An EA may serve any of the following purposes:

(a) to ensure that the agency uses the natural and social sciences and the environmental design arts in planning and decision-making. An EA may be used independently or in conjunction with other agency planning and decision-making procedures;

(b) to assist in the evaluation of reasonable alternatives and the development of conditions, stipulations or modifications to be made a part of a proposed action;

(c) to determine the need to prepare an EIS through an initial evaluation and determination of the significance of impacts associated with a proposed action;

(d) to ensure the fullest appropriate opportunity for public review and comment on proposed actions, including alternatives and planned mitigation, where the residual impacts do not warrant the preparation of an EIS; and

(e) to examine and document the effects of a proposed action on the quality of the human environment, and to provide the basis for public review and comment, whenever statutory requirements do not allow sufficient time for an agency to prepare an EIS. The agency shall determine whether sufficient time is available to prepare an EIS by comparing statutory requirements that establish when the agency must make its decision on the proposed action with the time required by Rule XII to obtain public review of an EIS plus a reasonable period to prepare a draft EIS and, if required, a final EIS.

(3) The agency shall prepare an EA whenever:

(a) the action is not excluded under (5) and it is not clear without preparation of an EA whether the proposed action is a major one significantly affecting the quality of the human environment;

(b) the action is not excluded under (5) and although an EIS is not warranted, the agency has not otherwise implemented the interdisciplinary analysis and public review purposes listed in (2)(a) and (d) through a similar planning and decision-making process; or

(c) statutory requirements do not allow sufficient time for the agency to prepare an EIS.

(4) The agency may, as an alternative to preparing an EIS, prepare an EA whenever the action is one that might normally require an EIS, but effects which might otherwise be deemed significant appear to be mitigable below the level of significance through design, or enforceable controls or stipulations or both imposed by the agency or other government agencies. For an EA to suffice in this instance, the agency must determine that all of the impacts of the proposed action have been accurately identified, that they will be mitigated below the level of significance, and that no significant impact is likely to occur. The agency may not consider compensation for purposes of determining that impacts have been mitigated below the level of significance.

(5) The agency is not required to prepare an EA or an EIS for the following categories of action:

(a) actions that qualify for a categorical exclusion as defined by rule or justified by a programmatic review. In the rule or programmatic review, the agency shall identify any extraordinary circumstances in which a normally excluded action requires an EA or EIS;

(b) administrative actions: routine, clerical or similar functions of a department, including but not limited to administrative procurement, contracts for consulting services, and personnel actions;

(c) minor repairs, operations, or maintenance of existing equipment or facilities;

(d) investigation and enforcement: data collection, inspection of facilities or enforcement of environmental standards;

(e) ministerial actions: actions in which the agency exercises no discretion, but rather acts upon a given state of facts in a prescribed manner; and

(f) actions that are primarily social or economic in nature and that do not otherwise affect the human environment." (**History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"IV. DETERMINING THE SIGNIFICANCE OF IMPACTS (1) In order to implement 75-1-201, MCA, the agency shall determine the significance of impacts associated with a proposed action. This determination is the basis of the agency's decision concerning the need to prepare an EIS and also refers to the agency's evaluation of individual and cumulative impacts in either EAs or EISs. The agency shall consider the following criteria in determining the significance of each impact on the quality of the human environment:

(a) the severity, duration, geographic extent, and frequency of occurrence of the impact;

(b) the probability that the impact will occur if the proposed action occurs; or conversely, reasonable assurance in keeping with the potential severity of an impact that the impact will not occur;

(c) growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts;

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

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

(f) 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

(g) potential conflict with local, state, or federal laws, requirements, or formal plans.

(2) An impact may be adverse, beneficial, or both. If none of the adverse effects of the impact are significant, an EIS is not required. An EIS is required if an impact has a significant adverse effect, even if the agency believes that the effect on balance will be beneficial." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP:, Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"V. PREPARATION AND CONTENTS OF ENVIRONMENTAL ASSESSMENTS (1) The agency shall prepare an EA, regardless of its length or the depth of analysis, in a manner which utilizes an interdisciplinary approach. The agency may initiate a process to determine the scope of issues to be addressed in an EA. Whenever the agency elects to initiate this process, it shall follow the procedures contained in Rule VII.

