Montana Wilderness Assn. v. Board of Health and Environmental Sciences, et al.
Montana Supreme Court case
171 M 477, 559P2d 1157
Decided 1976

MEPA Issue Litigated: Does MEPA supplement a state agency's permitting/licensing authority?

Court Decision: No

COMPLAINT

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF MONTANA,

IN AND FOR THE COUNTY OF LEWIS & CLARK

* * * * * * * * *

THE MONTANA WILDERNESS ASSOCIATION, and THE GALLATIN SPORTSMAN ASSOCIATION, INC.,

Plaintiffs,

-vs-

THE BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES of the State of Montana; THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES of the State of Montana,

Defendants.

No. 38092

COMPLAINT

I.

Plaintiff, Montana Wilderness Association, is a non-profit corporation organized and operating under the Laws of the State of Montana, dedicated to the promotion of wilderness areas and dedicated to advancing environmental causes generally. There are approximately seven hundred fifty (750) residents of the State of Montana who are members of the Montana Wilderness Association and approximately seventy-five (75) of said members live in the vicinity of Bozeman, Montana. Individual members of the Montana Wilderness Association have appeared and testified at wilderness hearings concerning the wilderness proposals on lands in the vicinity of the proposed Beaver Creek South Subdivision described hereinafter.

Individual members of the Montana Wilderness Association make substantial use of the public lands in the vicinity of the proposed Beaver Creek South Subdivision hereinafter described.

II.

The Gallatin Sportsman Association is a local conservation organization, a non-profit corporation organized under the

laws of the State of Montana. Gallatin Sportsmen has approximately one hundred sixty-five (165) members residing in the State of Montana, primarily in the Bozeman area.

Gallatin Sportsmen is organized for charitable, educational and scientific purposes, which include the conservation of wildlife, wildlife habitat, and other natural resources. Gallatin Sportsmen's concern for and involvement in the preservation and enhancement of wildlife habitat and other natural resources is well known. Gallatin Sportsmen submitted comments on the draft environmental impact statement of the Beaver Creek S outh Subdivision. A large number of members of Gallatin Sportsmen hunt and fish in the area of the Beaver Creek South Subdivision and such uses would be adversely affected if the Board of Health and the Department of Health allow the removal of the sanitary restrictions on Beaver Creek South Subdivision.

III.

The Board of Health and Environmental sciences of the State of Montana (hereinafter referred to as Board of Health) is the lawful board charged under Montana law with the duty of enforcing the Montana laws on environmental policy and water pollution, §69-5001, R.C.M. (1947), et. seq., §69-4801, R.C.M. (1947), et. seq., and §69-6501, R.C.M. (1947), et. seq.

IV.

The Department of Health and Environmental Sciences of the State of Montana (hereinafter referred to as the Department of Health) is the agency charged with the duty of administering the Montana laws above-mentioned in Paragraph III.

V.

Beaver Creek South is a proposed subdivision development located in the Gallatin Canyon about fifty (50) miles south of Bozeman, Montana, adjacent to U. S. 191 and Beaver Creek.

FIRST CLAIM

VI.

In the Spring of 1974, a plat concerning said Beaver Creek South Subdivision was submitted to the Department of Health for said agency's approval and for said agency's order to remove the sanitary restrictions.

VII.

On or about April 8, 1974, the Department of Health issued a draft environmental impact statement outlining a proposal to develop approximately seventy-two (72) lots for single and multi-family residences and approximately seven and one/half (7 1/2) acres along U. S. 191 for a neighborhood commercial area.

VIII.

On or about June 26, 1974, the Department of Health released what purports to be a final environmental impact statement on the development, consisting primarily of the comments submitted by parties reviewing the draft environmental impact statement. Said final describes the same proposal offered in the draft environmental impact statement.

IX.

Upon information and belief, the Board of Health and/or the Department of Health will on July 26, 1974, or very soon thereafter remove the sanitary restrictions on the proposed subdivision.

X.

The above-mentioned purported final environmental impact statement does not comply with either the procedural or substantive requirements of Section 69-6501, et. seq. (Montana Environmental Policy Act), and therefore, the purported final environmental impact statement is inadequate at law.

XI.

The Department and Board are obligated to prepare a final environmental impact statement which meets the requirements of Section 69-6501, et. seq., prior to approval of the lifting of the sanitary restrictions on a subdivision of the magnitude of Beaver Creek South.

XII.

The Department and Board, in preparing the above-mentioned purported final environmental impact statement, failed to comply with the requirements of the Montana law on sanitation in subdivisions, Section 69-5001, Et. seq., Revised Codes of Montana (1947), and failed to comply with the regulations of the Department of Health.

XIII.

The Department and Board, in preparing the above-mentioned purported environmental impact statement failed to comply with the guidelines of the Environmental Quality Council and are obligated to do so prior to approval of the lifting of the sanitary restrictions on a subdivision of the magnitude of Beaver Creek South.

XIV.

The removing of said sanitary restrictions by said Board of Health will, if consumated, violate Montana law because said removal will allow construction and pollution at the site of said Beaver Creek South Subdivision without adequate environmental and legal safeguards and protections.

XV.

If said sanitary restrictions are removed, plaintiffs and individual members of plaintiff organizations will be irreparably injured by the resultant pollution and degradation of the waters in the area and by the pollution and degradation of quality of the nearby National Forest.

XVI.

Plaintiffs have no adequate remedy at law or otherwise for the harm or damage threatened to be done by defendants, Board of Health and Department of Health.

XVII.

In failing to comply with the above-cited laws of the State of Montana, the Board of Health and Department of Health and agents thereof have acted willfully and deliberately disregardful of said laws.

WHEREFORE Plaintiffs pray:

1. For a permanent injunction enjoining and restraining the Board of Health and Department of Health from removing or authorizing the removal of the sanitary restrictions on Beaver Creek South Subdivision.

2. Costs of this action.

3. Attorneys fees.

4. For such other and further relief as to the Court appears proper.

JAMES H. GOETZ
15 South Tracy, Suite 8
Bozeman, Montana 59715
Attorney for Plaintiffs

STATE OF MONTANA)
: ss.
County of Gallatin)

I, Rick Applegate, as member of plaintiff, Montana Wilderness Association, swear and affirm that I have read and know the contents of this Complaint and I know the same to be true and accurate except for those allegations made on information and belief, and those I believe to be true.

Rick Applegate

Rick Applegate

SUBSCRIBED AND SWORN to before me this 25th day of July, 1974.,

Notary Public for the State of Montana
Residing at: Helena, Mont.
My commission expires: 10/30/74

BRIEF AMICUS CURIAE

6 Beaver Cr

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA,

IN AND FOR THE COUNTY OF LEWIS AND CLARK

* * * * * * * * * * * * * * * * *

THE MONTANA WILDERNESS ASSOCIATION, and GALLATIN SPORTSMEN'S ASSOCIATION, INC., Plaintiffs, -vs- THE BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES OF THE STATE OF MONTANA; THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES OF THE STATE OF MONTANA, Defendants, BEAVER CREEK SOUTH, INC., a corporation, Intervenor.	No. 38092 BRIEF AMICUS CURIAE

STATEMENT OF THE CASE

In the spring of 1974, a plat was submitted for approval to the Department of Health by the developers of Beaver Creek South, a subdivision proposed for development in the Gallatin Canyon. In June, 1974, the Department released its final environmental impact statement on the subdivision, pursuant to the Montana Environmental Policy Act (MEPA), 69-6504(b)(3), R.C.M. 1947. In July, Plaintiffs in this action filed their first complaint, alleging, inter alia, the inadequacy of the Department of Health's impact statement. On October 9, 1974 the Department issued a "revised final" environmental impact statement (EIS). On February 11, 1975, this Court dismissed the complaint on ripeness grounds, and because the complaint was not addressed specifically to this revised EIS. On February 14, 1975 the Department conditionally removed the sanitary restrictions from the proposed subdivision. Plaintiffs filed a second complaint on February 20. The second complaint again alleged inadequacies in the revised final EIS, and in support of that allegation, noted that the EIS fails to comply with the guidelines for preparation of environmental impact statements promulgated by the Environmental Quality Council.

As the agency established by MEPA to oversee and coordinate the implementation

of the act, the Environmental Quality Council (EQC) takes interest in the present action. The EQC is particularly concerned with the legal relationship between MEPA and EQC's guidelines. It is the Council's position that the EQC guidelines carry conclusive weight in determining whether an agency's actions comport with the procedural standards imposed by MEPA. With the Court's permission, the Environmental Quality Council submits this brief as amicus curiae in order to clarify the legal status of the EQC guidelines, and to discuss the Department of Health's failure to comply with those guidelines.

QUESTIONS PRESENTED.

As amicus curiae, the Environmental Quality Council will restrict its discussion in this brief to the following questions:

I. WHETHER THE ENVIRONMENTAL QUALITY COUNCIL'S GUIDELINES FOR THE PREPARATION OF ENVIRONMENTAL IMPACT STATEMENTS ARE ACCURATE EXPRESSIONS OF THE LEGISLATIVE INTENT BEHIND THE ENVIRONMENTAL POLICY ACT, AND THEREFORE ENTITLED TO GREAT WEIGHT IN THE COURT'S CONSIDERATIONS.

II. WHETHER THE DEPARTMENT OF HEALTH'S ENVIRONMENTAL IMPACT STATEMENT ON BEAVER CREEK SOUTH FAILS TO COMPLY WITH THE ENVIRONMENTAL QUALITY COUNCIL'S GUIDELINES AND IS THEREFORE INADEQUATE.

I. THE ENVIRONMENTAL QUALITY COUNCIL'S GUIDELINES FOR THE PREPARATION OF ENVIRONMENTAL IMPACT STATEMENTS ARE ACCURATE EXPRESSIONS OF THE LEGISLATIVE INTENT BEHIND THE ENVIRONMENTAL POLICY ACT, AND ARE THEREFORE ENTITLED TO GREAT WEIGHT IN THE COURT'S CONSIDERATIONS.

EQC's duties require it to construe and interpret MEPA.

In 1971, the Legislature, in the Montana Environmental Policy Act (MEPA), 69-6501 et seq., R.C.M. 1947, declared it to be

> 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 (emphasis added)

to assure the preservation and enhancement of a wide range of environmental values. (69-6503(a)) In addition to declaring that every person is "entitled to a healthful environment" and noting that each person "has a responsibility to contribute to the preservation and enhancement of the environment," (69-6503) MEPA addresses itself specifically to the various state agencies, directing that

> to the fullest extent possible, (a) the policies, regulations, and laws of the state shall be interpreted and administered in accordance with the policies set forth in this act, and (b) all agencies of the state shall
> (1) utilize a systematic, interdisciplinary approach...in planning and decision making...
> (2) include in every recommendation or report on proposals for projects, programs, legislation and other major actions of state government significantly affecting the quality of the human environment, a detailed statement.... (69-6504) (emphasis added)

The preparation of these environmental impact statements (EISs) has become the most important practical procedure through which state agencies have responded to the responsibilities imposed upon them by MEPA. The language of MEPA makes clear that mechanical and superficial compliance with the policies and procedures set out in the act will not be sufficient. Agencies are required, "to the fullest extend possible," to make consideration of environmental factors an essential part of their programs and policies.

The legislature was not content to leave the adoption of MEPA's policies completely to the judgement of those agencies on whom the burden of implementation was to fall. Section 8 of MEPA created the Environmental Quality Council, a legislative agency, and entrusted to the executive staff of

of EQC the responsibility (inter alia)

> (b) to review and appraise the various programs and activities of the state agencies in the light of the policy set forth in section 3[69-6503] for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the governor and the legislative assembly with respect thereto... (i) to review and evaluate operating programs in the environmental field in the several agencies to identify actual or potential conflicts, both among such activities, and with a general ecological perspective, and to suggest legislation to remedy such situations (69-6514) (emphasis added)

In addition, all state agencies were to submit to the EQC by July 1, 1972, their proposals for revising agency authority and policies to bring them into conformity with the requirements of MEPA (69-6505).

Thus, it is the responsibility of the EQC to review, appraise and evaluate agency programs and activities, to determine whether those programs and activities are in compliance with the policies of MEPA, and to identify conflicts among agency programs and with the ecological perspective of MEPA.

In order to evaluate agency activity in light of MEPA's policies, it was necessary for EQC to interpret and construe ambiguous and vague portions of the statute. These interpretations could then be applied to agency action and the appraisals made. It is generally recognized that an agency charged with the administration of a statute may interpret and construe that statute in order to perform its functions:

> where there is an ambiguity in the statute as to whether the latter does or does not cover a particular matter, a practical construction of the statute shown to have been the accepted construction of the agency charged with administering the matters in question under the statute will be one factor which the court may take into consideration as persuasive as to the meaning of the statute. E. C. Olsen Co. v. State Tax Commission, 109 Utah 563, 168 P2d. 324 (1946)

See also, Skidmore v. Swift & Co., 323 US 134 (1944); U.S. v. Bergh, 352 US 40 (1956); Whitcomb Hotel Co. v. California Employment Commission, 24 Cal 2d 753, 151 02d 233 (1944). California Co. v. Udall, 296 F2d 384 (D.C. Cir. 1961). The construction and interpretation by an administrative agency of the law under which it acts provides a practical guide as to how the agency will seek to apply the law, and an experienced and informed judgement to which courts and litigants may properly resort for guidance. 2 Am. Jur. 2d, Administrative Law § 236 Such an interpretation by the agency charged with overseeing the

implementation of a statute should "not be disturbed except for weighty reasons." Brewster v. Gage, 280 US 327, 336 (1930).

Interpretations of MEPA by EQC, a legislative agency, represent the legislative intent behind the law.

While these and other cases recognizing the validity of agency interpretation of statutes are concerned specifically with administrative or executive agencies, the reasoning applies with equal force to a legislative agency such as EQC. Regardless of the branch of government with which an agency is affiliated, when it is given the statutory responsibility to appraise and evaluate activities and to make recommendations based on those appraisals, interpretation of the statute by that agency is an essential and unavoidable concomitant to the performance of its duties. Such interpretations have validity not because the agency directly administers the statute, but because the interpretations are "based upon more specialized experience and broader investigations and information" than are available to other branches or agencies of government. Skidmore v. Swift and Company, supra. This is especially the case when the agency's interpretations express "the opinions of men who probably were active in the drafting of the statute." Whitcomb Hotel Co. v. California Employment Commission, supra, at 235. In this regard it should be noted that Senator George Darrow, the sponsor of MEPA in the legislature, was chairman of the EQC when the guidelines were first adopted by the Council.

Because of EQC's identification with the legislative branch of government, its interpretations of the law have an important implication not shared by executive agency rules and regulations. The legislative branch's function does not terminate with the enactment of laws. It has the further responsibility to keep an eye on the manner in which those laws are implemented. "One of the fundamental concepts of our form of government is that the legislature, as representative of the people, will maintain a degree of supervision over the administration of governmental affairs." (Gellhorn and Byse, Administrative Law, 82) Executive and administrative agencies do not have a completely free hand in making policy. They are subject to legislative supervision to insure

that executive and administrative actions may accurately reflect legislative intent. This is recognized on the Federal level:

> For there to be truly effective checks upon administrative action, the courts must be supplemented by congressional oversight. The Congress is the one great organ of American government that is both responsible to the electorate and independent of the Executive. As the source of delegations of administrative power, it must also exercise direct responsibility over the manner in which such power is employed. (B. Schwartz, An Introduction to American Administrative Law, 70).

The Montana Supreme Court has recognized the same principle on the state level:

> When the legislature confers authority on an administrative agency, it may lay down the policy or reasons behind the statute, and also prescribe standards and guides for the grant of power which has been made...the legislature must set limits on such agency's power and enjoin on it a certain course of procedure and rules of decision in the performance of its function. (Bacus v. Lake County, 138 Mont. 69, 354 P2d 1056, 1061 (1960))

Many of the administrative and executive agencies of the state have been granted the authority to promulgate rules and regulations in order to perform their duties. With respect to MEPA, it is necessary for many of those agencies to develop procedures for the preparation and circulation of environmental impact statements. The development of these procedures involves rule making type activity, and rule making is essentially a legislative function. When the legislature delegates legislative authority to other branches of government, the responsibility to supervise that delegated authority is even more compulsory than the general responsibility to oversee executive actions. All such powers conferred upon administrative and executive agencies by the legislature must be carefully circumscribed. "The delegation of uncontrolled discretion is invalid. The legislature must specify a sufficiently clear test or standard for an agency to exercise its discretion in making rules and regulations." (Hampton and Company v. U.S., 276 US 394 (1928)). "The discretion conferred must not be so wide that it is impossible to discern its limits. There must instead be an ascertainable legislative intent to which the exercise of the delegated power must conform" (B. Schwartz, An Introduction to American Administrative Law, P. 34)

Thus, the legislature, in the exercise of its law-making powers, has a

responsibility to assure that its policies are adhered to by the executive branch. The legislature has a wide range of options to choose from in performing its oversight responsibilities. An obvious one is control of appropriations. Legislative approval of agency performance is tacitly extended or withdrawn depending on the size of the budget granted to the agency. In addition, amendatory legislation may revise an agency's duties or powers. In Montana, as in many other states, the legislature has ultimate approval authority over all rules and regulations promulgated by administrative agencies, and may, by joint resolution, direct agencies to adopt or amend rules. (82-4203,1, R.C.M. 1947)

A device which Congress has used with some success on the federal level is the establishment of standing or watchdog committees to oversee executive performance in specialized fields. Standing committees have been charged by law with responsibility for exercising "continuous watchfulness" of administrative agencies' execution of their assigned duties. (Section 136 of the Legislation Reorganization Act of 1946 (60 Stat 831)) MEPA established the EQC to carry out just such a watchdog function. Thus, the EQC's interpretations of the requirements imposed on executive agencies by MEPA, while they do not enjoy the binding effect of statutes or regulations, are an expression of legislative intent which cannot be ignored by either the agencies or the courts.

The EQC, therefore, regards its guidelines as representing an accurate interpretation of the requirements of MEPA, and entitled to great weight in determining the extent to which an agency has complied with the law. Ultimately, of course, this is a question which can only be resolved by the courts. It is for the courts to give the final and authoritative interpretation to statutes (Davier Warehouse Company v. Bowles, 321 US 144 (1943); Whitcomb Hotel Company v. California Employment Commission, 24 Cal 2d 753, 151 02d 233) and to determine the legality of government activity. The EQC believes that the courts must consider all relevant evidence and opinions in determining agency compliance with MEPA. The EQC also believes that the Council's opinions are entitled to special consideration because of its specific responsibility to monitor compliance with MEPA. The following discussion, it is hoped, will clarify the

origin and development of EQC's guidelines, and will explain in more detail why we believe the guidelines embody the most accurate statement of legislative intent behind MEPA.

The National Environmental Policy Act and Federal Court Interpretation of That Act Should Serve as a Model for Interpretation of MEPA.

The EQC guidelines have their origin in the guidelines developed by the federal Council on Environmental Quality established by NEPA. They follow closely the procedures developed by the CEQ, and represent the culmination of four years of judicial and administrative interpretation and application of NEPA and the various state environmental policy acts which are NEPA's progeny. The guidelines are designed to provide for state agencies the shortest and surest procedural path for compliance with MEPA.

There have been as yet no definitive judicial determinations in Montana of the weight to which the EQC guidelines are entitled, but there has been a wealth of litigation in the federal courts and in other states arising under NEPA and the various state environmental policy acts. The role of guidelines such as EQC's has been clarified in those jurisdictions, and provides helpful guidance in determining the effect of EQC's guidelines in Montana.

As has been noted, the Montana EPA, like similar acts in other states was modeled closely after the National EPA. Montana's Supreme Court has recognized the importance of the judicial construction in other jurisdictions of "borrowed" statutes. Although such construction is not binding, the Court

> [has] long observed in [their] decisions that where a statute is similar to one in a sister state, [they] should give consideration to the construction which it had received by the courts of the state where it had been previously adopted...
>
> Cahill-Mooney Construction Co. v. Ayres
> 140 Mont. 464, 467, 373 P2d 703 (1962)

Further,

> We understand the rule to be that the construction put upon statutes by the courts of the state from which they are borrowed is entitled to respectful consideration, and that only strong reasons will warrant a departure from it...
>
> Ancient Order of Hiberniaus v. Sparrow
> (29 Mont. 132, 135-6 (1903))[1]

1. It should be noted that the statutes referred to in the cited cases had already received judicial interpretation in the sister states at the time the statute was enacted in Montana, and this interpretation was therefore considered part of the (informal) legislative history of the

statute. Judicial interpretation by sister states which occurs subsequent to Montana's adoption of the statute in question may perhaps carry less weight, but the principle of parallel construction still applies.

Other states whose environmental policy acts closely resemble NEPA have recognized the relevance of judicial and administrative interpretations of the act on the federal level. In Friends of Mammoth v. Mono County, 8 Cal 3rd 247, 502 P2d 1049 (1972) an important California case arising under that state's Environmental Quality Act (EQA), Cal P.R.C. Sec. 21000 et seq., the California court noted that the EQA was patterned after NEPA, and that therefore definitions provided by the federal Council on Environmental Quality (CEQ) were relevant.

> In view of the similarity between the federal and state acts, the Legislature obviously was aware of the federal definitions when the EQA was passed...Accordingly, the definitions promulgated by the CEQ are helpful to an understanding of the subsequent California use of the word....

The New Mexico Supreme Court, in City of Roswell v. New Mexico Water Quality Control Commission, 84NM560, 505 P2d 1237 (1973) noted that

> ...the New Mexico Environmental Quality Control Act is closely patterned after the NEPA...which has been characterized as the most important legislative act of the decade, and also as our "environmental constitution". It was surely intended that on the state level NMEQCA would fulfill as important a role and have as profound an impact as the national act
> (505 P2d at 1240)

The courts of the state of Washington have also been influenced by the similarity between their state environmental policy act and NEPA.

> It is well settled that when a state borrows federal legislation it also borrows the construction placed upon such legislation by the federal courts...
> Juanita Bay Valley Community Association v. City of Kirkland, 9 Wn App 59, (510 P2d 1140, at 1146 (1973))

The federal act, then, can serve as a model, and the treatment by federal courts of the CEQ guidelines will be helpful in determining the proper role of Montana's EQC, and the guidelines which it has promulgated.

Before proceeding with a more thorough analysis of the federal experience, it is necessary to clarify an uncertainty which has arisen as to the relevance of that experience to Montana. The federal Council on Environmental Quality is an executive branch entity allocated to the Office of the President. By

executive order, the CEQ has been given the authority to promulgate guidelines within the statutory provisions of the National Environmental Policy Act. For that reason, it has been suggested that the guidelines developed by the CEQ are entitled to greater weight with federal courts than are EQC's guidelines in Montana. This is not the case.

Although the CEQ is allocated to the executive branch of the federal government, it has no more administrative responsibility than does the EQC. Indeed, the language of NEPA creating the CEQ and describing its duties is almost identical to the language of MEPA creating the EQC. Both agencies are directed to appraise, review, evaluate, recommend. Nowhere in the federal act are guidelines explicitly mentioned. The CEQ was given authority to promulgate guidelines by executive order, (Executive Order 11514, 35 Fed. Reg. 4247, March 5, 1970) but that order neither expanded the CEQ's administrative duties, nor determined the degree to which the guidelines would be binding on federal agencies. As will be demonstrated in the discussion below, the federal courts did not give weight to CEQ's guidelines simply because CEQ was identified with the executive branch, or simply because of the executive order. Rather, the courts have accepted CEQ interpretations of NEPA because of that agency's duty to oversee the implementation of the Act, and its familiarity with the requirements of preparing EISs.

The EQC's familiarity and expertise with respect to MEPA are exactly analogous. Furthermore, the Montana legislature in House Joint Resolution 73 (see attachment) explicitly recognized the validity of EQC's guidelines, and declared them to be, in at least one respect, an accurate representation of legislative intent.

The Federal Courts Have Given Great Weight to the Comments and Recommendations of the Federal Council on Environmental Quality, and Have Incorporated CEQ Guidelines Into Their Judicial Decisions.

In the four years since NEPA was enacted there have been between two and three hundred suits brought in the federal courts which have clarified many aspects of the act and of the proper administrative implementation of the act. In a large number of those cases, the courts have made references to the CEQ

guidelines and have often looked to those guidelines for direction and support. In one of the leading cases, Greene County Planning Board v. F.P.C., 455 F2d 412 (2nd Cir., 1972) the court remarked that although it considered the guidelines to be only advisory,

> we would not lightly suggest that the Council, entrusted with the responsibility of developing and recommending national policies 'to foster and promote the improvement of the environmental quality,'...has miscontrued NEPA.
> (455 F2d at 421)

Even though the court appears to have qualified the authority of the guidelines, it should be pointed out that the court was in no way ignoring or over-ruling the guidelines. They were rather challenging the FPC's interpretation of those guidelines, and, indeed, imposed even stricter procedural requirements on the FPC than that commission had thought necessary.

Other courts have been more emphatic in their endorsement of the CEQ's interpretation of NEPA. In Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 728, (E.D.Ark., 1971), the court gave great weight to the CEQ's determination of the importance of a proposed federal action.

> Such an administrative interpretaion cannot be ignored except for the strongest reasons, particularly where...[the] interpretation...[is] a construction of a statute by the men charged with the responsibility of putting that statute into effect.
> (325 F. Supp. at 744.)

In SCRAP v. U.S., 346 F. Supp. 189; 412 US 669 (1972), the court quoted the CEQ guidelines and indicated that in reaching its holding, the court relied on those guidelines for support.

> In light of [the CEQ's] interpretation of the statutory language, we think it clear beyond a doubt that this order is a 'major federal action'
> (345 F. Supp. at 200)

In devising its resolution of the issue in that case, court considered the guidelines to provide the proper model.

> [W]e have decided to retain jurisdiction over this matter so as to insure that any permanent tariffs which are permitted to take effect are preceded by an impact statement in conformance with NEPA and the CEQ guidelines (emphasis added)
> (346 F. Supp. at 194-5)

The Sixth Circuit, in Environmental Defense Fund v. Tennessee Valley Authority, 468 F2d 1164 (1972), held against the TVA, at least in part, because of that

agency's violation of CEQ guidelines.

> We conclude that appellants' contentions ignore the language and policy of NEPA, violate regulations promulgated both by the CEQ and by the TVA itself, and are against the clear weight and trend of the case law that has developed under the act.
> (468 F2d at 1172-3.)

After quoting from the guidelines at length as to the applicability of NEPA to ongoing projects, the court summed up by saying:

> Such an administrative interpretation by the agency charged with implementing and administering the NEPA is entitled to great weight.
> (468 F2d at 1178)

Other federal cases in which courts rely on CEQ guidelines to support their holdings include: Scientists Institute for Public Information v. AEC, 481 F2d 1076, 1088 (D.C.Cir,. 1973) (cites guidelines for including recommendations for appropriations as "major federal action"); Jicarilla Apache Tribe of Indians v. Morton, 471 F2d 1275, 1285 (9th Cir., 1973) (quotes guidelines with respect to requirements for a hearing); Hanley v. Kleindienst, 471 F2d 823, 828, 838 (2nd Cir., 1972) (quotes guidelines with respect to threshold determination of "significance" of federal action); Environmental Defense Fund v. Corps of Engineers, 470 F2d 289, 296-7, (8th Cir., 1972) (cites guidelines in connection with retroactive application of NEPA, and consideration of alternative courses of action); City of Boston v. Volpe, 464 F2d 254, 258 (1st Cir., 1972) (cites guidelines dealing with need to consider cumulative effects of proposed actions); Calvert Cliffs Coordinating Committee v. AEC, 449 F2d 1109, 1118 (D.C.Cir., 1971) (refers to guidelines with respect to consideration of alternatives); Daly v. Volpe, 350 F. Supp. 252, 260, (W.D. Wash., 1972) (cites guidelines with respect to need for public participation); Environmental Law Fund v. Volpe, 340 F. Supp. 1328, 1331-2 (N.D. Cal., 1972) (cites guidelines as to practicability of review of ongoing projects); Izaak Walton League of America v. Schlesinger, 337 F. Supp. 287, 295 (D.D.C., 1971) (cites guidelines as to threshold determination of need for EIS); Goose Hollow Foothills League v. Romney, 334 F. Supp. 877, 879 (D. Ore., 1971) (quotes guidelines with respect to definition of "major federal action").

EQC Interpretations of MEPA are Entitled to Greater Weight Than are Interpretations by other Agencies.

It is fundamental that all administrative agencies are entitled to interpret, to some degree, the statutes under which they operate, and these interpretations are entitled to weight by the courts in determining the meaning of the law. U.S. v. Bergh, 352 US 40 (1946); Kolovrat v. Oregon, 366 US 187; Whitcomb Hotel Company v. California Employment Commission, 24 Cal 2d 753, 151 P2 233 (1944); State v. King Colony Ranch, 137 Mont. 145, 350 P2d 841 (1960). But it is for the courts to determine how much weight it is appropriate to assign to such opinions. Lassiter v. Guy F. Atkinson Company, 176 F2d 984 (9th Cir. 1949). Where more than one agency has interpreted the same statute, the courts may often have to choose among divergent interpretations. The greatest weight should be given to the opinions of that agency which has the most direct responsibility for the application of the policies established by the statute in question; that agency

> on whom the legislature must rely to advise it as to the practical working out of the statute, and [whose] practical application of the statute presents the agency with unique opportunities and experiences for discovering dificiencies, inaccuracies, or improvements in the statute. E.C. Olsen v. State Tax Commission, 109 Utah 563, 168 P2d 324 (1946)

The federal courts have accepted as a rule that in the construction and application of NEPA, the opinions of the CEQ are entitled to greater weight than the determinations of other federal agencies. As the agency entrusted with the supervision of the implementation of NEPA, "the [CEQ's] guidelines were intended to govern HUD's environmental decisions...." Goose Hollow Foothills League v. Romney, 334 F. Supp. 877, 879 (D. Ore., 1971).

In Ely v. Velde, 451 F2d 1130 (4th Cir., 1971), the Law Enforcement Assistance Agency (LEAA) interpreted the Safe Streets Act as preventing it from requiring a state agency to prepare an EIS before construction of a prison facility with federal funds. The LEAA argued that its own interpretation of NEPA was controlling. The Court disagreed.

> We are of the opinion that the LEAA's interpretation is entitled to no such weight. The Safe Streets Act is not the only statute under consideration here. What we are called upon to decide is

> the relationship of three statutes,[2] each of which creates an agency charged with its own administration...
>
> The CEQ as the agency created by NEPA, interprets its governing statute as binding on all federal agencies 'unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.' (cites guidelines)
>
> The Supreme Court has recognized that administrative practice is not entitled to special weight when, as here, it clashes with the interpretation given by other agencies to statutes they were created to administer.
>
> (451 F2d at 1135)

The court went on to uphold CEQ's interpretation of the LEAA's responsibility to prepare an impact statement.

In Hanley v. Kleindienst, 471 F2d 823 (1972), Judge Friendly in a dissenting opinion made clear this distinction between the front-line federal agencies who are mandated by NEPA to consider environmental factors in their decision-making, and CEQ, NEPA's "watch-dog"

> Beyond the general scheme of the legislation, a court normally looks for guidance, in the case of a statute calling for administrative action, to the views of those charged with its administration. [citations omitted] However, this does not mean that dominating weight should be given to the views of agencies upon whom NEPA placed a duty to make impact statements when the result would be to relieve them from that oblication...The NEPA established its own watch-dog agency, the Council on Environmental Quality.
>
> (471 F2d at 838)

In addition to the guidelines per se, the comments and memoranda issued by the CEQ have often carried weight in the deliberation of the federal courts. In Warm Springs Task Force v. Gribble, 6ERC 1747 (1974), the issue was the adequacy of an EIS prepared by the Corps of Engineers. The CEQ in a letter announced its opinion that the guidelines had not been followed and that the EIS was inadequate in several respects. The district court upheld the EIS, but Justice Douglas, acting as circuit justice for the 9th Circuit, overruled the district court solely on the basis that the Court had ignored the CEQ recommendations, observing that "CEQ is given authority under NEPA to: Review and appraise the various programs and activities of the federal government in light of the policy set forth [in NEPA]...(6ERC at 1748)." Justice Douglas concluded that

2. The National Historic Preservation Act was also involved here.

> the Council on Environmental Quality ultimately responsible for the administration of the NEPA and most familiar with its requirements for EIS's, has taken the unequivocal position that the statement in this case is deficient, despite the contrary conclusions of the district court. That agency determination is entitled to great weight [citations omitted] and it leads me to grant the requested stay pending appeal in the Court of Appeals (id.)

The full Supreme Court concurred in this opinion by denying a petition to vacate the stay.[3] Thus, the Supreme Court has recognized that, although the CEQ's opinions are not technically binding, they are extremely persuasive because of the particular responsibility and expertise of that agency. EQC's responsibility and expertise derive from almost identical statutory language, and should be equally persuasive.

It is just as true on the state level as on the federal level that the special agency created by the Environmental Policy Act is in the best position to interpret it. EQC's mandate is defined solely by MEPA, while executive agencies have additional responsibilities elsewhere. In addition, EQC's use of guidelines promotes the consistency of judgement to which courts give particular weight. Federal Maritime Board v. Isbrandtsen Company, 356 US 481; Mabee v. White Plains Publishing Company, 327 US 178. Furthermore, the endorsement of the guidelines by the legislature in HJR 73 (see attachment) is also entitled to weight by the courts. State v. Toomey, 135 Mont. 35, 335 P2d 1051 (1959); Mugavin v. Nyquist, 358 N.Y.S. 2d 980 (1974).

CEQ's guidelines are an accurate interpretation of NEPA not only because of the general expertise developed by that agency, but also because of the particular way in which the guidelines have been developed and revised over the years.

The guidelines are revised from time to time in order to more clearly reflect the prevalent judicial handling of NEPA. In turn, the federal courts often incorporate, or expand on, the guidelines.

3. Other cases in which CEQ comments are relied on by the Court include SCRAP v. U.S., 346 F. Supp. 189; Scientists Institute for Public Information v. AEC, 481 F2d 1079.

This pattern of development is exemplified in Natural Resources Defense Council v. Morton, 458 F2d 827 (D.C.Cir., 1972).

> The holding of NRDC v. Morton in early 1972 discussed the need to consider a broad range of alternatives whenever the proposed action is an integral part of a broad federal program. Then, in May, 1972, CEQ recommended to agencies that in certain situations broad program statements would be appropriate in order to properly assess the full scope of the environmental impact. This recommendation drew on the ideas of NRDC v. Morton and made them applicable to a wider range of agency actions. This recommendation in turn served as one of the bases for the court's holding in SIPI v. AEC, [481 F2d 1079 (D.C.Cir., 1972)] that in large technology development programs, broad program statements are required under NEPA in addition to subsequent individual statements. Finally, the holding of SIPI v. AEC was codified in the CEQ guidelines, thus transforming a policy concept into a new legal requirement. The process resembles a feedback loop whereby a new position taken by CEQ induces a corresponding change which in turn produces a further change in the CEQ interpretation of NEPA. This process has taken place throughout the three years of NEPAs life...and...has been an intimate part of the process of NEPA's growth.
>
> (This discussion is taken from "CEQ Guidelines and Their Influence on the NEPA", by Herbert F. Stevens in 23 Catholic Law Review 547 (1974), at p. 571.)

Another example of this process was provided by SCRAP v. U.S., 346 F. Supp. 189 (1972), where the district court expressed dissatisfaction with the Interstate Commerce Commission's inadequate compliance with NEPA.

> Indeed, the draft [EIS] is so deficient that it may not comport with the statutory requirement that the Commission permit comment from interested parties before making its impact statement final. (346 F. Supp. at 194 n. 8)

Thus the notion of a draft EIS, reflecting the two-stage review process developed by the CEQ, was adopted by the court as the most acceptable way to satisfy the public participation requirements of NEPA.

EQC's guidelines, modeled after CEQ's, incorporate the results of this "feedback" process.[4] In addition, EQC revises its guidelines periodically to

4. Some examples of judicial holdings which are part of EQC and CEQ guidelines:
   1. Assessment of all impacts is required
      a. assessment must be made early in the decision making process; Calvert Cliffs Coordinating Committee v. AEC, 449 F2d 1109.
      b. Concerned parties should be consulted; Akers v. Resor, 339 F. Supp. 1375.
      c. All known possible environmental consequences should be addressed; Environmental Defense Fund v. Corps of Engineers,
      d. Economic and technical benefits must be weighed against the environmental costs incurred in a particular action; EDF v. Corps of Engineers, supra.
      e. A good faith effort requires a discussion of all impacts of a given action, including political, social, economic, and cultural impacts as well as ecological impacts; Calvert Cliffs, supra.

reflect problems which arise. Comments and suggestions from state agencies play an important role in these guideline revisions. This incorporation of agency experience adds to the weight to which the guidelines are entitled.

Conclusion

The federal courts have made it clear that although the CEQ guidelines are not legally binding in a formal sense, they are entitled to great weight. The courts have been consistently guided in their decisions by the interpretations of NEPA provided by the CEQ. Most important, CEQ's guidelines and current judicial opinions reinforce and complement each other in a dynamic manner.

The guidelines of Montana's Environmental Quality Council were modeled closely after the federal guidelines, and therefore have incorporated current federal interpretations of environmental policy. Because of the similarity between the federal and state acts and the federal and state guidelines, the federal experience should be particularly relevant in applying MEPA to the actions of state agencies.

In addition, the EQC guidelines reflect a process of evaluation of state programs and consultation with state agencies which makes these guidelines a particularly relevant interpretation of the Montana Environmental Policy Act. The guidelines embody EQC's judgement, based on the four-year history of the state and federal statutes and on expertise developed by the EQC staff during that period, as to the proper interpretation of the requirements imposed on state agencies by MEPA. They represent, in other words, EQC's interpretation

2. Environmental Impact Statement requires the early and thorough circulation of a draft statement; later, all comments received must be circulated; EDF v. Corps of Engineers, supra.
3. Environmental Impact Statement process requires a thorough discussion of all feasible alternatives, including the alternative of taking no action; EDF v. Corps of Engineers, supra.
4. Environmental Impact Statement process requires a thorough discussion of the problems and objections raised by commenting parties, Latham v. Volpe, 455 F2d 1111.
5. Environmental Impact Statement process requires that the document be factual, specific, and allow non-expert readers to evaluate conclusions intelligently. EDF v. Corps of Engineers, 492 F2d 1123.

of the legislative intent behind MEPA. The guidelines have been developed in such a way that when they are followed, MEPA is almost certainly satisfied (at least procedurally). But when agency action departs substantially from the guidelines, compliance with MEPA, in EQC's judgement, is doubtful.