(2) For a routine action with limited environmental impact, the contents of an EA may be reflected on a standard checklist format. At the other extreme, whenever an action is one that might normally require an EIS, but

effects that otherwise might be deemed significant are mitigated in project design or by controls imposed by the agency, the analysis, format, and content must all be more substantial. The agency shall prepare the evaluations and present the information described in section (3) as applicable and in a level of detail appropriate to the following considerations:

(a) the complexity of the proposed action;

(b) the environmental sensitivity of the area affected by the proposed action;

(c) the degree of uncertainty that the proposed action will have a significant impact on the quality of the human environment;

(d) the need for and complexity of mitigation required to avoid the presence of significant impacts.

(3) To the degree required in (2) above, an EA must include:

(a) a description of the proposed action, including maps and graphs;

(b) a description of the benefits and purpose of the proposed action. If the agency prepares a cost/benefit analysis before completion of the EA, the EA must contain the cost/benefit analysis or a reference to it;

(c) a listing of any state, local, or federal agencies that have overlapping or additional jurisdiction or environmental review responsibility for the proposed action and the permits, licenses, and other authorizations required;

(d) an evaluation of the impacts, including cumulative and secondary impacts, on the physical environment. This evaluation may take the form of an environmental checklist and/or, as appropriate, a narrative containing more detailed analysis of topics and impacts that are potentially significant, including, where appropriate: terrestrial and aquatic life and habitats; water quality, quantity, and distribution; geology; soil quality, stability, and moisture; vegetation cover, quantity and quality; aesthetics; air quality; unique, endangered, fragile, or limited environmental resources; historical and archaeological sites; and demands on environmental resources of land, water, air and energy;

(e) an evaluation of the impacts, including cumulative and secondary impacts, on the human population in the area to be affected by the proposed action. This evaluation may take the form of an environmental checklist and/or, as appropriate, a narrative containing more detailed analysis of topics and impacts that are potentially significant, including where appropriate, social structures and mores; cultural uniqueness and diversity; access to and quality of recreational and wilderness activities; local and state tax base and tax revenues; agricultural or industrial production; human health; quantity and distribution of employment; distribution and density of population and housing; demands for

government services; industrial and commercial activity; locally adopted environmental plans and goals; and other appropriate social and economic circumstances;

(f) a description and analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably available and prudent to consider and a discussion of how the alternative would be implemented;

(g) a listing and appropriate evaluation of mitigation, stipulations, and other controls enforceable by the agency or another government agency;

(h) a listing of other agencies or groups that have been contacted or have contributed information;

(i) the names of persons responsible for preparation of the EA; and

(j) a finding on the need for an EIS and, if appropriate, an explanation of the reasons for preparing the EA. If an EIS is not required, the EA must describe the reasons the EA is an appropriate level of analysis." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"VI. PUBLIC REVIEW OF ENVIRONMENTAL ASSESSMENTS (1) The level of analysis in an EA will vary with the complexity and seriousness of environmental issues associated with a proposed action. The level of public interest will also vary. The agency is responsible for adjusting public review to match these factors.

(2) An EA is a public document and may be inspected upon request. Any person may obtain a copy of an EA by making a request to the agency. If the document is out-of-print, a copying charge may be levied.

(3) The agency is responsible for providing additional opportunities for public review consistent with the seriousness and complexity of the environmental issues associated with a proposed action and the level of public interest. Methods of accomplishing public review include publishing a news release or legal notice to announce the availability of an EA, summarizing its content and soliciting public comment; holding public meetings or hearings; maintaining mailing lists of persons interested in a particular action or type of action and notifying them of the availability of EAs on such actions; and distributing copies of EAs for review and comment.

(4) For an action with limited environmental impact and little public interest, no further public review may be warranted. However, where an action is one that normally requires an EIS, but effects that otherwise might be deemed significant are mitigated in the project proposal or by controls imposed by the agency, public involvement must include the opportunity for public comment, a public meeting or hearing, and adequate notice. The agency is responsible for determining appropriate methods to

ensure adequate public review on a case by case basis.