The EQC guidelines, therefore, should carry great weight in determining the legal sufficiency of executive agency actions. A court's responsibility is to determine whether an agency has violated MEPA, and the EQC guidelines are the surest indication of whether or not MEPA has been satisfied. If the agency's actions depart substantially from EQC requirements, the agency must bear the burden of showing that it has not violated MEPA.

II. THE DEPARTMENT OF HEALTH'S ENVIRONMENTAL IMPACT STATEMENT ON BEAVER CREEK SOUTH FAILS TO COMPLY WITH THE ENVIRONMENTAL QUALITY COUNCIL'S GUIDELINES AND IS THEREFORE INADEQUATE.

The Department's Discussion of Alternatives is Inadequate

Section 69-6504(b)(3)(iii) of MEPA requires the detailed statement (EIS) to include "alternatives to the proposed action." Section 69-6504(b)(4) goes on to require agencies to

> study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.

The federal courts, as a rule, have read these two clauses in conjunction. (See, e.g., Calvert Cliffs Coordinating Committee v. AEC, 449 F2d 1109 (D.C.Cir. 1971)) to find that the discussion of alternatives in the impact statement must amount to more than simply mentioning the alternatives. The EQC guidelines, taken from the guidelines of the federal Council on Environmental Quality, expand on these requirements:

> A rigorous exploration and objective evaluation of alternative action (including no action at all) that might avoid some or all of the adverse environmental effects is essential. In addition, there should be an equally rigorous consideration of alternatives open to other authorities. Sufficient analysis of such alternatives and their costs and impact on the environment should accompany the proposed action through the agency review process in order not to foreclose prematurely options which might have less detrimental effects. (EQC guidelines 6.a.(4))

The discussion of alternatives in the EIS is a crucial part of the environmental review process. MEPA puts a great deal of emphasis on the utilization of an "interdisciplinary approach" by state agencies in making their decisions (69-6504(b)(1)), and requires state agencies to coordinate plans and programs with an eye to preserving environmental amenities for future generations. 69-6503(a)) For these reasons, it is necessary that the decision maker have before him

> all possible approaches to a particular project (including total abandonment of the project) which would alter the environmental impact and cost benefit balance. Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made. Calvert Cliffs Coordinating Committee v. AEC, 449 F2d 1109, at 1114

In NRDC v. Morton, 337 F. Supp. 165 (D.D.C.), the court emphasized that the EIS should not merely mention the alternatives, but should attempt to assess the environmental risk of each, in comparison to the main proposal. The court also noted that alternatives beyond the power of the agency to implement must be discussed. Professor Frederick Anderson, in his authoritative book, NEPA in the Courts explains:

> if alternatives were limited to those which [the lead agency] could choose, the more basic question of how responsibility could best be apportioned among the departments would be ignored (p. 220)

In light of these requirements, the treatment of alternatives in the Department's final revised EIS is clearly inadequate. (see p. 50, final revised EIS) The Department does little more than mention three alternatives: to approve the plat as submitted; to grant conditional approval pending successful operation of the wastewater disposal system; to refuse to approve the plat. There is no discussion, detailed or otherwise, of the environmental impacts to be expected from the last two alternatives. There is no mention of other alternatives, such as requiring larger and fewer parcels, which would reduce environmental impact.

Perhaps most disturbing is the Department's statement that they are unable to refuse approval because "there is no legal justification for refusing to grant subdivision plat approval based on [environmental] grounds.

The EQC guidelines, in interpreting the policies set forth in MEPA, warn against such an "excessively narrow construction of existing statutory authorizations." (EQC Guidelines §2.a.) MEPA states explicitly that "the policies, regulations, and laws of the state shall be interpreted and administered in accordance with the policies set forth in this act." (69-6504(a)) Furthermore, section 69-6504 (3) requires the impact statement to discuss "(ii) any adverse environmental effects.... (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action..." (emphasis added) Thus MEPA requires a "systematic and interdisciplinary" analysis of the proposal, not an analysis limited to the particular expertise or jurisdiction of the agency.

In the landmark case, Calvert Cliffs Coordinating Committee v. AEC, 449 F2d 1109, the District of Columbia Circuit Court directly addressed this question. In that case, plaintiffs challenged AEC regulations which supervised construction of nuclear facilities, but which failed to provide for an independent evaluation of water quality problems. The court rejected AEC's approach to environmental analysis:

> We believe that the Commission's rule is in fundamental conflict with the basic purpose of the Act.
>
> The sweep of NEPA is extraordinarily broad, compelling consideration of any and all types of environmental impact of federal action...
>
> The Atomic Energy Commission, abdicating entirely to other agencies' certifications, neglects the mandated balancing analysis. Concerned members of the public are thereby precluded from raising a wide range of environmental issues in order to affect particular commission decisions. And the special purpose of [NEPA] is subverted. (Id.)

A large number of federal decisions have followed the lead of Calvert Cliffs in broadening the environmental responsibilities of executive agencies. (See, e.g., Silva v. Romney, 342 F. Supp. 783 (D.C. Mass., 1972); Hanly v. Kleindienst, 409 U.S. 990; Kalur v. Resor, 335 F. Supp. 1 (D.D.C., 1971); Getty Oil v. Ruckelshaus, 342 F. Supp 1006 (D. Del., 1972); EDF v. Corps of Engineers, 348 F. Supp. 916 (N.D., Miss., 1972); Sierra Club v. Froehlke, 345 F. Supp. 440 (W.D. Wis. 1972); Daly v. Volpe, 350 F. Supp. 252 (W.D. Wash. 1972); NRDC v. Morton, 337 F. Supp. 170 (D.D.C. 1972); SCRAP v. U.S. 346 F.

Supp. 189 (D.D.C. 1972).

A case which is particularly relevant is Kalur v. Resor, supra. That case involved a statute which authorized the Corps of Engineers to permit the deposit of refuse matter into a navigable river under certain conditions. The question in the case was whether the Corps was entitled to limit its considerations to water quality, or whether NEPA required it to prepare a comprehensive environmental analysis. The court held that the latter was the case:

> Congress...certainly did not grant a license to disregard the main body of NEPA obligations. There are no specific statutory obligations that the Corps of Engineers has that prevents it from complying with the letter of NEPA.... Obedience to water quality certifications under the Water Quality Improvement Act is not mutually exclusive with the NEPA procedures. It does not preclude performance of the NEPA duties. Water Quality certifications essentially establish a minimum condition for the granting of a license. But they need not end the matter. The Corps of Engineers can then go on to perform the very different operation of balancing the over-all benefits and costs of a particular proposed project, and consider alterations above and beyond the applicable water quality standards that would further reduce environmental damage.

This interpretation of an agency's responsibility is directly applicable to the Department of Health's duties under the Water Pollution Act (69-4801 et seq.) and the Sanitation in Subdivisions Act (69-5001 et seq.) Neither of those statutes mandate that the Department must grant approval of a subdivision upon a finding that certain specified prerequisites are met. Rather, the statutes direct the Department (or the Board of Health) to adopt rules for the administration of the laws.(69-4808.2, 69-5005) Where no explicit conflict exists between the Department's permit authority and its obligations under MEPA, the legislature's command that agencies comply with the policies of MEPA "to the fullest extent possible" (69-6504) cannot be ignored.

In any event, the Department's protestation that a non-approval decision is without legal basis is totally irrelevant to the discussion of alternatives in an environmental impact statement. The EIS is intended to discuss environmental impacts of possible courses of action so that decision makers will be able to arrive at a well-informed decision. It is not intended to

justify decisions already made. It is for that reason that MEPA requires that the EIS "accompany the proposal through the existing agency review processes," (69-6504(3)) and it is for that reason that the EQC guidelines recommend that draft and final impact statements be distributed for comment "at the earliest possible point in the agency review process in order to permit meaningful consideration of the environmental issues before an action is taken." (EQC Guidelines, 8.b.) (See, also, federal cases which have rejected impact statements for being overly conclusory: EDF v. Corps of Engineers (Gilham Damm), 325 F. Supp. 728 (E.D. Ark. 1970-71); City of New York v. U.S., 337 F. Supp. 150 E.D. N.Y. 1972); SCRAP v. U.S., 346 F. Supp. 189 (D.D.C. 1972))

There is no Adequate Discussion of Cumulative Impacts of Subdivision Development.

One of the fundemental purposes of a broad environmental policy law directed to all state agencies is to promote a systematic, interdisciplinary, and coordinated approach to decision making which impinges on the environment. This means that an agency must look beyond the impacts of the particular project considered in isolation, and must consider how that project relates to the entire complex of executive decision making, both now and in the future, in order that the state may

> fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; and attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences; (69-6503(a))

The EQC guidelines deal with this point at considerable length: (EQC Guidelines 5.b.)

> The statutory clause "major actions of State government significantly affecting the quality of the human environment" shall be construed by agencies from the perspective of the overall, cumulative impact of the action proposed (and of further actions contemplated). Such actions may be localized and seemingly insignificant in their impact, but if there is a potential that the environment may be significantly affected, the statement shall be prepared.
>
> In deciding what constitutes "major action significantly affecting the environment," agencies should consider that the effect of many State decisions about a project or a complex of projects can be individually limited but

> cumulatively considerable. By way of example, two suitable illustrations can be drawn: (1) one or more agencies, over a period of years, commits minor amounts of resources at any single instance, but the cumulative effect of those individually minor commitments amounts to a major commitment of resources, or (2) several government agencies individually make decisions regarding partial aspects of a major action. The guiding principle is that the whole can be greater than the sum of the parts. The lead agency shall prepare an environmental impact statement if it is foreseeable that a cumulatively significant impact on the environment will arise from State action. "Lead agency" refers to the State agency which has primary authority for committing the State government to a course of action with significant environmental impact. As necessary, the Environmental Quality Council will assist in resolving questions of lead agency determination.

Such a cumulative approach is especially important in an area like the Gallatin Canyon, where the fragile "carrying capacity" of the ecosystem is in danger of being overwhelmed piecemeal. The Department's EIS recognizes that this danger exists (final revised EIS, p. 43), but fails to deal with the problem beyond mentioning it. The Department notes that the Gallatin Canyon Study Team from Montana State University is currently addressing this problem and that their reports are available to the public. The Department then drops the subject without making the slightest attempt to integrate the findings of the Gallatin Canyon Study into the impact statement.

For an impact statement to provide a good faith discussion of the cumulative effect of a series of proposed or predictable developments, the results of such a study should be included. And it is not a sufficient excuse to say that the study is still in progress. The most acceptable course of action may be to await the completion of the study. In his book, NEPA in the Courts, Professor Anderson discusses this matter:

> There are several objections to allowing action to continue while further study is carried out. The increased commitment of resources might swing the balance in favor of proceeding with an otherwise undesirable project. Moreover, adverse findings would be diluted, as they trickled in one after another instead of being collected and cogently set forth in one document for reviewers. One solution would be to require the agency to seek out testimony on the range and magnitude of the risks involved in proceeding without specific studies. (p. 216)

In EDF v. Hardin, 325 F. Supp. 1401 (D.D.C. 1971) the court echoed this analysis:

> [The requirement that agencies utilize a systematic, interdisciplinary approach]...makes the completion of an adequate research program a prerequisit to agency action. The adequacy of the research should be judged in light of the scope of the proposed program and the extent to which existing knowledge raises the possibility of potential adverse environmental effects.

In view of the fact that by far the largest number of impact statements received by the EQC deal with subdivision proposals, it is especially important that an environmental analysis procedure be developed which will address itself to the problems of cumulative impacts. As one example among many, consider the statement on page 33 of the revised final EIS:

> It is the concensus of opinion that the ultimate factor that will control the amount of development in the Gallatin Canyon will be the capacity of the highway to handle the traffic load that would be generated. Beaver Creek South would add to the traffic load on the highway, but...would not be the development that would make reconstruction [of the highway] necessary.

In other words, the problem is left for the future, when the options may have been restricted by short-sighted decisions made in the present. What will be the effect of future highway reconstruction in terms of air pollution, fuel consumption, visual impact, etc? What will be the effect on this and future subdivisions if highway reconstruction does not take place? What will be the cumulative social, economic and environmental impacts of continued subdivision development in Gallatin Canyon? If there is a density level beyond which development should not be allowed, how and when should that line be drawn? These are a few of the questions which are not even presented by the Department's discussion. This failure is one of the most crucial inadequacies in the revised final EIS.

The Need for a Programmatic Approach

Having reviewed some of the case law which explains the need for a full discussion of alternatives and cumulative impacts, it is appropriate now to put the Health Department's efforts into perspective. As the discussion above has demonstrated, one of the fundamental themes underlying MEPA is the coordination of state agency activity so that environmental matters may receive a systematic treatment by all agencies. One of the most vexing

problems which arise in applying MEPA to actions such as the present one is the limited expertise of the lead agency. Because of the current state of the laws in Montana, the Department of Health is the only state-level agency with approval authority over subdivisions. (The Subdivision and Platting Act, 11-3859 et seq., gives the Department of Intergovernmental Relations review authority, but IGR's approval is not required.) The statutes under which the Department operates in this regard address themselves specifically to water quality and waste water disposal. The Department has neither the expertise nor the specific jurisdiction to deal with such matters as wildlife preservation or highway construction (although the air pollution impacts of increased highway travel make the latter somewhat more closely related to Health Department responsibilities).

Nevertheless, MEPA imposes on the Department of Health and on all other agencies of the state the duty to interpret and administer its policies and regulations in accordance with the goals of MEPA. The preparation of an environmental impact statement is the mechanism by which the Department of Health, as "lead agency" must fulfill this responsibility.

(A strong argument might be made that the board of county commissioners of Gallatin County ought to be the lead agency. The Subdivision and Platting Act makes it their explicit responsibility to consider all environmental impacts in making their decisions. That statute also seems to make the county board an agent of the state, charged with the responsibility of seeing that environmental matters are considered, so the board is arguably a "state agency" to which MEPA applies. This interpretation of the law has not been widely accepted, however, and in any event, the county board was not named as defendant in this suit, so this must stand as a parenthetical comment.)

As mentioned above (p. 20, supra) one function of an EIS is to indicate how responsibility in environmental matters can best be apportioned among state agencies. For this reason, all impacts of the proposed action, from the perspective of all relevant state agencies, should be presented in the impact statement. In addition, discussions of possible related decisions

which might be made in the future by other agencies should be included. Ideally, an impact statement should serve as a source of information and a guide to decision making not only for the lead agency in the action under immediate consideration, but also for other agencies making related decisions now or in the future, and for the public in general. For this reason, an impact statement must discuss thoroughly even those impacts and alternative actions which the lead agency by itself is unable to control. This is the meaning of the characterization of environmental policy acts such as NEPA and MEPA as "full disclosure" laws:

> The "detailed statement"...should, at a minimum, contain such information as will alert the President, the Council on Environmental Quality, the public and, indeed, the Congress, to all known possible environmental consequences of proposed agency action. (emphasis in original) EDF v. Corps of Engineers. (Gillham Dam), 325 F. Supp. 728, at 759

And it is for this reason that the Department of Health has sidestepped its responsibility to make full disclosure by noting that environmental decisions are more properly made elsewhere (final revised EIS, p. 27-28).

It seems clear that the development of subdivisions in the Gallatin Canyon (or any similarly fragile environment) will have a cumulative impact far in excess of the impacts of any one subdivison taken by itself. Again, the county rather than the Department of Health seems to be proper place for long-range planning to occur. But again, the full disclosure responsibilities placed on the Department as lead agency require a comprehensive "programmatic" discussion of the cumulative impacts of increased development in the Canyon. The Department takes a first step in this direction with its discussion of predicted water impacts (final revised EIS, p. 44), but much more is necessary to satisfy MEPA.

Procedures need to be developed so that an impact statement analyzes all relevant impacts of future predicted development in the area. Ideally, such a broad programmatic EIS could then serve as a basis for future decisions by Health, by IGR, by the Highway Department, by the county. The comprehensive programmatic approach would only have to be taken once in a given area--a concerted effort by all agencies with relevant expertise--and future EISs for

particular projects would require only minimal updating and specifics.

This programmatic approach has not yet been developed by any agency, but it is a necessity for compliance with MEPA. Without such a programmatic-cumulative impact statement to back it up, the present EIS is insufficient. This is not to say that the Health Department must necessarily base its own decisions with respect to sanitary restrictions on the full range of cumulative environmental effects of subdivision development, but as the responsible state agency, the Department must prepare an impact statement which addresses those matters, so that all decision makers are adequately informed of the issues. Perhaps it is impractical to require the Department of Health to develop the necessary procedures before approval for the present action can be granted, but the responsibility to develop these procedures must be made clear.

Conclusion

For the above reasons, it is the position of the Environmental Quality Council as amicus curiae that until a comprehensive programmatic impact statement providing a full discussion of alternatives and cumulative impacts is prepared, MEPA will not have been fully complied with.

Dated, this _____ day of May, 1975

Environmental Quality Council
Amicus Curiae

_____
John W. Reuss
Executive Director, EQC

By_____
Steven J. Perlmutter
Legal Assistant

_____
Supervising Attorney

HOUSE JOINT RESOLUTION NO. 73

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA CALLING FOR THOROUGH ECONOMIC ANALYSIS IN ENVIRONMENTAL IMPACT STATEMENTS AND DIRECTING THE ENVIRONMENTAL QUALITY COUNCIL TO ELICIT SUCH ANALYSIS FROM STATE AGENCIES.

WHEREAS, the Montana Environmental Policy Act, enacted by the 1971 Legislative Assembly, requires a full assessment of major agency actions with significant effects on the human environment; and

WHEREAS, the Montana Environmental Policy Act and the guidelines adopted pursuant to that act by the state Environmental Quality Council define human environment to include social, economic and cultural factors as well as aesthetic and environmental factors; and

WHEREAS, the act and guidelines further require a rigorous consideration of all alternative actions and the full range of their economic and environmental costs and benefits; and

WHEREAS, full economic analysis has not typically accompanied agency actions requiring environmental impact statements, thus indicating a failure on the part of the Environmental Quality Council and state agencies to fully implement the Montana Environmental Policy Act and

WHEREAS, it is a matter of serious concern to the legislature that this enactment be fully implemented in all respects,

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That all agencies of state government are hereby directed to achieve forthwith the full implementation of the Montana Environmental Policy Act including the economic analysis requirements of sections 69-6504 through 69-6514 and guidelines for fully integrated environmental and economic analysis of major actions with significant effects on the human environment; and

BE IT FURTHER RESOLVED, that economic analysis shall accompany environmental impact statements as required by the foregoing sections of the act and shall encompass an analysis of the costs and benefits to whomsoever they may accrue, including considerations of employment, income, investment, energy, the social costs and benefits of growth, opportunity costs, and the distribution effects; and

BE IT FURTHER RESOLVED, that the Environmental Quality Council is directed to monitor agency compliance with this resolution and to report to the 1975 Legislative Assembly the extent of agency implementation of the act's requirements for full economic analysis; and

BE IT FURTHER RESOLVED, that the executive director and staff are directed to fully perform the duties required by section 69-6514 to give consideration to economic goals and requirements of the state in implementation of the Montana environmental policy act; and

BE IT FURTHER RESOLVED, that copies of this resolution be sent to the Governor, the Environmental Quality Council, and all state agencies.

Approved March 16, 1974

Certificate of Service

I, Steven J. Perlmutter, legal assistant for Amicus Curiae, do hereby certify that the foregoing petition and brief Amicus Curiae was duly served by mail upon the attorneys for the plaintiffs, defendants and intervenor on this _____ day of May, 1975.

DATED this _____ day of May, 1975

_____
Steven J. Perlmutter

OPINION AND DECLARATORY JUDGMENT

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK.

THE MONTANA WILDERNESS ASSOCIATION, and GALLATIN SPORTSMEN'S ASSOCIATION, INC.,

Plaintiffs,

vs.

THE BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES OF THE STATE OF MONTANA; THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES OF THE STATE OF MONTANA,

Defendants.

BEAVER CREEK SOUTH, INC., a corporation,

Intervenor.

THE MONTANA ENVIRONMENTAL QUALITY COUNCIL,

Amicus Curiae.

No. 38092

OPINION and DECLARATORY JUDGMENT.

On February 20, 1975, plaintiffs filed a second amended complaint in this action. Thereafter, On March 7, 1975, defendants filed a motion to dismiss that second amended complaint, and on March 9, 1975, interventors filed a motion to dismiss the second amended complaint. Intervenors and defendants filed briefs in support of their motion to dismiss. On March 20, 1975, plaintiffs asked leave to amend certain paragraphs of the second amended complaint and likewise filed a brief in opposition to the motions to dismiss. Leave was granted to amend the second amended complaint. On May 30, 1975, the Environmental Quality Council sought leave to file a brief as amicus curiae, and by its order of June 11, 1975, the Court granted the petition and stated that it would consider the brief of amicus curiae. Further briefing was done by the plaintiffs and defendants on the matter before the court, the final brief of plaintiffs having been filed July 14, 1975. Oral argument not having been requested, and being deemed unnecessary by the Court, the motions of the

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defendants and the intervenor to dismiss are before the Court for determination.

I.

Plaintiffs have standing.

For the reasons set forth in our Memorandum and Order of February 11, 1975, and upon plaintiffs' testimony and affidavitsof record in this case, I conclude the plaintiffs have standing to pursue the present action in this Court.

II.

The cause is appropriate and ready for determination under Rule 56 in accordance with Rule 12 (b).

The defendants and the intervenor have both moved for dismissal on grounds provided in Rule 12 (b)(6)(failure to state a claim upon which relief can be granted). The last sentence of Rule 12 (b) provides for conversion of such a motion to a motion made under Rule 56 for summary judgment, and consideration thereunder of matters outside the pleadings. Under such a motion, all facts well pleaded by the plaintiffs are deemed admitted. The principal fact pleaded by all parties is the environmental impact statement (EIS) of the defendant department of October 9, 1974. The plaintiff also pleads House Joint Resolution #73 of the Forty-Third Legislative Assembly, of which the Court takes judicial notice. Interrogatories and the answers thereto may also be considered.

The central question presented is whether the EIS conforms to and meets the requirements of Section 69-6504 (b)(3) R.C.M. 1947. This determination may be made by comparison of the act with the EIS. The EIS is, therefore, the operative fact, it is not in issue and it is before the Court. Thus there remains no outstanding factual issues and the matter is ready for determination by summary judgment.

III.

The EIS does not meet statutory requirements.

A. Economic considerations. Section 69-6504 directs that, "to the fullest extent possible," the agencies of the state shall:

> "identify and develop methods and procedures which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations;" (69-6504(b)(2)).

Subparagraph (3) of the same section provides:

> "(3) include in every recommendation or report on proposals for projects, programs, legislation and other major actions of state government significantly affecting the quality of the human environment, a detailed statement on--
> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
> Prior to making any detailed statement, the responsible state official shall consult with and obtain the comments of any state agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate state, federal, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the governor, the environmental quality council and to the public, and shall accompany the proposal through the existing agency review processes."

It might be argued that it was the intent of the legislature that subparagraph (2), standing by itself, requires only that the evaluating agency set up some kind of a system that will insure consideration of economic matters, but that the agency is not required to note such consideration in the detailed statement required by subparagraph (3). Obversely, it could be argued that subparagraph (2) makes economic considerations pertinent to over-all environmental impact and that, therefore, they should be set forth as an integral

part of the detailed statements required by subparagraph (3).

It is, however, unnecessary to resolve this argument by interpreting legislative intent on the basis of statutory construction. The legislature has stated its intent specifically, and it did so prior to the complation of the instant EIS. By its Joint Resolution #73 of March 16, 1974, the legislature declared its intent to be:

> "***that economic analysis shall accompany environmental impact statements as required by the foregoing sections of the act [referring specifically to Sections 69-6504 through 69-6514] and shall encompass an analysis of the costs and benefits to whomsoever they may accrue, including consideration of employment, income, investment, energy, the social costs and benefits of growth, opportunity costs, and the distribution effects; ***"

In researching and writing the EIS under consideration, the Department was either unaware of this legislative suggestion and the law it referred to, or ignored it. Nothing in the EIS rises to the dignity of an economic analysis; there is little evidence of consideration of economic matters, much less a balanced evaluation of them, as required. The one attempt at making some kind of economic analysis was an analysis of educational costs on page 39 of the EIS. The actual cost analysis appears to be inaccurate, in that the amount involved in education costs would be more likely around $186,000 rather than $128,000. In addition there was no cumulative analysis of these costs coupled with other costs and their effect on the county.

The statement is also totally devoid of any discussion of employment, of income, of investments, and the statement is seriously inadequate regarding discussions of energy and of the social costs and benefits of growth and the opportunity costs involved. In answering plaintiff's interrogatory number 10 regarding these social costs, the defendant stated that they had no knowledge what these costs would be as compared to revenue. In interrogatory number 11, the plaintiffs asked the defendants:

"State whether any market analysis has been conducted for the proposed subdivision."

The defendants answered a flat "No."

B. Aesthetic considerations. As noted in A, above, subsection (2) of Section 69-6504 requires the evaluating agency to "identify and develop methods and procedures, which will insure that unquantified environmental amenities and values may be given appropriate consideration in decision making ***" While it might be difficult to describe the working parameters of an "unquantified environmental amenity", certainly esthetic considerations should be included in this encompassing ring. If this be so, it might be argued, again, that the legislature intended by this subparagraph simply to require that methods and procedures be established to evaluate esthetic considerations, and did not intend to require inclusion of these considerations in the EIS. I think not. Certainly esthetic considerations fit under the broad, general requirement for a statement of environmental impact (Subparagraph (h)(3)(i)), and subparagraph (2) requires that some kind of procedure is required to implement the EIS requirement.

What was done here to evaluate "visual impact", unquestionably an esthetic consideration which should be viewed as an "unquantified environmental amenity"?

Page 23 of the EIS offers the following statement:

"Visual impact would certainly result from the proposed development. The severity of this visual impact is purely speculation, and the desirability is a matter of personal aesthetic values."

There are those who would argue, I'm sure, that the area under consideration in this EIS is the most beautiful in the world or in Montana. Yet the defendant department carries out the clear mandate for appropriate detailed, systematic, interdisciplinary consideration of this aspect of the development by observing, in effect: "Yep, it's sure going to raise hell with the scenery,

depending on whose looking at it!" This is not an environmental impact statement within the meaning of the act. Furthermore, the answer to plaintiff's interrogatory No. 12 makes it quite clear that the Department had not developed any procedures whereby amenities such as aesthetic quality could be quantified and given consideration in the making of this EIS. Thus the law was not complied with in either the development or the presentation of the statement.

C. Alternatives. Section 69-6504(b)(3)(iii) requires a detailed statement on alternatives to the proposed action. Section 69-6504(b)(4) requires the evaluating agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;" (emphasis added). Reading this subsection in para materia with the rest of the section, I conclude it was intended the description appear in the EIS. I don't know exactly what a "proposal which involves unresolved conflicts concerning alternative uses of available resources" means, but the letters attached to the EIS reveal an abundance of unresolved conflicts, and the EIS itself concedes there are alternatives to the decision made by the department. The alternatives are merely stated as conclusions: approve the plat as submitted, grant conditional approval pending successful operation of the waste water disposal system, or refuse to approve the plat. Considering the objections made by the Forest Service, the Highway Department, the Fish and Game Department and others, the bare statement of alternatives itself is patently inadequate. But there is no discussion or evaluation, detailed or otherwise, of the environmental impacts to be expected from the last two alternatives given. As an alternative to the intervenor, the Department suggests that it might avoid the rigors of the subdivision act, (Sections 69-5001 et. seq. R.C.M. 1947) including compliance with The Environmental Policy Act, by developing tracts of

over ten acres. It should be pointed out that this was an alternative open to consideration by the Department, as well as the intervenor. There is no detailed consideration of the impact of such alternative development.

D. Wildlife. The defendant department, in response to its initial, or proposed, EIS, received a veritable barrage of objections to and questions about the project from state and federal agencies and private groups concerned with wildlife. It duly recorded some of those comments in its EIS, but "begged off" from any in-depth consideration of them on the ground that wild life habitat was not to be considered under the 1973 subdivision act, and passed the buck to the local community, which, it said, could hold hearings on these matters under the same act(pp.27,28). There was no evaluation even attempted with regard to the serious questions raised in this area. Quoting from letters protesting or raising questions as to a proposed development cannot, by itself, be deemed to be a "detailed statement" on any of the matters required to be dealt with by Section 69-6504(b)(3). Such comments are not only to accompany the proposal through review process (last sentence of the cited sub-paragraph) but clearly the final EIS must reveal that they have been considered and evaluated, and that a conclusion has been reached in regard to them. The Montana Environmental Policy Act and particularly its EIS provisions, was not designed merely to set up another conveyor belt for paper through the state agencies. The agencies have been directed to "use all practicable means" (Section 69-6503(a)) to achieve the ends of the act, environmental protection, through "a systematic, interdisciplinary approach to insure the integrated use of the natural and social sciences and the environmental design arts in planning and decision making which may have an impact on man's environment." (Section 69-6504(b)(1)). This exhalted goal cannot be accomplished by the mere publication of objections and decision making that does not deal with them. In regard to wildlife, all the pertinent comments indicated an

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adverse environmental effect could not be avoided if the proposal were to be implemented (Section 69-6504 (b)(3)(11). Yet the EIS offers nothing even approaching a definitve detailed statement on that effect.

E. Highways. The same applies to the EIS treatment of highway problems. According to the U.S. Forest Service, "the treatment of the effect on traffic is very incomplete." See P. 31, EIS. As stated on page 31 of the EIS:

> "Use of Highway 191 in the Gallatin Canyon may be approaching capacity during peak periods of the day now. Motor vehicle accident figures and deaths have increased many fold in the last five years. Beaver Creek South will intensify the problems. The report should accurately quantify these additional traffic problems and weigh their consequences including the consequences of a 4 lane highway."

A similar concern was expressed by the Department of Natural Resources and Conservation. See pages 32 and 33 of EIS. These factors are merely dismissed in the EIS. Section 69-6504 (b)(3)(iv)(v), R.C.M. 1947, states that the EIS must contain a detailed statement on "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (b) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented...." In the EIS the problem of traffic load and highway development are left for the future. See P. 33, EIS. There is no discussion of the effect of future highway reconstruction in terms of air pollution, fuel consumption, and visual impact. There is also no discussion as to what would be the effect if highway reconstruction does not take place, nor of the cumulative social, economic and environmental impacts of continued development in the Gallatin Canyon.

F. Energy. The energy needs of the subdivision are superficially analyzed at best in the EIS. The U.S. Forest Service and the Department of Natural Resources both note the inadequacies in the EIS as to future energy needs. (See pages 34 and 35 of EIS.) These needs

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are merely mentioned by the defendant department and not examined in any detail.

G. Necessity. The actual necessity for the subdivision is questioned by the Department of Natural Resources and the Environmental Quality Council. The defendants state that the proposed development will be occupied by employees of Big Sky of Montana, Inc. The defendants view statements that the available housing in the subdivision might be out of the price range of Big Sky employees as not an important element and dismiss them. The law requires that this be analyzed, for it will certainly have an impact on the environment. If there is no need for the subdivision, then the alternative of not approving the proposed subdivision should be explored in detail.

H. Cumulative impact. The cumulative impacts of the proposed subdivision must be discussed in greater detail. The EIS only gives cursory coverage to this on page 43 through 45. As the Department of Natural Resources states on page 43 of the EIS, "The final EIS should, therefore, consider not only the direct impacts of this one proposal, but also the cumulative impacts of existing and potential subdivisions in a relatively pristine canyon setting." This type of analysis would comply with Section 69-6504(b)(3)(iv), R.C.M. 1947.

I would add as a gratuitous comment that throughout the statement there is an inherent suggestion that the matters noted above, and others, are beyond the expertise of the Department of Health and Environmental Sciences. This, I believe, is patently true. Its expertise, with regard to this project, has to do with such matters as drainage, sewage, water levels, sanitation, etc. Due to its responsibilities under the Subdivision Act, it is nevertheless charged with the responsibility of developing the EIS for the proposed project. It would seem that it could discharge that responsibility more adequately than it has here by "farming out" EIS sections to appropriate agencies of the state government for research and evaluation, possibly using the Environmental Quality Council (Section 69-6508, et.seq.) as

coordinator. In that way, the clear intention of The MEPA could be accomplished by fully utilizing the expertise of all interested state agencies to achieve a "systematic interdisciplinary approach."

For the reasons noted above, I conclude the procedure adopted in promulgating the EIS is wholly inadequate to meet the standards set by the statute. In view of this, I consider it unnecessary to examine the question of whether the EIS conforms to the defendant departments' own regulations or the adequacy of their regulations.

IV

The Appropriate Remedy is Injunction.

The plaintiffs in their prayer have called upon the Court for equitable relief by way of injunction. The grounds therefor have been fully pleaded and briefed. The first question in this regard is whether such relief can be coupled with the declaratory judgment asked for. I believe it can be. The statute (Section 93-8908) so provides. At 101 ALR 693 it is stated:

> "Under a declaratory judgment statute permitting the plaintiff to ask for a declaration of rights or duties, either along or with other relief, the plaintiff, in an action for declaratory relief, may ask also for any affirmative or consequential relief to which he is entitled under the facts alleged."

See also County of Los Angeles v. State Dept. of Public Health (322 P2d 968), a subdivision platting case, at pp. 979 and 980.

The second question is whether injunctive relief can be provided in this particular case. MEPA is bereft of any specific provision for remedy. The same is true of the National Environmental Policy Act (NEPA), after which MEPA was patterned. NEPA, in this regard, as in others, has been extensively construed by the federal courts. We have no Montana Supreme Court interpretations of MEPA or, particularly, of its enforcibility. We must therefore look to the federal court holdings.

Our Section 69-6504 directs that "to the fullest extent possible:"

"(a) The policies, regulations, and laws of the state shall be interpreted and administered in accordance with the policies set forth in this act..."

The language of Section 102 of the federal act (43 USC 4321 et. seq., 83 Stat. 852, Pub. L. 91-190, Sect. 4332) is identical, except the reference is to the public laws of the U.S.

A landmark federal case in the interpretation of this section is Environmental Defense Fund v. Corps of Engineers 470 F. 2d 289, in which the court stated, at page 297:

> "Section 102 (1) directs that the policies, regulations, and public laws of the United States be interpreted in accordance with these policies to the fullest extent possible. Section 102 (2), of course, sets forth the procedural requirements of the Act, discussed previously in this opinion. The purpose is to 'insure that the policies enunciated in section 101 are implemented.' S.Rep. 91-296, 91st Con., 1st Sess. 19 (1969). The procedures included in § 103 of NEPA are not ends in themselves. They are intended to be 'action forcing.'
>
> The unequivocal intent of NEPA is to require agencies to consider and give effect to the environmental goals set forth in the Act, not just to file detailed impact studies which will fill government archives." (Emphasis added)

Perhaps the leading federal case in the interpretation and implementation of NEPA is Calvert Cliffs Coordinating Committee v. U.S. Atomic Energy Commission, 449 F. 2d 1109. At page 1115 therein the court said:

> "The reviewing courts probably cannot reverse a substantive decision on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values. But if the decision was reached procedurally without individualized consideration and balancing of environmental factors--conducted fully and in good faith--it is the responsibility of the courts to reverse. As one District Court has said of Section 102 requirements: 'It is hard to imagine a clearer or stronger mandate to the courts.'"

Here we have not, although urged to by the plaintiffs, ventured into a substantive evaluation of the merits of the defendants' decision. We

have merely determined that the statement itself clearly shows that in many respects the decision made was not based on "individualized consideration and balancing of environmental factors--conducted fully and in good faith." I therefore conclude that supplemental relief by way of injunction is not only permitted but required in order to carry out the clear, strong mandate of our act.

Judgment

It is hereby adjudged and decreed that the Revised Final Environmental Impact Statement for Beaver Creek South, a proposed subdivision in Gallatin County, Montana, published by The Department of Health and Environmental Sciences of the State of Montana, on October 9, 1974 (E.S. 74/85) does not comply procedurally with The Montana Environmental Policy Act (Ch. 238, L. 1971, Sections 69-6501, et.seq., R.C.M. 1947) and is therefor void and of no legal effect.

It is further adjudged, decreed and directed that The Department of Health and Environmental Sciences of the State of Montana rescind its removal of sanitary restrictions on that certain plat filed with the Clerk and Recorder of Gallatin County on February 18, 1975 and denominated "Beaver Creek South Subdivision #J 6" (Certificate of Survey #13 filed March 1, 1974).

It is further ordered that the intervenor cease and desist from further subdivision development upon the land (SE¼ Section 17, T 7 S, R 4 E, M.P.M.) embraced by said plat until the sanitary restrictions, now reimposed, are removed in accordance with Section 69-5003(1)(b) after the promulgation by The Department of Health and Environmental Sciences of the State of Montana of a detailed statement conforming with the requirements of The Montana Environmental Policy Act.

It is further ordered that a certified copy of this judgment be filed in the office of the Clerk and Recorder of Gallatin County, Montana.

Dated this 29th day of August, 1975.

GORDON R. BENNETT
District Judge

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SUPPLEMENTARY BRIEF OF AMICUS CURIAE
MONTANA ENVIRONMENTAL QUALITY COUNCIL

NO. 13179

IN THE SUPREME COURT

OF THE STATE OF MONTANA

THE MONTANA WILDERNESS ASSOCIATION, and GALLATIN SPORTSMEN'S ASSOCIATION, INC.,

Plaintiffs and respondents,

vs.

THE BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES OF THE STATE OF MONTANA; THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES OF THE STATE OF MONTANA,

Defendants and Appellants,

and

BEAVER CREEK SOUTH, INC., a corporation

Intervenor and Appellant.

SUPPLEMENTARY BRIEF OF AMICUS CURIAE, MONTANA ENVIRONMENTAL QUALITY COUNCIL

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Appealed from the
DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
In and For the County of Lewis and Clark

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INTRODUCTION

In their reply brief filed with this Court on March 3, 1976, the Defendent-Appellant Department of Health and Environmental Sciences Department raised a number of new statutory and constitutional issues with respect to the authority of the Montana Environmental Quality Council (EQC) to issue guidelines, and suggested that it would be a violation of the separation of powers doctrine for the Court to consider such guidelines. Because of the importance of the constitutional questions involved, and because we have had no opportunity to address these newly raised issues, the EQC submits this supplementary brief to demonstrate that the Montana Environmental Policy Act (MEPA), 69-6501 et seq, R.C.M. 1957, does provide sufficient authority for the issuance of guidelines, and that the only danger to the separation of powers lies in the Department's unfounded challenge to EQC's authority.