(5) The agency shall maintain a log of all Eas completed by the agency and shall submit a list of any new EAs completed to the office of the governor and the environmental quality council on a quarterly basis. In addition, the agency shall submit a copy of each completed EA to the EQC.

(6) The agency shall consider the substantive comments received in response to an EA and proceed in accordance with one of the following steps, as appropriate:

(a) determine that an EIS is necessary;

(b) determine that the EA did not adequately reflect the issues raised by the proposed action and issue a revised document; or

(c) determine that an EIS is not necessary and make a final decision on the proposed action, with appropriate modification resulting from the analysis in the EA and analysis of public comment." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"VII. DETERMINING THE SCOPE OF AN EIS (1) Prior to the preparation of an EIS, the agency shall initiate a process to determine the scope of the EIS.

(2) To identify the scope of an EIS, the agency shall:

(a) invite the participation of affected federal, state, and local government agencies, Indian tribes, the applicant, if any, and interested persons or groups;

(b) identify the issues related to the proposed action that are likely to involve significant impacts and that will be analyzed in depth in the EIS;

(c) identify the issues that are not likely to involve significant impacts, thereby indicating that unless unanticipated effects are discovered during the preparation of the EIS, the discussion of these issues in the EIS will be limited to a brief presentation of the reasons they will not significantly affect the quality of the human environment; and

(d) identify those issues that have been adequately addressed by prior environmental review, thereby indicating that the discussion of these issues in the EIS will be limited to a summary and reference to their coverage elsewhere; and

(e) identify possible alternatives to be considered." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"VIII. ENVIRONMENTAL IMPACT STATEMENTS--GENERAL REQUIREMENTS The following apply to the design and preparation of EISs:

(1) The agency shall prepare EISs that are analytic rather than encyclopedic.

(2) The agency shall discuss the impacts of a proposed action in a level of detail that is proportionate to their significance. For other than significant issues, an EIS need only include enough discussion to show why more study is not warranted.

(3) The agency shall prepare with each draft and final EIS a brief summary that is available for distribution separate from the EIS. The summary must describe:

(a) the proposed action being evaluated by the EIS, the impacts, and the alternatives;

(b) areas of controversy and major conclusions;

(c) the tradeoffs among the alternatives; and

(d) the agency's preferred alternative, if any." (**History: Sec. 2-3-103, 2-4-201 MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"IX PREPARATION AND CONTENTS OF DRAFT ENVIRONMENTAL IMPACT STATEMENTS If required by these rules, the agency shall prepare a draft environmental impact statement using an interdisciplinary approach and containing the following:

(1) a description of the proposed action, including its purpose and benefits;

(2) a listing of any state, local, or federal agencies that have overlapping or additional jurisdiction and a description of their responsibility for the proposed action;

(3) a description of the current environmental conditions in the area affected by the proposed action or alternatives, including maps and charts, whenever appropriate. The description must be no longer than is necessary to understand the effects of the action and alternatives. Data analysis must be commensurate with the importance of the impact with less important material summarized, consolidated, or simply referenced;

(4) a description of the impacts on the quality of the human environment of the proposed action including:

(a) the factors listed in (3)(d) and (e) of Rule V, whenever appropriate;

(b) primary, secondary, and cumulative impacts;

(c) potential growth-inducing or growth-inhibiting impacts;

(d) irreversible and irretrievable commitments of environmental resources, including land, air, water and energy;

(e) economic and environmental benefits and costs of the proposed

action; and

(f) the relationship between local short-term uses of man's environment and the effect on maintenance and enhancement of the long-term productivity of the environment. Where a cost-benefit analysis is prepared by the agency prior to the preparation of the draft EIS, it shall be incorporated by reference in or appended to the EIS;

(5) an analysis of reasonable alternatives to the proposed action, including the alternative of no action and other reasonable alternatives that may or may not be within the jurisdiction of the agency to implement, if any;

(6) a discussion of mitigation, stipulations, or other controls committed to and enforceable by the agency or other government agency;

(7) a discussion of any compensation related to impacts stemming from the proposed action;

(8) an explanation of the tradeoffs among the reasonable alternatives;