I. THE EQC'S GUIDELINES ARE ENTITLED TO GREAT WEIGHT IN THE COURTS'S CONSIDERATION

The Department, on pages 5 and 6 of their reply brief, characterise as "legal hocus pocus" the suggestion that this court may take into consideration the guidelines and opinions of the EQC, the agency of state government explicitly entrusted by the legislature with the duty to review and appraise executive agency compliance with the policies of MEPA. The EQC submits that it is for this Court, not the Department of Health, to determine whether a Legislative agency's opinions are relevant,

and what weight they should be given.

In similar situations, the Federal courts have consistently given weight to the guidelines of the President's Council on Environmental Quality, even though those guidelines, like the EQC's, lack the binding effect of law:

> When faced with the problem of statutory construction, this court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. * * * While CEQ is not strictly charged with administration of NEPA, it is charged with the duty of reviewing and appraising agency compliance with the statute, and so is entitled to deference. 42 USC 4344(3) This deference is heightened when, as here, the administrative interpretation is adopted soon after passage of the legislation. Sierra Club v. Morton, 514 F2d 856 (D.C.Cir. 1974), at 873, n. 24 (Emphasis supplied.)

The EQC has already described at considerable length the nature and origin of the guidelines and why we consider them relevant. (EQC Brief, p. 7 et seq.) It is not necessary to repeat those arguments at this point, except to remind the Court that the guidelines were not cut arbitrarily out of whole cloth by the Council. They are the result of a careful distillation of years of judicial and administrative experience on the state and federal levels, and reflect the judgment of the one agency responsible for oversight of MEPA implementation, as to the proper interpretation of the Act. We feel it is much more than "legal hocus pocus" to recommend for the Court's consideration the opinions of a co-equal branch of government.

II. MEPA PROVIDES AMPLE STATUTORY AUTHORITY FOR THE PROMULGATION OF GUIDELINES BY THE EQC.

The Department argues that the EQC has no authority, either express or implied, to issue guidelines of any kind. (Department's

Reply Brief, p. 6 et seq.) In attempting to make this argument, the Department first tells us that "administrative officers and agencies" have only such powers as are conferred on them by law, and then argues at length that the EQC is not an "agency" to begin with. The Department further confuses the issue by pointing out that the Montana Administrative Procedures Act (MAPA) (82-4201 et seq, R.C.M. 1947) does not apply to legislative agencies such as the EQC, and concludes from this that the EQC does not have the power to issue guidelines.

This "argument" is little more than a non sequitor. The MAPA does not confer rule-making authority on state agencies. On the contrary, it limits rule-making authority by imposing on agencies certain procedural requirements. As the Department points out, legislative agencies are exempt from those requirements. More to the point, the EQC has never attempted to promulgate rules or regulations which would have the binding effect of law. As will be explained below, the EQC guidelines perform an entirely different function. The Department's arguments based on the MAPA and the authority of administrative agencies are therefore completely irrelevant.

At page 6 of its reply brief, the Department quotes from Guillot v. The State Highway Commission, 102 Mont. 149, 154, 56 P.2d 1072:

> In addition to powers expressly conferred upon...(a public officer)...by law, an officer has by implication such powers as are necessary for the due and efficient exercise of those expressly granted, or such as may be fairly implied therefrom...

The Department continues with the quotation:

> "...(T)his court has rather narrowed this rule, by declaring that such agencies have only those implied powers which are 'indispensible' in order to carry out those expressly granted, and that, where there is a fair and reasonable doubt as to the existence of a particular power, it must be resolved against the existence of the power."

The Court should be aware, however, that the Department conveniently omitted the first clause of this sentence:

> "With reference to municipal corporations, this court has rather narrowed this rule..." 102 Mont. at 154 (Emphasis supplied.)

This limitation on the authority of municipal corporations has absolutely no bearing on the authority of an agency of the Legislature of the State of Montana. The following discussion will show that the EQC guidelines have been developed and used as a tool to facilitate "the due and efficient exercise" of expressly granted powers, and the authority to issue such guidelines may therefore be "fairly implied" from the language of MEPA.

A. THE GUIDELINES ARE A NECESSARY TOOL FOR THE EFFECTIVE PERFORMANCE OF EQC'S STATUTORY DUTIES

In 1971, the Legislature, in the Montana Environmental Policy Act (MEPA) 69-6501, et seq., R.C.M. 1947, declared it to be

> 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 (emphasis added)

to assure the preservation and enhancement of a wide range of environmental values. (69-6503(a) R.C.M. 1947) In addition to declaring that every person is "entitled to a healthful environment"

and noting that each person "has a responsibility to contribute to the preservation and enhancement of the environment," (69-6503 R.C.M. 1947) MEPA addresses itself specifically to the various state agencies, directing that

> to the fullest extent possible, (a) the policies, regulations, and laws of the state shall be interpreted and administered in accordance with the policies set forth in this act, and (b) all agencies of the state shall
> (1) utilize a systematic, interdisciplinary approach...in planning and decision making...
> (2) include in every recommendation or report on proposals for projects, programs, legislation and other major actions of state government significantly affecting the quality of the human environment, a detailed statement.... (69-6504) (emphasis added)

The preparation of these environmental impact statements (EISs) has become the most important practical procedure through which state agencies have responded to the responsibilities imposed upon them by MEPA. The language of MEPA makes clear that mechanical and superficial compliance with the policies and procedures set out in the act will not be sufficient. Agencies are required, "to the fullest extent possible," to make consideration of environmental factors an essential part of their programs and policies.

The legislature was not content to leave the adoption of MEPA's policies completely to the judgment of those agencies on whom the burden of implementation was to fall. Section 8 of MEPA created the Environmental Quality Council (EQC), a legislative agency, and entrusted to the executive staff of EQC the responsibility (inter alia)

> (b) to review and appraise the various programs and activities of the state agencies in the light of the policy set forth in section 3[69-6503] for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such

> policy, and to make recommendations to the governor and the legislative assembly with respect thereto...
>
> (c) to develop and recommend to the governor and the legislative assembly, state policies to foster and promote the improvement of environmental quality..
>
> (i) to review and evaluate operating programs in the environmental field in the several agencies to identify actual or potential conflicts, both among such activities, and with a general ecological perspective, and to suggest legislation to remedy such situations (69-6514 R.C.M. 1947) (emphasis added)

In addition, all state agencies were to submit to the EQC by July 1, 1972, their proposals for revising agency authority and policies to bring them into conformity with the requirements of MEPA (69-6505 R.C.M. 1947). Furthermore, all state agencies are required to submit copies of their Environmental Impact Statements (EISs) to the EQC for review. (69-6504(b)(3), R.C.M. 1947)

Thus, it is the responsibility of the EQC to review, appraise and evaluate agency programs and activities, to determine whether those programs and activities are in compliance with the policies of MEPA, and to identify conflicts among agency programs and with the ecological perspective of MEPA. Faced with these responsibilities, it was necessary for EQC to develop procedures to (1) keep tabs on environment-related activities of the various state agencies; (2) evaluate those activities to see if they comply with MEPA; (3) compare the activities of the various agencies with one another to detect any inconsistencies; (4) reach conclusions based on those observations; and (5) make recommendations to the governor and the legislature based on those conclusions.

Keeping tabs on agency actions is a voluminous but relatively straightforward undertaking. EQC developed many analytical and cataloguing devices to assist in this task. Evaluating and comparing agency activities and making recommendations based on these judgments required techniques of a different kind. In order to evaluate agency activity in light of MEPA's policies, it was necessary for EQC to interpret and construe ambiguous and vague portions of the statute. These interpretations could then be applied to agency action and the appraisals made. It is generally recognized that an agency charged with the administration of a statute may interpret and construe that statute in order to perform its functions:

> Where there is an ambiguity in the statute as to whether the latter does or does not cover a particular matter, a practical construction of the statute shown to have been the accepted construction of the agency charged with administering the matters in question under the statute will be one factor which the court may take into consideration as persuasive as to the meaning of the statute. E. C. Olsen Co. v. State Tax Commission, 109 Utah 563, 168 P2d. 324 (1946)

See also, Skidmore v. Swift & Co. 323 US 134 (1944). While these and other cases recognizing the validity of agency interpretation of statutes are concerned specifically with administrative or executive agencies, the reasoning applies with equal force to a legislative agency such as EQC. Regardless of the branch of government with which an agency is affiliated, when it is given the statutory responsibility to appraise and evaluate activities and to make recommendations based on those appraisals, interpretation of the statute by that agency is an essential and

unavoidable concomitant to the performance of its duties.

How, for example, can the EQC appraise agency compliance with the directive to prepare EISs on "proposals for projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment," (69-6504 (b)(3), R.C.M. 1947) without construing the meaning of such terms as "major actions," and "significantly affecting," or without making some judgment as to what constitutes an adequate Environmental Impact Statement? Such interpretations of the statute are necessary in order for the EQC to perform its statutory duties, and such interpretations have validity not because the EQC directly administers the statute, but because the interpretations are "based upon more specialized experience and broader investigations and information" than are available to other branches or agencies of the government. Skidmore v. Swift and Company, supra.

But if EQC is to evaluate agency programs as well as isolated activities, and if programs of various agencies are to be compared for consistency, EQC's evaluations must, themselves, be consistent. An ad hoc, case-by-case evaluation of agency actions would have been one approach to the problem, but the drawbacks to that approach are obvious. There would have been no guarantee of consistency or uniformity in the determinations made by EQC

An observation that an agency's actions "are contributing to the achievement of [the policies of MEPA]" in one instance, might have little useful relationship to a contrary observation of another agency's actions, or the actions of the same agency at another time.

The evaluation of programs over a period of time, the comparison of many diverse programs, and the process of basing recommendations on these evaluations and comparisons, made a structured, uniform appraisal system imperative.

The guidelines were developed as just such an appraisal system; a standard against which agency actions can be measured; a standard which represents EQC's interpretation of the intent of MEPA. Agency actions can be compared with the guidelines, and notice can be taken when agency procedures depart substantially from the procedures outlined by the guidelines. In this way, EQC's evaluations of agency performance are uniform and self-consistent. A meaningful collection of observations can be accumulated which are relevant to a wide range of agency programs and activities because the same criteria were applied uniformly throughout. Recommendations to the governor and the legislature for program revisions and legislation are then firmly based on that collection of observations.

In this way, the guidelines assist EQC in monitoring, reviewing and evaluating agency activity, detecting inconsistencies and deficiencies in agency compliance with MEPA, and providing the basis for recommendations to the legislature and the governor, all of which functions are explicity mandated by MEPA. The job could possibly have been done without guidelines, but not nearly as efficiently, as systematically, as consistently, or as impartially. An agency of the legislature is entitled to use any reasonable device not inconsistent with its statutory mandate in the performance of its assigned duties. "The grant of an express power is

always attended by the incidental authority fairly and reasonably necessary or appropriate to make it effective." Cammarata v. Essex County Park Commission, 140 A2d 397 (N.J., 1958). See also Warren v. Marion County 353 P2d 257 (Ore., 1960). The Environmental Quality Council believes that promulgation of guidelines is a reasonable and effective device for monitoring, appraising and collecting information and is therefore well within the proper scope of EQC's authority.

Furthermore, the legislature agrees with this assessment and has explicitly approved the device of guidelines. House Joint Resolution 0073 passed by the legislature in 1974, declares that,

> WHEREAS, the Montana Environmental Policy Act and the guidelines adopted pursuant to that act by the state Environmental Quality Council define human environment to include social, economic and cultural factors as well as aesthetic and environmental factors; and
>
> WHEREAS, the act and guidelines further require a rigorous consideration of all alternative actions and the full range of their economic and environmental costs and benefits;...
>
> NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:
>
> That all agencies of state government are hereby directed to achieve forthwith the full implementation of the Montana Environmental Policy Act including the economic analysis requirements of sections 69-6504 through 69-6514 and guidelines for fully integrated environmental and economic analysis of major actions with significant effects on the human environment;... (emphasis added)

Thus the legislature of the state of Montana has not only recognized and accepted the practice of promulgation of guidelines

by EQC, it has also declared them to be, in at least one respect, an accurate representation of the legislative intent of MEPA. This Court has held that such legislative constructions of a statute, while not conclusive, are entitled to respectful consideration. State v. Erickson, 75 Mont. 429, 244 P. 287; State v. Toomey, 135 Mont. 35, 335 P.2d 1051.

The EQC submits, therefore, that the utilization of all reasonable techniques, such as guidelines, for the performance of its statutory duties is sufficiently authorized by the language of MEPA itself, and by subsequent legislative approval.

III. IT IS PROPER FOR THE COURT TO CONSIDER EQC OPINIONS IN CONSTRUING MEPA, AND IT IS NOT A VIOLATION OF SEPARATION OF POWERS FOR THE COURT TO DO SO.

The Department has put forth the rather incredible argument that it would be a violation of the doctrine of separation of powers for the Court to consider EQC's guidelines in evaluating agency compliance with MEPA. (Department's Reply Brief, p. 11 et seq.) In other words, according to the Department, it is appropriate for the EQC to evaluate agency activity and make recommendations based on those evaluations, but it is an unconstitutional interference with the executive branch to suggest that anyone should pay attention to those recommendations! This argument is patently absurd, but the seriousness of the constitutional issues presented requires a careful response.

It is the EQC's position, as set forth in the preceding arguments, that the promulgation of guidelines as a device for evaluating agency activity is well within the scope of EQC's

statutory authority. The question remains, whether guidelines promulgated by a legislative agency which set forth that agency's interpretation of its authorizing statute, and which indicate that agency's judgment as to what is required of executive and administrative agencies under that statute, but which are not directly enforceable by that agency, constitute a violation of separation of powers. The contention that such a violation has occurred might be made on one of three grounds: (1) Promulgation of guidelines for the administration of a statute is an executive-type activity, and cannot be performed by a legislative agency; (2) Promulgation of guidelines by a legislative agency which propose standards of performance for executive agencies is an undue interference with the executive branch; or (3) Promulgation of guidelines by a legislative agency rather than by the entire legislature is an improper delegation of the legislative power. The EQC contends, and the following discussion will show, that, in the present situation, none of these arguments has merit.

A. Promulgation of Guidelines is a Proper Legislative Action.

The doctrine of separation of powers in the American form of government declares that governmental powers are divided among the three branches of government, and broadly operates to confine legislative powers to the legislature, executive powers to the executive, and judicial powers to the judiciary, and precludes one branch of government from exercising or invading the power of others. (See 1 Am.Jur.2d; Administrative Law § 76, and cases cited.)

The doctrine is implied in the U.S. Constitution, but is made explicit in Article III of Montana's Constitution:

> Section 1. Separation of Powers. The power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly, directly or permitted.

While this provision leaves many questions unanswered (i.e., what powers "properly belong" to the legislative, executive, or judicial branch) it does express a conviction about the manner in which powers may be allocated among the agencies of government. But the distinction between the nature of the power exercised, and the methods utilized in the exercise of those powers, must be made clear. The doctrine of separation of powers does not mean an entire and complete separation of all duties and functions into three distinct categories. Such a rigid classification scheme would be impossible in modern government, even if it were desirable.

In State v. Aronson, 132 Mont. 120, 314 P2d 849 (1957), which has been cited as one of the leading Montana cases on separation of powers, the Supreme Court acknowledged this distinction between powers and methods. Discussing the duties of a legislative committee, the Court stated:

> In the present instance, it is urged that certain of the duties performed by the commission are executive in nature and it is therefore argued that the doctrine of separation of powers prevents the exercise of such functions by members of the legislative branch of government. If the duties were

> classified as legislative in nature, it is apparent that the same doctrine would prevent the exercise of such functions by the executive members of the commission.

The Court resolved this dilemma by recognizing that separation of powers is not intended to impose such arbitrary classifications on the activities of government officials:

> The separation of powers doctrine does not require that we classify these incidental governmental duties, and that we thereafter limit such activity to the particular branch of government first selected. Such subsidiary duties may properly be performed by a variety of governmental agencies.

The Aronson opinion borrowed extensively from a leading California case Parker v. Riley 18 Cal 2d 83, 113 P2d 873, in which the California court considered the constitutionality of a legislative commission which was directed by statute to consult with other government agencies and make recommendations to the legislature. In order to perform these functions, the commission engaged in investigatory fact-finding activities, which were challenged as being executive in nature. The court was clear on this point:

> The doctrine [of separation of powers] has not been interpreted as requiring the rigid classification of all the incidental activities of government, with the result that once a technique or method of procedure is associated with a particular branch of government, it can never be used thereafter by another.

The most recent discussion of separation of powers by this Court is found in State ex rel Judge v. Legislative Finance Committee, 543 P2d 1317, 1321:

> In theory, this section (Section 1, Article IV, 1889 Montana Constitution, almost identical to Section 1,

> Article III, 1972 Montana Constitution * * * effects an absolute separation of the three departments of our government, 'but, while such is the theory of American constitutional government, it is no longer an accepted canon among political scientists; it has never been entirely true in practice.' 12 C.J. 803; Cooley on Constitutional Law, 44; Story on Constitution of the United States, 525.
> * * * That section 1, article 4, does not wholly prevent the exercise of functions of a nature belonging to one department by those administering the affairs of another is recognized in State ex rel Hillis v. Sullivan, 137 P. 392, 48 Mont. 320, wherein Mr. Justice Sanner, speaking for this court, said: 'The separation of the government into three great departments does not mean that there shall be "no common link of connection, or dependence, the one upon the other in the slightest degree" (1 Story's Commentaries on the Constitution, § 525); it means that the powers properly belonging to one department shall not be exercised by either of the others. Constitution art. 4 § 1. There is no such thing as absolute independence.' He then cites numerous instances of the exercise of powers by one department which, from their nature, would seem to belong to another, but which are incidents to the proper discharge of the powers vesting in the department exercising them, or are reposed in the particular department as a matter of convenience in governmental affairs." (Emphasis Supplied)

Thus, this Court has made it abundantly clear that the doctrine of separation of powers is not meant to impose a rigid system of classification on the activities of government agencies. Indeed, a strict application of the separation of powers doctrine as a classification system would make it impossible for many of the administrative and quasi-judicial agencies of state government to carry out their activities. Every time the Board of Health and Environmental Sciences adopts regulations, it is engaged, essentially, in a legislative-type activity. Every time the Board hears a contested case and adjudicates the rights of a petitioner, it is engaged in judicial activity. But we do not hear the Department challenging

these activities as violations of separation of powers.

The crucial factor, then, is not the character of the method or technique utilized by an agency in performing its duties, but rather the nature of the power which gives rise to those duties. If the fundamental purpose and function of an agency is legislative, it may use any reasonable techniques to achieve that purpose, regardless of the characterization of those techniques.

> [T]o the extent such [an agency] exercises any executive function, as distinguished from executive power in the constitutional sense, it does so in the discharge and effectuation of its quasi-legislative... powers, or as an agency of the legislative...department of the government. (emphasis added)
> I.C.C. v. Chatsworth Cooperative Marketing Association 347 F2d 821, 822 (7th Cir., 1965)

The purposes of the EQC, as set out in MEPA, are investigation, consultation, evaluation, and recommendation. The Montana Supreme Court recognizes these as properly legislative in nature:

> ...where the responsibilities imposed are merely those of gathering information and making recommendations, we think the duties must be considered incidental to the lawmaking function. State v. Aronson, 132 Mont. 120, 314 P2d 849 (1957) (emphasis added)

The court continues:

> The duties imposed on the commission...are those of investigation and consultation. The statutory plan culminated in recommendations or proposals made by the commission from time to time. Such activity insofar as it requires classification, may properly be described as the performance of duties which are incidental and ancillary to the ultimate performance of law-making functions by the legislature itself. (emphasis added)

Thus the EQC's objectives are clearly legislative in nature. More to the point, its techniques are also legislative in character.

Nowhere in the Aronson opinion does the court indicate, specifically, what sorts of techniques would be improper for a legislative agency to utilize. Indeed the court acknowledges that,

> intelligent legislation upon the complicated problems of modern society is impossible in the absence of accurate information on the part of the legislators, and any reasonable procedure for securing such information is proper. (emphasis added)

Consider some of the activities which have been judged improper for a legislative agency: exercising the voting power of government-owned stock (Springer v. Philippine Islands, 277 US 189 (1928)); making specific allocations of funds to other agencies (People v. Tremaine, 252 NY 27, 169 NE 817 (1929); Opinion of the Justices, 302 Mass 605, 19 NE 2d 809 (1939)); prosecuting or defending causes of action (Stockman v. Leddy, 55 Colo. 24, 192 P. 220 (1912)). These activities are clearly executive in nature, and have little or no connection to the legislative function of making laws and policies. In contrast, the promulgation of guidelines for the purpose of evaluation, monitoring, interpretation of legislative intent, and making recommendations to the governor and the legislature is intimately related to the legislative process.

Promulgation of guidelines, while traditionally associated with executive and administrative agencies, is essentially a legislative activity. As expressed by Justice Holmes in Prentiss v. Atlantic Coast Line Company, 211 US 210,

> Legislation...looks to the future and changes existing conditions by making a new rule to be applied hereafter to all or some part of those subject to its power.

Promulgation of guidelines which establish standards to be applied to future situations, then, is essentially a legislative function. This function is often delegated by the legislature, within limits, to executive agencies, but that in no way makes such activity an executive prerogative. If the authority to promulgate regulations which have the binding effect of law can be delegated to an executive agency, the authority to issue guidelines which have no such binding effect can certainly be reposed in an agency of the legislature.

It is therefore the contention of the EQC that the Council's purposes are legislative in nature, that the device of the guidelines is essentially a legislative-type technique, and that, in any event, all reasonable and proper techniques may be used by the Council in performing its statutory duties, and that promulgation of guidelines is such a reasonable and proper technique. The doctrine of separation of powers is therefore not violated because of a legislative agency exercising executive powers.

B. Promulgation of Guidelines by the EQC is not an Improper Interference with the Executive Branch.

A second facet of the separation of powers doctrine is involved in the second possible argument, that promulgation of guidelines by EQC is an unconstitutional interference with the executive branch. The Department's argument proceeds something like this: Even though the EQC guidelines are not directly enforceable by EQC, and the Council makes no attempt to enforce them (indeed the Council has no enforcement machinery to carry out such an attempt), the guidelines are put forth by the Council as embodying the procedural and substantive

requirements imposed on executive agencies by MEPA. This judgment by the Council is then adopted by others (for example, citizen groups challenging agency actions in the courts for lack of compliance with MEPA) and the courts are (or may be) persuaded to apply the guidelines to those executive actions. Thus, in order to avoid litigation, executive agencies are (or may be) required to comply with the guidelines. This is deemed, so the argument goes, an improper interference with the executive branch.

As a foundation for this argument, the doctrine of separation of powers is conceived as calling for the independence of each branch of government from the others. While it is true, of course, that part of the meaning of separation of powers is that each branch should be free of undue interference from the other branches, the three branches are more properly described as coordinate or co-equal, than as independent. Indeed, the constitution specifically requires that each branch participate to some degree in the activities of the others. The governor must sign all bills before they become law, and he therefore is part of the legislative process. His pardon power involves him in the judicial process. The legislature's power of impeachment, and the senate's obligation to consent to executive appointments gives the legislative branch influence over the executive and the judiciary. And the courts, with their ultimate power of judicial review, exercise an important check on the activities of the other two branches. Separation of powers does not mean that the three branches should be totally immune from the influence of the other two, but rather that each should be independent enough, and

vital enough, to exert on the other branches those checks and balances envisioned by the framers of the constitution as being the true safeguards against dangerous concentration of power in any one branch. "It is in such checks upon powers, rather than in the classification of powers, that our governmental system finds equilibrium." R. W. Ginnane, The Control of Federal Administration by Congressional Resolutions and Committees, 66 Harvard Law Review 569 (1953).

1. The Legislature's Powers Are Broader Than the Executive's.

There is a natural and healthy tension, therefore, between each branch's desire for independence, and the need for checks and balances. The legislature, however, to a greater extent than the other branches of government, is entitled to freedom and flexibility in performing its functions. It has been said that,

> the executive power is more limited [than legislative powers]: it merely extends to details of carrying into effect the laws enacted by the legislature, as they may be interpreted by the courts. Except where limited by the constitution itself, the legislature may stipulate what action the executive officers shall or shall not perform. State v. Huber, 129 W. Va. 198, 40 SE 2d 11, 18.

The reason that the legislature's powers are broader than the executive's, is that "a state legislature is not acting under ennumerated or granted powers, but rather under inherent powers, restricted only by the provisions of the constitution." State v. Camp Sing, 18 Mont. 128, 44 P 516, 517. See also, State ex rel Du Fresue v. Leslie, 100 Mont. 449, 50 P2d 959.

In Du Fresue v. Leslie, supra, the Montana Supreme Court acknowledged emphatically the broad powers of the legislature.

> The authority of the legislature, otherwise plenary, will not be held circumscribed by implication; but one who seeks to limit it must be able to point out the particular provisions of the Constitution which contains the limitation in clear terms. (Quoting from State ex rel Evans v. Steward, 53 Mont. 18, 161 P 309).
>
> In other words, the legislature, representing the sovereign power of the state, may exercise such power to any extent it may choose, except to the extent it is restrained by the State or Federal Constitutions (50 P2d at 961-2).

2. The Legislature Has the Reponsibility to Oversee Executive Agency Performance to Assure That the Legislative Intent is Adhered To.

The legislature, then, has wide latitude in the exercise of its powers. Moreover, it is the legislature's responsibility to assure that that power is wisely exercised. "One of the fundamental concepts of our form of government is that the legislature, as representative of the people, will maintain a degree of supervision over the administration of governmental affairs." (Gellhorn and Byse, Administrative Law, 82) Executive and administrative agencies do not have a completely free hand in making policy. They are subject to legislative supervision to insure that executive and administrative actions may accurately reflect legislative intent. This is recognized on the Federal level:

> For there to be truly effective checks upon administrative action, the courts must be supplemented by congressional oversight. The Congress is the one great organ of American government that is both responsible to the electorate and independent of the Executive. As the source of delegations of administrative power, it must also exercise direct responsibility over the manner in which such power is employed. (B. Schwartz, An Introduction to American Administrative Law, 70).

The Montana Supreme Court has recognized the same principle on the state level:

> When the legislature confers authority on an administrative agency, it must lay down the policy or reasons behind the statute, and also prescribe standards and guides for the grant of power which has been made...the legislature must set limits on such agency's power and enjoin on it a certain course of procedure and rules of decision in the performance of its function. (Bacus v. Lake County, 138 Mont. 69, 354 P2d 1056, 1061 (1960))

All such powers conferred upon administrative and executive agencies by the legislature must be carefully circumscribed.

> "If the legislature fails to prescribe with reasonable clarity the limits of power delegated to an administrative agency, or if those limits are too broad, its attempt to delegate is a nullity." Montana Milk Control Board v. Rehberg, 141 Mont. 149, 161, 376 P2d 508

3. The Legislature May Utilize a Wide Variety of Instrumentalities to Oversee Executive Activity.

Thus, the legislature, in the exercise of its broad law-making powers, has a responsibility to assure that its policies are adhered to by the executive branch. The legislature has a wide range of options to choose from in performing its oversight responsibilities.

> Where the legislature has authority to provide a governmental regulation and...the nature of the regulation does not require that it be afforded by direct legislative act, such regulation may be provided either directly by the legislature, or indirectly by the legislative use of any appropriate instrumentality where no provision or principle of organic law is thereby violated (emphasis added) Jacksonville v. Bowden, 67 Fla 181, 64 So. 769, 774 (1914).

Legislatures have made use of many "instrumentalities" to keep tabs on executive actions. An obvious one is control of appropriations. Legislative approval of agency performance is tacitly extended or withdrawn depending on the size of the budget

granted to the agency. In addition, amendatory legislation may revise an agency's duties or powers. In Montana, as in may other states, the legislature has ultimate approval authority over all rules and regulations promulgated by administrative agencies, and may, by joint resolution, direct agencies to adopt or amend rules. (82-4203.1, R.C.M. 1947)

A device which Congress has used with some success on the federal level is the establishment of standing or watchdog committees to oversee executive performance in specialized fields. Standing committees have been charged by law with responsibility for exercising "continuous watchfulness" of administrative agencies' execution of their assigned duties. (Section 136 of the Legislation Reorganization Act of 1946 (60 Stat 831)) Special watchdog committees have been established on several occasions to maintain contact with particular agencies. The first such was the Joint Committee on Atomic Energy, established by the Atomic Energy Act of 1946. the JCAE was given jurisdiction over all legislative proposals touching on atomic energy, and was instructed to maintain a constant study of what the Atomic Energy Commission was doing. Another example was the joint watchdog committee established by the Defense Production Act of 1950 (64 Stat 798; 50 USC app. 2061). The following discussion of the functions of that committee (G.J. Maurer, Congressional Oversight of Defense Production, 21 Geo. Wash. L. Rev. 26 (1952)) provides some interesting comparisons with the operations of the EQC.

In an effort to keep abreast of the departmental

> functions under the Act, the committee held 17 sessions of hearings...,and in addition, it requested periodic reports from the agencies and regular departments.... These reports and copies of regulations and press releases were continously surveyed by the committee staff. The result has been that many orders which might have produced inequities and undue hardships were obviated before publication, or were rescinded before any serious damage could be done to the national economy. The committee held frequent across-the-table conferences with officials in charge of controls to keep the Congress and the public informed of developments, to assure compliance with the Congressional intent, and to avoid pitfalls in rules and regulations....
>
> [T]he staff has had frequent conferences with officials in charge of writing and enforcing regulations and disposing of individual cases. In a great many of these instances, regulations were amended as a consequence of the staff discussions. Another feature of this single watchdog committee,...has been to give the administrative agencies a constant and receptive forum where problems and agency requirements could be heard and discussed within the committee or with staff experts. (p. 34-5)

Although the EQC does not claim to be a "watchdog committee" of the type described above, it is instructive to note that a process of consultation, recommendation and communication between executive and legislative branch agencies does have a proper and productive role to play within the limits of the separation of powers doctrine. A legislative committee such as EQC may consult with executive agencies and make recommendations with respect to proposed regulations, procedures or actions in order "to insure compliance with [legislative] intent;" and such recommendations may often lead to revisions of those proposals; yet "undue interference" with the executive branch does not necessarily follow. The EQC's hopes are that the promulgation of its guidelines will facilitate the appropriate level of consultation and communication

among the branches of government.

4. Summary.

The foregoing discussion has established, then, that the doctrine of separation of powers encourages not simply the independence of one branch of government from another, but rather controlled independence within a system of checks and balances; that the legislature possesses particularly broad powers, and is entrusted with an equally broad responsibility to oversee executive activities to insure that legislative intent is adhered to; that the legislature has a high degree of flexibility in developing methods and instrumentalities for the exercise of its powers and the supervision of executive performance.

In this context, let us consider the present situation. Administrative and executive agencies are, with few exceptions, creatures of statute. They are created by the legislature, their duties and functions are defined by the legislature, and the power to perform those functions is granted by the legislature. MEPA in particular imposes on state agencies the responsibility to develop methods and procedures which will contribute to the achievement of the goals and policies of the Act. MEPA also established a legislative agency, the Environmental Quality Council, to review and evaluate executive performance and to make recommendations based on these evaluations. Though an agency of this sort is relatively uncommon in state government, there should be no doubt that it is a legitimate instrumentality devised by the legislature to keep tabs on executive performance. The legislature's responsibility to the people to see that legislative intent is implemented allows no less.

The EQC in no way means to imply that, absent EQC guidelines, there would be an unconstitutional delegation of authority to the executive branch without sufficient standards. The above discussion is simply meant to indicate that, in considering separation of powers issues with respect to legislative control of executive agencies, the danger is generally conceived to be too little supervision by the legislature, rather than too much. In other words, the presumption is in favor of legislative supervision, and, in light of the broad flexibility of the legislative process, that supervision may legitimately take many forms.

If the EQC's opinions and recommendations, issued pursuant to the directives of MEPA, are at times in conflict with executive attitudes, this airing of differences is exactly the sort of communication between governmental agencies which the doctrine of checks and balances requires.

In State ex rel Judge v. Legislative Finance Committee, supra, at p. 1322 this Court quoted Mr. Justice Brandeis in Meyers v. U.S., 272 U.S.52:

> The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy. (Emphasis supplied)

To assert that opinions issued by the legislature or one of its agencies constitute undue interference with the executive branch and a violation of separation of powers, is to assert that the executive branch ought to be completely free and independent of

legislative control. To assert that a court's giving weight to EQC opinions in judging agency compliance with MEPA constitutes undue interference with the executive branch is to call into question the very function of the judiciary, whose responsibility is to act as a check on both the executive and the legislative branches. EQC recommendations, are, after all, based on the belief that the guidelines represent procedures necessary for compliance with MEPA. It is hardly undue interference for a legislative agency to recommend that an executive agency comply with the law, or to express this opinion to the courts.

Such contentions are foreign to our system of government and tend dangerously towards an improper concentration of power in the executive branch. We do not mean to impute any improper motives to those who, through honest concern for the efficient operation of state government, have raised these issues. Nevertheless, it requires a much more direct interference with the operations of the executive branch than the promulgation of guidelines and the issuance of recommendations and reports, to justify a finding that legislative monitoring, through the agency of the Environmental Quality Council, is an unconstitutional violation of separation of powers.

C. Granting Authority to the EQC to Promulgate Guidelines is not An Improper Delegation of Legislative Power.

The final ground on which the Department's argument might be supported is that if, as the EQC contends, MEPA authorizes the promulgation of guidelines, such authorization is an improper

delegation of the legislative power. "The Legislature may not delegate a power to an interim committee which is '... properly exercisable only by either the entire legislature or an executive officer or agency...'" (Department's Reply Brief, p. 13-14; quoting from State ex rel Judge v. Legislative Finance Committee, supra, at 8.) This argument might carry some weight if the EQC claimed for its guidelines the binding effect of statutes or regulations, or attempted to enforce them as such. This is simply not the case.

As pointed out earlier, the guidelines were developed as a device to evaluate agency activity in light of the policies and requirements of MEPA. Typically, an agency action will be reviewed by the EQC staff, the extent of compliance with the guidelines is determined, and appropriate comments are made to the agency. In this way, the guidelines not only make uniform and systematic judgments possible for the EQC staff, but they also provide assistance to the agencies in reshaping their procedures. Since the guidelines represent EQC's judgment as to minimum requirements for compliance with MEPA, it is natural for EQC to encourage agencies to follow the guidelines.

In the course of commenting on EISs prepared by state agencies, the EQC staff has pointed out to agencies those portions of their EISs which in the judgment of the staff have failed to comply both procedurally and substantively with MEPA and the standards outlined in the guidelines. On several occasions, the EQC staff has recommended that deficient parts of the state agency EIS be redone. Likewise, the EQC has on occasion suggested that because of serious

deficiencies entire EISs be redone. However, in its interaction with the state agencies, the EQC staff has never taken the position that with respect to EIS deficiencies it had the authority to enforce its recommendations.

Several state agencies have expressed concern that the use of mandatory language in the guidelines is meant to imply that EQC has enforcement authority. This is not the case. Mandatory language is used in order to express in the strongest possible terms EQC's belief that compliance with the procedural and substantive policies of MEPA requires adherence to the procedures and interpretations set out in the guidelines. The guidelines do not say, "An agency must do X in order to be permitted to carry on its activities." Rather, the guidelines say, "An agency must do X, in the judgment of the EQC, in order for its actions to be in compliance with MEPA."

The guidelines represent, in other words, EQC's interpretation of the legislative intent behind MEPA. The guidelines have been developed in such a way that when they are followed, MEPA is almost certainly satisfied (at least procedurally). But when agency action departs substantially from the guidelines, compliance with MEPA, in EQC's judgment, is doubtful. The guidelines, then, are a device for appraising agency compliance with MEPA. An agency action which departs substantially from the guidelines has been appraised and found lacking.

The Department seems to be unable to understand that advisory guidelines which represent the best judgment of the agency entrusted

by law with the responsibility to oversee compliance with MEPA, are entitled to careful consideration by both the executive and judicial branches of government, even though they do not have the binding effect of statutes or regulations. Ultimately, of course, it is for the Courts to give the final and authoritative interpretation to statutes, and to determine the constitutionality of government activity. But the EQC believes that the Courts are entitled to consider all relevant evidence and opinions in making those determinations. The EQC also believes that the Council's opinions are entitled to special consideration because of its specific responsibility to monitor compliance with MEPA. If an agency's actions depart substantially from the requirements of the EQC guidelines, that agency should bear the burden of showing that it has not violated MEPA.

CONCLUSION

For the reasons given above, the EQC prays the Court to find that the Montana Environmental Quality Council is authorized by MEPA to issue guidelines, that such guidelines do not constitute a violation of the doctrine of separation of powers, and that the guidelines are entitled to great weight in the Court's deliberations in determining agency compliance with the Montana Environmental Policy Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, STEVEN J. PERLMUTTER, attorney for amicus curiae Montana Environmental Quality Council, hereby certify that on the _____ day of _____ 1976, I served true and correct copies of the foregoing SUPPLEMENTARY BRIEF OF AMICUS CURIAE upon the attorneys named below by depositing the same in the United States mails, postage prepaid, and securely sealed in envelopes addresses to them at their following last-know addresses, respectively:

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DECISION

No. 13179

IN THE SUPREME COURT OF THE STATE OF MONTANA

1976

THE MONTANA WILDERNESS ASSOCIATION, and
GALLATIN SPORTMEN'S ASSOCIATION, INC.,

Plaintiffs and Respondents,

-vs-

THE BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES
OF THE STATE OF MONTANA; THE DEPARTMENT OF HEALTH
AND ENVIRONMENTAL SCIENCES OF THE STATE OF MONTANA,

Defendants and Appellants,

-and-

BEAVER CREEK SOUTH, INC., a corporation,

Intervenor and Appellant.

Appeal from: District Court of the First Judicial District,
Honorable Gordon R. Bennett, Judge presiding.

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Thomas J. Kearney
Clerk

1st Decision

Mr. Justice Frank I. Haswell delivered the Opinion of the Court.

This is an action by the Montana Wilderness Association and the Gallatin Sportsmen's Association, Inc., for declaratory and injunctive relief against a proposed subdivision development in Gallatin County known as Beaver Creek South. The district court of Lewis and Clark County entered summary judgment (1) that the environmental impact statement on the proposed subdivision was void, (2)ordering reinstatement of the prior sanitary restrictions on the proposed subdivision, and (3) enjoining further development of the proposed subdivision until the reimposed sanitary restrictions are legally removed. One of the defendants and intervenor appeal.

Plaintiffs in the district court were the Montana Wilderness Association, a Montana nonprofit corporation dedicated to the promotion of wilderness areas and aiding environmental causes generally, and Gallatin Sportsmen's Association, Inc., a Montana nonprofit corporation organized for charitable, educational and scientific purposes including the conservation of wildlife, wildlife habitat and other natural resources.