(9) the agency's preferred alternative, if any, and its reasons for the preference;

(10) a section on consultation and preparation of the draft EIS that includes the following:

(a) the names of those individuals or groups responsible for preparing the EIS;

(b) a listing of other agencies, groups, or individuals who were contacted or contributed information; and

(c) a summary list of source materials used in the preparation of the draft EIS;

(11) a summary of the draft EIS as required in Rule VIII; and

(12) other sections that may be required by other statutes in a comprehensive evaluation of the proposed action, or by the National Environmental Policy Act or other federal statutes governing a cooperating federal agency." (**History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"X. ADOPTION OF DRAFT ENVIRONMENTAL IMPACT STATEMENT AS FINAL (1) Depending upon the substantive comments received in response to the draft EIS, the draft statement may suffice. The agency shall determine whether to adopt the draft EIS within 30 days of the close of the comment period on the draft EIS.

(2) In the event the agency determines to adopt the draft EIS, the agency shall notify the governor, the Environmental Quality Council, the applicant, if any, and all commenters of its decision and provide a statement describing its proposed course of action. This notification must be accompanied by a copy of all comments or a summary of a

representative sample of comments received in response to the draft statement, together with, at minimum, an explanation of why the issues raised do not warrant the preparation of a final EIS.

(3) The agency shall provide public notice of its decision to adopt the draft EIS as a final EIS.

(4) If the agency decides to adopt the draft EIS as the final EIS, it may make a final decision on the proposed action no sooner than 15 days after complying with subsections (1) through (3) above." (**History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"XI. PREPARATION AND CONTENTS OF FINAL ENVIRONMENTAL IMPACT STATEMENT Except as provided in Rule X, a final environmental impact statement must include:

(1) a summary of major conclusions and supporting information from the draft EIS and the responses to substantive comments received on the draft EIS, stating specifically where such conclusions and information were changed from those which appeared in the draft;

(2) a list of all sources of written and oral comments on the draft EIS, including those obtained at public hearings, and, unless impractical, the text of comments received by the agency (in all cases, a representative sample of comments must be included);

(3) the agency's responses to substantive comments, including an evaluation of the comments received and disposition of the issues involved;

(4) data, information, and explanations obtained subsequent to circulation of the draft; and

(5) the agency's recommendation, preferred alternative, or proposed decision together with an explanation of the reasons therefor." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"XII. TIME LIMITS AND DISTRIBUTION OF ENVIRONMENTAL IMPACT STATEMENTS (1) Following preparation of a draft EIS, the agency shall distribute copies to the governor, EQC, appropriate state and federal agencies, the applicant, if any, and persons who have requested copies.

(2) The listed transmittal date to the governor and the EQC must not be earlier than the date that the draft EIS is mailed to other agencies, organizations, and individuals. The agency shall allow 30 days for reply, provided that the agency may extend this period up to an additional 30 days at its discretion or upon application of any person for good cause.

When preparing a joint EIS with a federal agency or agencies, the agency may also extend this period in accordance with time periods specified in regulations that implement the National Environmental Policy Act. However, no extension which is otherwise prohibited by law may be granted.

(3) In cases involving an applicant, after the period for comment on the draft EIS has expired, the agency shall send to the applicant a copy of all written comments that were received. The agency shall advise the applicant that he has a reasonable time to respond in writing to the comments received by the agency on the draft EIS and that the applicant's written response must be received before a final EIS can be prepared and circulated. The applicant may waive his right to respond to the comments on the draft EIS.

(4) Following preparation of a final EIS, the agency shall distribute copies to the governor, EQC, appropriate state and federal agencies, the applicant, if any, persons who submitted comments on or received a copy of the draft EIS, and other members of the public upon request.

(5) Except as provided by Rule X(4), a final decision must not be made on the proposed action being evaluated in a final EIS until 15 days have expired from the date of transmittal of the final EIS to the governor and EQC. The listed transmittal date to the governor and EQC must not be earlier than the date that the final EIS is mailed to other agencies, organizations, and individuals.

(6) All written comments received on an EIS, including written responses received from the applicant, must be made available to the public upon request.