Defendants are (1) the Board of Health and Environmental Sciences and, (2) the Department of Health and Environmental Sciences of the State of Montana. Intervenor Beaver Creek South, Inc. is a Montana corporation and the developer of the proposed subdivision. The Montana Environmental Quality Council, a statutory state agency, appeared in the district court as amicus curiae.

Beaver Creek South is located in the canyon of the West Gallatin River adjacent to U.S. Highway 191 about seven miles south of Meadow Village of Big Sky of Montana. Beaver Creek crosses a portion of the property for about one-quarter mile along the north

side. The general area where the proposed subdivision is located is a scenic mountain canyon area presently utilized as a wildlife habitat and a grazing area for livestock. Beaver Creek supports a salmonoid fishery. A two lane public highway, U.S. 191, runs through the canyon.

The developer Beaver Creek South, Inc., hereinafter called Beaver Creek, intends to subdivide approximately 95 acres into 75 lots for single-family and multi-family residences and a maximum of seven and one-half acres abutting U.S. Highway 191, for a neighborhood commercial area. The development of the subdivision is to be accomplished in two phases.

In 1973 Beaver Creek submitted to the Bozeman City-County Planning Board its subdivision plat contemplating Beaver Creek South for approval by the board and the county commissioners as required by sections 11-3859 through 11-3876, R.C.M. 1947, the Montana Subdivision and Platting Act. In the spring of 1974 Beaver Creek filed the subdivision plat and plans and specifications for a water supply and sewer system with the Montana Department of Health and Environmental Sciences (hereinafter called the Department) for review and approval as required by sections 69-5001 through 69-5009, R.C.M. 1947, the Sanitation in Subdivisions Act. Section 69-5003 (2)(b) provides that a subdivision plat may not be filed with the county clerk and recorder until the Department has certified "that it has approved the plat and plans and specifications and the subdivision is subject to no sanitary restriction".

In April 1974 the Department circulated a "draft" environmental impact statement on the proposed subdivision in order to obtain comments on the proposal pursuant to section 69-6504(b)(3),

R.C.M. 1947, of the Montana Environmental Policy Act (MEPA). Written comments were received and the Department issued its "final" environmental impact statement in June 1974. The following month plaintiff Associations commenced this action seeking a permanent injunction against the Department's removal of sanitary restrictions on the proposed Beaver Creek South. The Associations alleged failure of compliance with subdivision laws, administrative rules, Environmental Quality Council guidelines, and MEPA. The district court issued a temporary restraining order and an order to show cause. The Department and the Associations entered into a stipulation vacating the show cause hearing and the Department revised its final environmental impact statement, submitting a copy to the district court in October 1974. This revised final environmental impact statement is hereinafter called the Revised EIS.

Meanwhile, in September 1974, Beaver Creek was granted leave to intervene. Motions to dismiss and briefs were filed, and on February 11, 1975, the district court ordered the temporary restraining order be dissolved, and the Associations be given an opportunity to file an amended complaint seeking a declaratory judgment on any impact statement other than the one filed in June 1974. In its memorandum and order, the district court found the Associations had standing to sue a state agency, but the Department must be given an opportunity to exercise its discretion and that an injunction would lie "only after the Department has acted unlawfully".

On February 14, 1975 the Department conditionally removed the sanitary restrictions on Beaver Creek South.

On February 21, 1975, plaintiffs filed their second amended complaint seeking: (1) declaratory judgment that the Revised EIS of the Department was inadequate in law; (2) a permanent injunction

prohibiting Beaver Creek from selling any of the lots or further developing Beaver Creek South until compliance with the laws of Montana was effected; and (3) a mandatory injunction ordering the Department to reimpose sanitary restrictions on Beaver Creek South.

The focus of the second amended complaint is that the Revised EIS does not comply with legal requirements of MEPA in these particulars:

(1) The Revised EIS does not disclose that the Department used to the fullest extent possible a systematic, interdisciplinary approach as required by section 69-6504(b)(1), R.C.M. 1947.

(2) The Revised EIS does not include a detailed statement of alternatives to the proposed action nor were such alternatives studied, developed or described to the fullest extent possible as required by section 69-6504(b)(3)(iii) and 69-6504(b)(4), R.C.M. 1947.

(3) The Revised EIS does not contain a detailed statement of the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity as required by section 69-6504(b)(3)(iv), R.C.M. 1947.

(4) The Revised EIS does not include to the fullest extent possible a detailed statement of the environmental impact of the proposed subdivision as required by section 69-6504(b)(3)(i), R.C.M. 1947.

(5) The Revised EIS contains no adequate consideration of the full range of the economic and environmental costs and benefits of the alternative actions available.

Defendants and intervenor filed motions to dismiss the second amended complaint. This complaint was further amended; the Environmental Quality Council was granted leave to file a brief as amicus

curiae; briefs were filed by all parties; and the matter was submitted to the district court for decision.

The district court considered the motions to dismiss as motions for summary judgment under Rule 12(b)(6), M.R.Civ.P. and considered matters outside the pleadings, principally interrogatories and answers.

On August 29, 1975 the district court issued its opinion and declaratory judgment. In substance the district court held the plaintiffs have standing to prosecute this action, that the Revised EIS does not meet statutory requirements in various particulars, and plaintiffs are entitled to injunctive relief. Judgment was entered accordingly.

Defendant Department of Health and Environmental Sciences and intervenor Beaver Creek South, Inc. appeal from the judgment.

The issues can be summarized in this fashion:

1) Do plaintiff Associations have standing to maintain this action?

2) Does the Revised EIS satisfy the procedural requirements of the Montana Environmental Policy Act (MEPA)?

3) Are plaintiff Associations entitled to injunctive relief?

Appellants challenge the standing of the Associations to bring this suit. Appellants' arguments fall into three main categories: a) that the Associations have suffered no cognizable injury; b) that any injury suffered or threatened is indistinguishable from the injury to the public generally; and c) that neither MEPA, the Montana Administrative Procedure Act, nor any other statute grants standing to these Associations to sue agencies of the state.

Initially, the question of environmental standing under MEPA is one of first impression in Montana. Therefore, the Associations

and amicus curiae have presented this Court with numerous authorities from other jurisdictions on the issue of environmental standing. We have reviewed these authorities in detail. We find none are controlling as to the question before us, but a brief review of such authorities aids in the illumination of the determinative factors regarding this issue.

The Associations urge this Court to adopt the rationale of the federal courts in finding environmental standing because the relevant portions of MEPA in issue here are patterned virtually verbatim after corresponding portions of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 through 4347, (NEPA).

In the federal courts, citizen challenges to alleged illegal agency action are often brought pursuant to the federal Administrative Procedure Act, 5 U.S.C. §§ 701 through 706. The companion cases of Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L ed 2d 184,188; and Barlow v. Collins, 397 U.S. 159, 90 S.Ct. 832, 25 L ed 2d 192 (1970), established the federal two-pronged test for standing to sue administrative agencies. The United States Supreme Court held that persons have standing to obtain judicial review of federal agency action under the federal Administrative Procedure Act where they allege that the challenged action causes them injury in fact and where the alleged injury is to an interest "arguably within the zone of interests to be protected or regulated" by the statutes that the agencies are claimed to have violated.

Data Processing and Barlow did not concern environmental matters, but such a case was presented in Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L ed 2d 636, 641, (1972). In Sierra Club,

a conservation organization alleged its "special interest" in conservation and sound management of public lands, and sued the Secretary of the Interior for declaratory and injunctive relief against the granting of approval or issuance of permits for commercial exploitation of a national game refuge area in California. Petitioner invoked the judicial review provisions of the federal Administrative Procedure Act. The Supreme Court commenced its discussion of standing with this statement:

> "* * * Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' Baker v. Carr, 369 U.S. 186, 204, 7 L ed 2d 663, 678, 82 S.Ct. 691, as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capab' of judicial resolution.' Flast v. Cohen, 392 U.S. 83, 101, 20 L ed 2d 947, 962, 88 S.Ct. 1942. Where, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff."

The Supreme Court held that petitioner lacked standing solely because it did not sufficiently allege "injury in fact" to its "individualized interests", that is, its individual members. Thus the Court did not reach the question of whether petitioner satisfied the "zone of interest" test.

In United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 93 S.Ct. 2405, 37 L ed 2d 254, 269, (1973), proceedings were brought against the Interstate Commerce Commission (ICC) to enjoin the enforcement of certain administrative orders. Plaintiff organization alleged injury in that each of its members used the natural resources in the area of their legal residences for camping, hiking, fishing, sightseeing, and other

recreational and aesthetic purposes. The alleged illegal activity was that the ICC failed to include with its orders a detailed environmental impact statement as required by NEPA. The Court found the allegations of the complaint with respect to standing were sufficient to withstand a motion to dismiss in the district court. The Court also reiterated from Sierra Club that "injury in fact" is not confined to economic harm:

> "* * * Rather, we explained [in Sierra Club] : 'Aesthetic and environmental well-being, like economic well-being, are important ingredients in the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.' * * * Consequently, neither the fact that the appellees here claimed only a harm to their use and enjoyment of the natural resources of the Washington area, nor the fact that all those who use those resources suffered the same harm, deprives them of standing."

It was undisputed that the "environmental interests" asserted by plaintiff were within the "zone of interests" to be protected or regulated by NEPA, the statute claimed to have been violated.

Sierra Club and SCRAP underscore the fact that in the federal courts environmental standing has developed in the statutory context of the federal Administrative Procedure Act.

The lower federal courts have, of course, followed the "injury in fact" and "zone of interest" test. For example, in the Ninth Circuit Court: National Forest Preservation Group v. Butz, 485 F.2d 408 (1973); Cady v. Morton, 8 ERC 1097, 527 F.2d 786 (1975); City of Davis v. Coleman, 521 F.2d 661 (1975).

Here, the Associations also cite several cases from California and Washington in support of their standing argument. The experience in the state of Washington has some pertinence to our inquiry. Washington's State Environmental Policy Act, Washington Revised Code,

Ch. 43.21C (1974) (SEPA), is also modeled after NEPA and has been interpreted by the Washington courts in several cases. The leading case as to standing is Leschi Improvement Council v. Washington State Highway Commission, 84 Wash.2d 271, 525 P.2d 774, 786, (1974). Washington's SEPA, like MEPA, contains no express provision for judicial review at the behest of private parties. In Leschi petitioners obtained review of a state highway commission's limited access and design hearings and of the commission's environmental impact statement, not pursuant to any statutory grant of standing, but by way of certiorari in the state's lower court. Petitioners also sought an injunction. The Washington Supreme Court held the petitioners had standing because they raised the question of whether a nonjudicial administrative agency committed an illegal act violative of fundamental rights. An illegal act was said to be one which is contrary to statutory authority. More important, the court held that petitioners sufficiently alleged violation of a fundamental right because of the language in SEPA that each person has a "fundamental and inalienable right to a healthful environment." Washington Revised Code §43.21C.020(3). This section schematically corresponds to MEPA section 69-6503(b), which recognizes that "each person shall be entitled to a healthful environment * * *."

In Leschi four justices dissented. They objected to the standing of petitioners because:

> "* * * Judicial review of the administrative proceeding involved, at the instance of persons standing in the position of the appellants, is not authorized by any statute or any doctrine of the common law, and there is no suggestion that it is mandated by any provision of the state or federal constitutions." (Emphasis supplied.)

Here, appellants suggest this Court follow certain Montana cases in denying standing on the ground that the Associations lack standing to enjoin public officers from acting. This argument fails

to distinguish between the separate questions of standing and of injunctive relief. The particular issue of injunctions will be treated separately hereinafter.

In Montana, the question of standing to sue government agencies has arisen in the context of taxpayer and elector suits. State ex rel. Mitchell v. District Court, 128 Mont. 325, 339, 275 P.2d 642, involved a complaint seeking to enjoin the secretary of state from certifying nominees for election to a certain office. This Court said:

> "The complaint which the plaintiff * * * filed in the district court shows that his only interest is as a taxpaying, private citizen and prospective absentee voter. It wholly fails to show that he will be injured in any property or civil right. Thus does [his] own pleading show him to be without standing or capacity to invoke equitable cognizance of a purely political question * * *." (Emphasis supplied.)

Holtz v. Babcock, 143 Mont. 341, 380, 390 P.2d 801, was an action to enjoin the governor and other state officers from performing an agreement regarding an airplane lease. It was held that plaintiff lacked standing to sue as a citizen, resident, taxpayer and airplane owner. On petition for rehearing the Court stated:

> "* * * The only complaint a taxpayer can have is when [the alleged state action] affects his pocketbook by unlawfully increasing his taxes. Appellant here does not allege any particular injury which he personally would suffer." (Emphasis supplied.)

In State ex rel. Conrad v. Managhan, 157 Mont. 335, 338, 485 P.2d 948, the Court summarily stated:

> "* * * We hold that relators as affected taxpayers, have standing to bring a declaratory judgment action [against county assessors and the state board of equalization] concerning a tax controversy * * *." (Emphasis supplied.)

Chovanak v. Matthews, 120 Mont. 520, 525-527, 188 P.2d 582, concerns an attack against the constitutionality of a statute rather than a challenge to particular agency action. However, we look to Chovanak for its general discussion of the principles of standing. There the plaintiff sued the state board of equalization for a declaratory judgment that a slot machine licensing act was constitutionally void. Plaintiff alleged he was a resident, citizen, taxpayer and elector of the county where the action was commenced. We quote Chovanak for the sound rules of jurisprudence enunciated:

> "It is by reason of the fact that it is only judicial power that the courts possess, that they are not permitted to decide mere differences of opinion between citizens, or between citizens and the state, or the administrative officials of the state, as to the validity of statutes. * * *
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> "* * * The judicial power vested in the district courts and the Supreme Court of Montana, by the provisions of the Montana Constitution extend to such 'cases at law and in equity' as are within the judicial cognizance of the state sovereignity. Article 8, secs. 3, 11. By 'cases' and 'controversies' within the judicial power to determine, is meant real controversies and not abstract differences of opinion or moot questions. Neither federal nor state Constitution has granted such power.
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> "* * *
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> "The only interest of the appellant in the premises appears to be that he is a resident, citizen, taxpayer and elector of the county * * *. He asserts no legal right of his that the said board has denied him, and sets forth no wrong which they have done to him, or threatened to inflict upon him.
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> "Appellant's complaint is in truth against the law, not against the board of equalization. He represents no organization that has been denied a slot machine license. He seeks no license for himself. In fact it appears from his complaint that slot machines, licensed or unlicensed, are utterly anathema to him. There is no controversy between him and the board of equalization.
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> "* * *

> "It is held in Montana, as it is held in the United States Supreme Court, and by courts throughout the nation, that a showing only of such interest in the subject of the suit as the public generally has is not sufficient to warrant the exercise of judicial power. * * *"

It is clear from these Montana cases that the following factors constitute sufficient minimum criteria, as set forth in a complaint, to establish standing to sue the state:

1) The complaining party must clearly allege past, present or threatened injury to a property or civil right.

2) The alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party.

3) The issue must represent a "case" or "controversy" as is within the judicial cognizance of the state sovereignty.

With the foregoing criteria in mind, we hold plaintiff Associations have standing to seek judicial review of the Department's actions under MEPA.

First, the complaint alleges a threatened injury to a civil right of the Associations' members, that is, the "inalienable * * * right to a clean and healthful environment", Article II, Section 3, 1972 Montana Constitution. This constitutional provision, enacted in recognition of the fact that Montana citizens' right to a clean and healthful environment is on a parity with more traditional inalienable rights, certainly places the issue of unlawful environmental degradation within the judicial cognizance.

We have studied appellants' arguments that Article IX, Section 1, 1972 Montana Constitution, states that the legislature shall provide for the enforcement of the state's duty to "maintain and improve a clean and healthful environment in Montana", and the

legislature shall provide for "adequate remedies" to protect it. We have studied the Constitutional Convention minutes surrounding Article IX and are aware the intent of the delegation was for the legislature to act pursuant to Article IX. But, we cannot ignore the bare fact that the legislature has not given effect to the Article IX, Section 1 mandate over a period of years. Moreover, the declaration of rights in Article II, the Article dealing with citizens' fundamental rights, gives "All persons" in Montana a sufficient interest in the Montana environment to enable them to bring an action based on those rights, provided they satisfy the other criteria set forth.

Intervenors urge this Court to consider the lengthy dissent in the Washington Leschi case as persuasive authority that the plaintiff Associations lack standing. The portion of that dissent relied upon, deals with the proposition the petitioners there came under no statutory grant of standing and were therefore excluded from the courts in a SEPA case. However, that dissent actually supports our holding here. The dissent assails the purported statutory creation of a "fundamental right" in SEPA upon which standing may be founded, and argues that a fundamental right can only be derived from the fundamental law. We concur and find an inalienable, or fundamental, right was created in our fundamental law, Article II, Section 3, 1972 Montana Constitution.

Second, the complaint alleges on its face an injury to the Associations which is distinguishable from the injury to the general public. When the plaintiffs do not rely on any statutory grant of standing, as here, courts must look to the nature of the interests of plaintiffs to determine whether plaintiffs are in a position to represent a "personal stake in the outcome of the controversy"

ensuring an "adversary context" for judicial review. Sierra Club v. Morton, supra; Chovanak v. Matthews, supra. Both Associations allege, in effect, that they are relatively large, permanent, nonprofit corporations dedicated to the preservation and enhancement of wilderness, natural resources, wildlife and associated concerns. Both Associations allege substantial use of the public lands adjacent to Beaver Creek South by their members for various recreational purposes. The Gallatin Sportsmen's Association contributed to the Department's Revised EIS by way of written comments to the draft environmental impact statement. These facts are sufficient to permit the Associations to complain of alleged illegal state action resulting in damage to the environment.

Third, there can be no doubt that unlawful environmental degradation is within the judicial cognizance of the state sovereignty. The constitutional provisions heretofore discussed and MEPA itself unequivocably demonstrate the state's recognition of environmental rights and duties in Montana. The courts of the state are open to every person for the remedy of lawfully cognizable injuries. Article II, Section 16, 1972 Montana Constitution; Section 93-2203, R.C.M. 1947.

Finally, we reiterate these Associations are citizen groups seeking to compel a state agency to perform its duties according to law. This concept is novel in Montana only insofar as it is raised here in the context of the state's explicit environmental policy. Were the Associations denied access to the courts for the purpose of raising the issue of illegal state action under MEPA, the foregoing constitutional provisions and MEPA would be rendered useless verbiage, stating rights without remedies, and leaving the

state with no checks on its powers and duties under that act. The statutory functions of state agencies under MEPA cannot be left unchecked simply because the potential mischief of agency default in its duties may affect the interests of citizens without the Associations' membership. United States v. SCRAP, supra.

The second major issue concerns the adequacy of the Revised EIS filed by the Department on the Beaver Creek South subdivision.

Throughout the argument Beaver Creek has maintained that MEPA has no bearing upon the Department's review of the proposed subdivision plat and an environmental impact statement is not required. If such statement is required, then Beaver Creek allies itself with the Department's position. The Department concedes that an environmental impact statement is required, but contends its responsibilities under MEPA are circumscribed by other statutory authority. In both Beaver Creek's and the Department's arguments, the thrust is that subdivision review has been comprehensively provided for in two acts hereinbefore cited: the Subdivision and Platting Act and the Sanitation in Subdivisions Act. They allege the clear legislative intent of the Subdivision and Platting Act is to place final subdivision approval authority in the hands of local government (e.g., section 11-3866, R.C.M. 1947), and the Department can interfere with town, city, or county subdivision approval only to the extent of its particular expertise and authority under the Sanitation In Subdivisions Act. Thus, they allege, if a Department environmental impact statement is required, it need deal in detail only with the environmental effects related to water supply, sewage disposal, and solid waste disposal.