(7) Until the agency reaches its final decision on the proposed action, no action concerning the proposal may be taken that would:

(a) have an adverse environmental impact; or

(b) limit the choice of reasonable alternatives, including the no-action alternative." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.**)

"XIII. SUPPLEMENTS TO ENVIRONMENTAL IMPACT STATEMENTS (1) The agency shall prepare supplements to either draft or final environmental impact statements whenever:

(a) the agency or the applicant makes a substantial change in a proposed action;

(b) there are significant new circumstances, discovered prior to final agency decision, including information bearing on the proposed action or its impacts that change the basis for the decision; or

(c) 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.

(2) A supplement must include, but is not limited to, a description of the following:

(a) an explanation of the need for the supplement;

(b) the proposed action; and

(c) any impacts, alternatives of other items required by Rule IX for a draft EIS or Rule XI for a final EIS that were either not covered in the original statement or that must be revised based on new information or circumstances concerning the proposed action.

(3) The same time periods applicable to draft and final EISs apply to the circulation and review of supplements." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"XIV. ADOPTION OF AN EXISTING EIS (1) The agency shall adopt as part of a draft EIS all or any part of the information, conclusions, comments, and responses to comments contained in an existing EIS that has been previously or is being concurrently prepared pursuant to MEPA or the National Environmental Policy Act if the agency determines:

(a) that the existing EIS covers an action paralleling or closely related to the action proposed by the agency or the applicant;

(b) on the basis of its own independent evaluation, that the information contained in the existing EIS has been accurately presented; and

(c) that the information contained in the existing EIS is applicable to the action currently being considered.

(2) A summary of the existing EIS or the portion adopted and a list of places where the full text is available must be circulated as a part of the EIS and treated as part of the EIS for all purposes, including, if required, preparation of a final EIS.

(3) Adoption of all or part of an existing EIS does not relieve the agency of the duty to comply with Rule IX.

(4) The same time periods applicable to draft and final EISs apply to the circulation and review of EISs that include material adopted from an existing EIS.

(5) The agency shall take full responsibility for the portions of a previous EIS adopted. If the agency disagrees with certain adopted portions of the previous EIS, it shall specifically discuss the points of disagreement.

(6) No material may be adopted unless it is reasonably available for inspection by interested persons within the time allowed for comment.

(7) Whenever part of an existing EIS or concurrently prepared EIS is adopted, the part adopted must include sufficient material to allow the part

adopted to be considered in the context in which it was presented in the original EIS." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.**)

"XV. INTERAGENCY COOPERATION (1) Whenever it is the lead agency responsible for preparation of an EIS, the agency may:

(a) request the participation of other governmental agencies which have special expertise in areas that should be addressed in the EIS;

(b) allocate assignments, as appropriate, for the preparation of the EIS among other participating agencies; and

(c) coordinate the efforts of all affected agencies.

(2) Whenever participation of the agency is requested by a lead agency, the agency shall make a good-faith effort to participate in the EIS as requested, with its expenses for participation in the EIS paid by the lead agency or other agency collecting the EIS fee if one is collected." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"XVI. JOINT ENVIRONMENTAL IMPACT STATEMENTS AND EA'S (1) Whenever the agency and one or more other state agencies have jurisdiction over an applicant's proposal or major state actions that individually, collectively, or cumulatively require an EIS and another agency is clearly the lead agency, the agency shall cooperate with the lead agency in the preparation of a joint EIS. Whenever it is clearly the lead agency, the agency shall coordinate the preparation of the EIS as required by this rule. Whenever the agency and one or more agencies have jurisdiction over an applicant's proposal or major state actions and lead agency status cannot be resolved, the agency shall request a determination from the governor.

(2) The agency shall cooperate with federal and local agencies in preparing EISs when the jurisdiction of the agency is involved. This cooperation may include, but is not limited to: joint environmental research studies, a joint process to determine the scope of an EIS, joint public hearings, joint EISs, and whenever appropriate, joint issuance of a record of decision.

(3) Whenever the agency proposes or participates in an action that requires preparation of an EIS under both the National Environmental Policy Act and MEPA, the EIS must be prepared in compliance with both statutes and associated rules and regulations. The agency may, if required by a cooperating federal agency, accede to and follow more stringent requirements, such as additional content or public review periods, but in no case may it accede to less than is provided for in these rules.

(4) The same general provisions for cooperation and joint issuance of

documents provided for in this rule in connection with EISs also apply to EAs." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"XVII. PREPARATION, CONTENT, AND DISTRIBUTION OF A PROGRAMMATIC REVIEW (1) Whenever the agency is contemplating a series of agency-initiated actions, programs, or policies which in part or in total may constitute a major state action significantly affecting the human environment, it shall prepare a programmatic review discussing the impacts of the series of actions.

(2) The agency may also prepare a programmatic review whenever required by statute, whenever a series of actions under the jurisdiction of the agency warrant such an analysis as determined by the agency, or whenever prepared as a joint effort with a federal agency requiring a programmatic review.

(3) The agency shall determine whether the programmatic review takes the form of an EA or an EIS in accordance with the provisions of Rule III and IV, unless otherwise provided by statute.

(4) A programmatic review must include, as a minimum, a concise, analytical discussion of alternatives and the cumulative environmental effects of these alternatives on the human environment. In addition programmatic reviews must contain the information specified in Rule IX for EISs or Rule V for EAs, as applicable.

(5) The agency shall adhere to the time limits specified for distribution and public comment on EISs or EAs, whichever is applicable.

(6) While work on a programmatic review is in progress, the agency may not take major state actions covered by the program in that interim period unless such action:

(a) is part of an ongoing program;

(b) is justified independently of the program; or

(c) will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program if it tends to determine subsequent development or foreclose reasonable alternatives.

(7) Actions taken under subsection (6) must be accompanied by an EA or an EIS, if required." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"XVIII. RECORD OF DECISION FOR ACTIONS REQUIRING ENVIRONMENTAL IMPACT STATEMENTS (1) At the time of its decision concerning a proposed action for which an EIS was prepared, the agency shall prepare a concise public record of decision. The record, which may be integrated into any other documentation of the decision that is prepared

by the agency, is a public notice of what the decision is, the reasons for the decision, and any special conditions surrounding the decision or its implementation.

(2) The agency may include in the final EIS, in addition to a statement of its proposed decision, preferred alternative, or recommendation on the proposed action, the other items required by (1), and additional explanation as provided for in (3) below. If the final decision and the reasons for that final decision are the same as set forth in the final EIS, the agency may comply with (1) by preparing a public notice of what the decision is and adopting by reference the information contained in the final EIS that addresses the items required by (1). If the final decision or any of the items required by (1) are different from what was presented in the final EIS, the agency is responsible for preparing a separate record of decision.

(3) There is no prescribed format for a record of decision, except that it must include the items listed in (1).The record may include the following items as appropriate:

(a) brief description of the context of the decision;

(b) the alternatives considered;

(c) advantages and disadvantages of the alternatives;

(d) the alternative or alternatives considered environmentally preferable;

(e) short and long-term effects of the decision;

(f) policy considerations that were balanced and considered in making the decision;

(g) whether all practical means to avoid or minimize environmental harm were adopted, and if not, why not; and

(h) a summary of implementation plans, including monitoring and enforcement procedures for mitigation, if any.

(4) This rule does not define or affect the statutory decision making authority of the agency." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"XIX. EMERGENCIES (1) The agency may take or permit action having a significant impact on the quality of the human environment in an emergency situation without preparing an EIS. Within 30 days following initiation of the action, the agency shall notify the governor and the EQC as to the need for the action and the impacts and results of it. Emergency actions must be limited to those actions immediately necessary to control the impacts of the emergency." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"XX. CONFIDENTIALITY (1) Information declared confidential by state law or by an order of a court must be excluded from an EA and EIS. The agency shall briefly state the general topic of the confidential information excluded." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"XXI. RESOLUTION OF STATUTORY CONFLICTS (1) Whenever a conflicting provision of another state law prevents the agency from fully complying with [these rules] the agency shall notify the governor and the EQC of the nature of the conflict and shall suggest a proposed course of action that will enable the agency to comply to the fullest extent possible with the provisions of MEPA. This notification must be made as soon as practical after the agency recognizes that a conflict exists, and no later than 30 days following such recognition.