Montana's Environmental Policy Act was enacted in 1971 and is patterned after the National Environmental Policy Act. It is a broadly worded policy enactment in response to growing public concern over the innumerable forms of environmental degradation occurring in modern society. The first two sections of MEPA state:

> "69-6502. Purpose of act. The purpose of this act is to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the state; and to establish an environmental quality council."
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> "69-6503. Declaration of state policy for the environment. The legislative assembly, recognizing the profound impact of man's 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 and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the state of Montana, in co-operation with the federal government and 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 man and nature can coexist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Montanans.
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> "(a) In order to carry out the policy set forth in this act, 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 co-ordinate state plans, functions, programs, and resources to the end that the state may ---
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> "(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
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> "(2) assure for all Montanans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

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

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

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

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

"(b) The legislative assembly recognizes that each person shall be entitled to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."

These sections unequivocably express the intent of the Montana legislature regarding environmental policy.

But MEPA does more than express lofty policies which want for any means of legislative or agency implementation. Section 69-6504, R.C.M. 1947, contains "General directions to state agencies" and provides:

"The legislative assembly authorizes and directs that to the fullest extent possible.

"(a) The policies, regulations, and laws of the state shall be interpreted and administered in accordance with the policies set forth in this act, and

"(b) all agencies of the state shall

"(1) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;

"(2) identify and develop methods and procedures, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations;

"(3) include in every recommendation or report on proposals for projects, programs, legislation and other major actions of state government significantly affecting the quality of the human environment, a detailed statement on ---

"(i) the environmental impact of the proposed action,

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"(iii) alternatives to the proposed action,

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

"Prior to making any detailed statement, the responsible state official shall consult with and obtain the comments of any state agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate state, federal, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the governor, the environmental quality council and to the public, and shall accompany the proposal through the existing agency review processes. * * *"

The "detailed statement" described by subsection (b)(3) is referred to as the environmental impact statement, or EIS.

Appellants emphasize that the Subdivision and Platting Act was passed two years after MEPA, and this circumstance expresses a legislative intent that local review of environmental factors, particularly under sections 11-3863 and 11-3866, R.C.M. 1947, obviates the necessity for Departmental review. Such an interpretation, however, conflicts with the terms of MEPA, in section 69-6507, R.C.M. 1947:

"The policies and goals set forth in this act are supplementary to those set forth in existing authorizations of all boards, commissions, and agencies of the state."

Had the legislature intended local review to replace the rigorous review required by responsible state agencies, it would easily have so stated. The existing statutes evince a legislative intent that subdivision decisions be made at the local planning level based upon factors with an essentially local impact, and that state involvement triggers a comprehensive review of the environmental consequences of such decisions which may be of regional or statewide importance.

An illustration of this interpretation is provided by a comparison of the provisions of MEPA, hereinbefore set forth, with certain provisions of the Subdivision and Platting Act. The statement of policy in the Subdivision and Platting Act contains a mandate to "require development in harmony with the natural environment", section 11-3860, R.C.M. 1947. Section 11-3863(1), R.C.M. 1947, requires local governing bodies to adopt regulations and enforcement measures for, inter alia, "the avoidance of subdivision which would involve unnecessary environmental degradation * * *." Subsection (2) requires the department of community affairs to prescribe minimum requirements for local government subdivision regulations, including "criteria for the content of the environmental assessment required by this act." Subsection (3) provides that this "environmental assessment" must be submitted to the governing body by the subdivider. Subsection (4) describes the environmental assessment which emphasizes research as to water, sewage, soil and local services. While these factors may be among the more significant immediate environmental problems created by a subdivision, an assessment of them does not approach the scope of the inquiry required by MEPA section 69-6504, R.C.M. 1947.

Furthermore, there is no irreconcilable repugnancy between these acts which would render either the Subdivision and Platting Act or MEPA a nullity. It is suggested the district court's judgment leads to the proposition that the Department could "veto" a local subdivision approval solely on the basis of its EIS --- in direct contravention of the intent of the Subdivision and Platting Act. While this "veto" prospect is feasible, two points are disregarded by the argument. First, MEPA was enacted to mitigate environmental degradation "to the fullest extent possible". Second, MEPA does not call for a halt to all further development; its express direction to agencies is to "utilize a systematic, interdisciplinary approach" to foster sound environmental planning and decision making. A state agency acting pursuant to this directive does not invoke the specter of state government vetoing viable local decisions. The concurrent functions of local and state governments with respect to environmental decisions serve to enhance the environmental policy expressed in all of the statutes here considered, that action be taken only upon the basis of well-informed decisions.

Thus, the statutes must be read together as creating a complementary scheme of environmental protection. As stated in Fletcher v. Paige, 124 Mont. 114, 119, 220 P.2d 484:

> "The general rule is that for a subsequent statute to repeal a former statute by implication, the previous statute must be wholly inconsistent and incompatible with it. United States v. 196 Buffalo Robes, 1 Mont. 489, approved in London Guaranty & Accident Co. v. Industrial Accident Board, 82 Mont. 304, 309, 266 Pac. 1103, 1105. The court in the latter case continued: 'The presumption is that the Legislature passes a law with deliberation and with a full knowledge of all existing ones on the same subject, and does not intend to interfere with or abrogate a former law relating to the same matter unless the repugnancy between the two is irreconcilable.'"

See: City of Billings v. Smith, 158 Mont. 197, 490 P.2d 221; State ex rel. Esgar v. District Court, 56 Mont. 464, 185 P. 157.

Support for our interpretation of the scope of MEPA is found in a leading federal case interpreting the NEPA. In Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission, 449 F.2d 1109, 1112, 17 ALR Fed 1 (D.C.Cir. 1971), regulations proposed by the Atomic Energy Commission (AEC) were challenged on the basis that the proposed regulations did not adequately provide for consideration of all environmental factors as mandated by NEPA. The AEC argued that its authority extended only to nuclear related matters and that it was prohibited from independently evaluating and balancing environmental factors which were considered and certified by other federal agencies. The Calvert Cliffs' court found the AEC's interpretation of NEPA unduly restricted, stating:

> "NEPA * * * makes environmental protection . part of the mandate of every federal agency and department. The Atomic Energy Commission, for example, had continually asserted prior to NEPA, that it had no statutory authority to concern itself with the adverse environmental effects of its actions. Now however, its hands are no longer tied. It is not only permitted, but compelled, to take environmental values into account."

The district court was correct in treating MEPA as the controlling statute in this case.

The district court held the Revised EIS does not comply procedurally with MEPA on eight separate grounds. The court expressly declined to venture into a review of the substantive merits of the Department's reasoning and conclusions.

A preliminary question is the inquiry into the proper scope of review of the Revised EIS by the courts. Because MEPA is modeled after NEPA, it is appropriate to look to the federal interpretation of NEPA. This Court follows the rule found in Ancient Order of Hiberians v. Sparrow, 29 Mont. 132, 135, 74 P. 197:

> "'* * * that the construction put upon statutes by the courts of the state from which they are borrowed is

entitled to respectful consideration, and * * * only strong reasons will warrant a departure from it.'"

Again, in State v. King Colony Ranch, 137 Mont. 145, 151, 350 P.2d 841:

> "The State Board of Equalization was and is warranted in following the Federal interpretation of the language which the Legislature of this state adopted from the Act of Congress."

See: Cahill-Mooney Construction Co. v. Ayers, 140 Mont. 464, 373 P.2d 703; Roberts v. Roberts, 135 Mont. 149, 338 P.2d 719; Lowe v. Root, 166 Mont. 150, 531 P.2d 674, 32 St.Rep. 122.

In determining the proper scope of judicial review of environmental impact statements under NEPA, the federal courts have framed the question in terms of whether NEPA is merely a procedural statute or whether it is a substantive statute creating substantive duties reviewable by the courts. See Note: The Least Adverse Alternative Approach to Substantive Review under NEPA, 88 Harvard Law Review 735 (1975). However because the district court ruled on procedural grounds, we limit our inquiry to procedural matters.

The United States Supreme Court recently stated in Aberdeen & Rockfish R.R.Co. v. SCRAP, 422 U.S. 289, 95 S.Ct. 2336, 45 L ed 2d 191, 215 (1975):

> "* * * NEPA does create a discreet procedural obligation on government agencies to give written consideration of environmental issues in connection with certain major federal actions * * *."

In Calvert Cliffs', supra, (449 F.2d 1109, 1115), the District of Columbia Court of Appeals stated:

> "* * * But if the decision was reached procedurally without individualized consideration and balancing of environmental factors---conducted fully and in good faith---it is the responsibility of the courts to reverse. * * *"

The Ninth Circuit Court of Appeals firmly bases its reviewing standard on the federal Administrative Procedure Act. Lathan v. Brinegar, 506 F.2d 677 (1974); Cady v. Morton, 527 F.2d 786 (1975); Trout Unlimited v. Morton, 509 F.2d 1276, 1282, 1283 (1974). In Trout Unlimited the court expanded on its explanation:

> "The 'without observance of procedure required by law' §706(2)(D) standard, however, is less helpful in reviewing the sufficiency of an EIS than one might wish * * *.
>
> "* * *
>
> "It follows, therefore, that in determining whether the appellees prepared an adequate EIS we will be guided in large part by 'procedural rules' rooted in case law. * * * All such rules should be designed so as to assure that the EIS serves substantially the two basic purposes for which it was designed. That is, in our opinion an EIS is in compliance with NEPA when its form, content and preparation substantially (1) provide decision-makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in the light of its environmental consequences, and (2) make available to the public, information of the proposed project's environmental impact and encourage public participation in the development of that information."

We are also mindful that the policies set forth in section 69-6503, R.C.M. 1947, are to be implemented by state agencies in accordance with sections 69-6504(a) and 69-6507, R.C.M. 1947.

In light of the foregoing, the scope of judicial review of the Revised EIS in this case is limited to a consideration of whether the Department provided a sufficiently detailed consideration and balancing of environmental factors which will ensure that the procedure followed will give effect to the policies of MEPA, aid the Department in decision making, and publicize the environmental impact of its action.

We will consider each factor of the Revised EIS found legally deficient by the district court in the sequence set forth in its opinion.

The district court held the Department failed to include in the Revised EIS anything rising to the dignity of an economic analysis, as required by MEPA and by House Joint Resolution No. 73, approved March 16, 1974. A joint resolution is not binding as law on this Court, but we give it consideration as a clear manifestation of the legislative construction of MEPA. State v. Toomey, 135 Mont. 35, 335 P.2d 1051; State ex rel. Jones v. Erickson, 75 Mont. 429, 244 P. 287. House Joint Resolution No. 73 states in relevant part:

> "WHEREAS, it is a matter of serious concern to the legislature that this enactment [MEPA] be fully implemented in all respects,
>
> "NOW, THEREFORE, BE IT RESOLVED * * *
>
> "That all agencies of state government are hereby directed to achieve forthwith the full implementation of the Montana Environmental Policy Act including the economic analysis requirements of sections 69-6504 through 69-6514 * * * and
>
> "* * * that economic analysis shall accompany environmental impact statements as required by the foregoing sections of the act and shall encompass an analysis of the costs and benefits to whomsoever they may accrue, including considerations of employment, income, investment, energy, the social costs and benefits of growth, opportunity costs, and the distribution effects * * *."

With the exception of a discussion of educational costs, the Revised EIS contains scant economic analysis. The Department seeks to explain this away with a reference to the function of local governing bodies in compiling economic data, and states it would be a duplication of effort for the Department to so engage itself. Earlier in this opinion we discussed this attempt to circumvent the intent of MEPA as expressed by the legislature---in this instance

as recently as 1974. The Department may not abdicate its duties under MEPA to local governments.

The cost-benefit analysis required by MEPA, as construed by the legislature, encompasses a broad consideration of several factors categorized in House Joint Resolution No. 73, approved March 16, 1974. A reasonsonable cost-benefit economic analysis undertaken pursuant to these criteria would, in effect, accomplish most of the purposes sought to be served by an environmental impact statement. Here, for example, the Revised EIS asserts that Beaver Creek South will provide necessary housing for many employees at nearby Big Sky of Montana. This comment, however, is not accompanied by any data to support the conclusion that Big Sky employees could afford, or would desire, to live at Beaver Creek South. In other words, the Revised EIS does not consider or disclose the approximate costs of the residential units, the average incomes of Big Sky employees, or even the likelihood that this projected housing use will come to pass. Such data is contemplated by MEPA.

The Department clearly ignored its duties to provide an economic analysis in its Revised EIS, as the district court found. Also the cooperative inter- and intra-governmental approach fostered by MEPA section 69-6503, R.C.M. 1947, should encourage the free exchange of data compiled by local and state agencies; if the local government prepares an economic analysis, such could be incorporated as part of the Department's environmental impact statement.

The gist of the Revised EIS, p.23, with respect to aesthetic considerations is demonstrated by its comments on visual impact:

> "A visual impact would certainly result from the proposed development. The severity of this visual impact is purely speculation, and the desirability is a matter of personal aesthetic values.
>
> "* * *
>
> "* * * Any development, including the proposed Beaver Creek South, placed within this scenic canyon setting would be considered aesthetically offensive by a majority of people."

Again, the Revised EIS, p. 24, affirms that visual impact is a matter of "speculation" because "Economists have not developed an acceptable process to place an economic valuation on such intangibles as aesthetics."

This latter comment betrays a fundamental weakness of the Department's approach to its responsibilities under MEPA. In decrying the absence of a precise quantitative or qualitative measure, the Department ignores the recognition of this variable factor in section 69-6504(b)(2), as one which must "be given appropriate consideration in decision making along with economic and technical considerations". (Emphasis supplied). Under section 69-6504(b)(3)(i), the Department is required to prepare a detailed statement on "the environmental impact of the proposed action" and visual impact falls within the meaning of this subsection. There is no detailed description of the design of the proposed residential units, the compatability of the architecture with the surrounding landscape, the obstruction or availability of views, or the relationship of the open spaces to these factors. The Revised EIS comments in this regard are not sufficiently detailed under any standard conceivable to give meaning to the act or inform decision makers and the public of the probable aesthetic consequences of the development.

Section 69-6504(b)(3)(iii), R.C.M. 1947, requires an environmental impact statement to contain "alternatives to the proposed action". Section 69-6504(b)(4), R.C.M. 1947, requires agencies to "study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources". The latter section appears to be operable whether or not an environmental impact statement is prepared. Trinity Episcopal School Corporation v. Romney, 8 ERC 1033, 523 F.2d 88, (2d Cir. 1975). The district court correctly concluded the subsection (b)(4) description is to be included in a subsection (b)(3) environmental impact statement.

However, the district court erred in its opinion that discussion of alternatives in the Revised EIS is "patently inadequate". The district court merely viewed the last two pages of the Revised EIS under the "Alternatives" heading, wherein various alternatives are essentially stated as conclusions. This review ignores the reasonable discussion of alternatives contained in other portions of the Revised EIS regarding such factors as water supply, wastewater, and police and fire protection. As stated by the Ninth Circuit Court of Appeals in Life of the Land v. Brinegar, 485 F.2d 460, 472 (1973):

> "NEPA's 'alternatives' discussion is subject to a construction of reasonableness. * * * Certainly, the statute should not be employed as a crutch for chronic faultfinding. Accordingly, there is no need for an EIS to consider an alternative whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative."

The discussion of alternatives in the Revised EIS viewed in its entirety is sufficiently detailed to comply with the procedural requirements of MEPA.

The Revised EIS contains reproductions of lengthy comments from the state Department of Fish and Game and the Gallatin Sportsmen's Association regarding impact of the proposed development on wildlife in the Gallatin Canyon. Other comments are also mentioned. All of the comments indicated that an adverse environmental effect on wildlife could not be avoided if the proposal were to be implemented. Section 69-6504(b)(3)(ii), R.C.M. 1947. The Revised EIS, p. 28, rather than dealing with a consideration of these adverse effects, contains a protracted discussion of the legislative history of the Subdivision and Platting Act and the local level hearings on the instant plat proposal, and concludes by stating:

> "Therefore, there is an opportunity to effect rejection or revision of a subdivision for environmental reasons at the county level. This would appear to satisfy the spirit in which the Montana Environmental Policy Act was enacted."

We find this justification for inaction and ad hoc agency "legislating" to be inappropriate in an environmental impact statement. The Department's responsibility in pursuing its duties under MEPA is to consider all relevant environmental values along with other factors and come to a conclusion with regard to them. Although we do not suggest the Department has the internal resources and expertise with which to expand upon or refute the wildlife comments received from outside sources, we do hold it is within the Department's province under MEPA to reach its decision based upon a procedure which encompasses a consideration and balancing of environmental factors. The district court was correct in holding that the mere transmittal of comments adverse to the proposal is insufficient.

The department of Highways commented on the effect of the proposed subdivision with respect to traffic flow on U.S. Highway 191. The Department of Highways states the Beaver Creek South Subdivision "will generate a large amount of traffic", citing figures, and states this increased volume "will not warrant the construction of a four lane facility in this vicinity." Several challenging comments call for more detailed and accurate information, but the Revised EIS, at p. 33, states the Department of Highways reaffirms its statement and on that basis says:

> "* * * Beaver Creek South would not be the development that would make reconstruction [of the highway] necessary."

The district court found this portion of the Revised EIS lacking because the treatment of highways was "incomplete", there was no discussion of the effect of future highway construction, and also no discussion of cumulative social, economic and environmental impacts of continued development in the Gallatin Canyon.

We believe the highway discussion is procedurally adequate and that the district court's opinion on this point requires an unwarranted clairvoyance on the part of the Department. In contradistinction to the wildlife discussion where the agency with the greatest expertise in the field (Department of Fish and Game) raised serious adverse questions which were not addressed, here the Department is justified in relying on the Department of Highways projections for future traffic flow. The published comments and accompanying discussion demonstrate a reasonable consideration and balancing of environmental factors.

Comments of Montana Power Company in the Revised EIS indicate to the Department that the company would have "no problem" in supplying the electricity needs of the proposed sub-

division, and that this capacity could be met with present transmission lines. The Revised EIS notes at p. 36, that the proposed subdivision "would be a contributing factor toward any future necessity for additional service." The adverse comments to this in the Revised EIS concentrate on the issue of whether or not Montana Power Company is counting on the use of a proposed new power line into the canyon from the west. The Department's conclusion does not dispute the information provided it by the power company. The district court held that this analysis is superficial at best.

The energy needs of the Gallatin Canyon with respect to Beaver Creek South, and future development, are sufficiently considered and balanced in the Revised EIS. The Department, through its inclusion in the Revised EIS of conflicting comments, cannot be expected to provide detail beyond that which is reasonably foreseeable. The Department reasonably concluded the proposed development would contribute to the total power needs of the area and to any future necessity for additional service. This constitutes procedural compliance with MEPA in that the Departmental decision makers are made aware of the environmental consequences regarding energy, and the same information is made available to other branches of government and the public. Trout Unlimited v. Morton, 509 F.2d 1276.

The district court held that the "actual necessity" for the proposed subdivision must be analyzed. As the appellants correctly point out, there is no provision in MEPA which requires a study of necessity. Therefore, the