(2) The agency has a continuing responsibility to review its programs and activities to evaluate known or anticipated conflicts between [these rules] and other statutory or regulatory requirements. It shall make such adjustments or recommendations as may be required to ensure maximum compliance with MEPA and these rules." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"XXII. CONTRACTS AND DISCLOSURE (1) The agency may contract for preparation of an EIS or portions thereof. Whenever an EIS or portion thereof is prepared by a contractor, the agency shall furnish guidance and participate in the preparation, independently evaluate the statement or portion thereof prior to its approval, and take responsibility for its scope and content.

(2) A person contracting with the agency in the preparation of an EIS must execute a disclosure statement, in affidavit form prepared by the agency, specifying that he has no financial or other interest in the outcome of the proposed action other than a contract with the agency." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"XXIII. PUBLIC HEARINGS (1) Whenever a public hearing is held on an EIS or an EA, the agency shall issue a news release legal notice to newspapers of general circulation in the area to be affected by the proposed action prior to the hearing. The news release or legal notice must advise the public of the nature of testimony the agency wishes to receive at the hearing. The hearing must be held after the draft EIS has been circulated and prior to preparation of the final EIS. A hearing involving an action for which an EA was prepared must be held after the

EA has been circulated and prior to any final agency determinations concerning the proposed action. In cases involving an applicant, the agency shall allow an applicant a reasonable time to respond in writing to comments made at a public hearing, notwithstanding the time limits contained in Rule XII. The applicant may waive his right to respond to comments made at a hearing.

(2) In addition to the procedure in (1) above, the agency shall take such other steps as are reasonable and appropriate to promote the awareness by interested parties of a scheduled hearing.

(3) The agency shall hold a public hearing whenever requested within 20 days of issuance of the draft EIS by either:

(a) 10% or 25, whichever is less, of the persons who will be directly affected by the proposed action;

(b) by another agency which has jurisdiction over the action;

(c) an association having not less than 25 members who will be directly affected by the proposed action; or

(d) the applicant, if any.

(4) In determining whether a sufficient number of persons have requested a hearing as required by subsection (3), the agency shall resolve instances of doubt in favor of holding a public hearing.

(5) No person may give testimony at the hearing as a representative of a participating agency. Such a representative may, however, at the discretion of the hearing officer, give a statement regarding his or her agency's authority or procedures and answer questions from the public.

(6) Public meetings may be held in lieu of formal hearings as a means of soliciting public comment on an EIS where no hearing is requested under (3) above. However, the agency shall provide adequate advance notice of the meeting; and, other than the degree of formality surrounding the proceedings, the objectives of such a meeting are essentially the same as those for a hearing." **(History: Sec. 2-3-103, 2-4-201, MCA; IMP: Sec. 2-3-104, 75-1-201, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"XXIV. FEES: DETERMINATION OF AUTHORITY TO IMPOSE (1) Whenever an application for a lease, permit, contract, license or certificate is expected to result in the agency incurring expenses in excess of $2,500 to compile an EIS, the applicant is required to pay a fee in an amount the agency reasonably estimates, as set forth in this rule, will be expended to gather information and data necessary to compile an EIS.

(2) The agency shall determine within 30 days after a completed application is filed whether it will be necessary to compile an EIS and assess a fee as prescribed by this rule. If it is determined that an EIS is necessary, the agency shall make a preliminary estimate of its costs. This

estimate must include a summary of the data and information needs and the itemized costs of acquiring the data and information, including salaries, equipment costs and other expenses associated with the collection of data and information for the EIS.

(3) Whenever the preliminary estimated costs of acquiring the data and information to prepare an EIS total more than $2,500, the agency shall notify the applicant that a fee must be paid and submit an itemized preliminary estimate of the cost of acquiring the data and information necessary to compile an EIS. The agency shall also notify the applicant to prepare and submit a notarized and detailed estimate of the cost of the project being reviewed in the EIS within 15 days. In addition, the agency shall request the applicant to describe the data and information available or being prepared by the applicant which can possibly be used in the EIS. The applicant may indicate which of the agency's estimated costs of acquiring data and information for the EIS would be duplicative or excessive. The applicant must be granted, upon request, an extension of the 15-day period for submission of an estimate of the project's cost and a critique of the agency's preliminary EIS data and information accumulation cost assessment." **(History: Sec. 75-1-202, MCA; IMP: Sec. 75-1-202, 203, 205, 206, and 207, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"XXV. FEES: DETERMINATION OF AMOUNT (1) After receipt of the applicant's estimated cost of the project and analysis of an agency's preliminary estimate of the cost of acquiring information and data for the EIS, the agency shall notify the applicant within 15 days of the final amount of the fee to be assessed. The fee assessed must be based on the projected cost of acquiring all of the information and data needed for the EIS. If the applicant has gathered or is in the process of gathering information and data that can be used in the EIS, the agency shall only use that portion of the fee that is needed to verify the information and data. Any unused portion of the fee assessed may be returned to the applicant within a reasonable time after the information and data have been collected or the information and data submitted by the applicant have been verified, but in no event later than the deadline specified in these rules. The agency may extend the 15-day period provided for review of the applicant's submittal but not to exceed 45 days if it believes that the project cost estimate submitted is inaccurate or additional information must be obtained to verify the accuracy of the project cost estimate. The fee assessed must not exceed the limitations provided in 75-1-203(2), MCA.

(2) If an applicant believes that the fee assessed is excessive or does not conform to the requirements of this rule or Title 75, chapter 1, part 2,

MCA, the applicant may request a hearing pursuant to the contested case provisions of the Montana Administrative Procedure Act. If a hearing is held on the fee assessed as authorized by this subsection, the agency shall proceed with its analysis of the project wherever possible. The fact that a hearing has been requested is not grounds for delaying consideration of an application except to the extent that the portion of the fee in question affects the ability of the department to collect the data and information necessary for the department to collect the data and information necessary for the EIS." **(History: Sec. 75-1-202, MCA; IMP: Sec. 75-1-202, 203, 205, 206 and 207, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

"XXVI. USE OF FEE (1) The fee assessed hereunder may only be used to gather data and information necessary to compile an EIS. No fee may be assessed if an agency intends only to compile an EA or a programmatic review. If a department collects a fee and later determines that additional data and information must be collected or that data and information supplied by the applicant and relied upon by the agency are inaccurate or invalid, an additional fee may be assessed under the procedures outlined in these rules if the maximum fee has not been collected.

(2) Whenever the agency has completed work on the EIS, it shall submit to the applicant a complete accounting of how any fee was expended. If the money expended is less than the fee collected, the remainder of the fee shall be refunded to the applicant without interest within 45 days after work has been completed on the final EIS." **(History: Sec. 75-1-202, MCA; IMP: Sec. 75-1-202, 203, 205, 206 and 207, MCA; NEW, 1988 MAR p. 2692, Eff. 12/23/88.)**

MEPA MODEL RULES/AGENCY ADMINISTRATIVE RULES CROSS-REFERENCE TABLE

Agency Acronyms:

Department of Agriculture:	AGR
Department of Commerce:	DOC
Department of Environmental Quality:	DEQ
Department of Fish, Wildlife & Parks:	DFWP
Department of Livestock:	DOL
Department of Natural Resources & Conservation:	DNRC
Department of Transportation:	MDT

Model Rule I: POLICY STATEMENT CONCERNING MEPA RULES . . . . . .

AGR:	4.2.312
DOC:	8.2.302
DEQ:	17.4.602
DFWP:	12.2.428
DOL:	32.2.221
DNRC:	36.2.521
MDT:	18.2.235

Model Rule II: DEFINITIONS . . . . . .

AGR:	4.2.313
DOC:	8.2.303
DEQ:	17.4.603
DFWP:	12.2.429
DOL:	32.2.222
DNRC:	36.2.522
MDT:	18.2.236

Model Rule III: GENERAL REQUIREMENTS FOR ENVIRONMENTAL REVIEW . . . . . .

AGR:	4.2.314
DOC:	8.2.304
DEQ:	17.4.607

Miscellaneous Agency MEPA Rules: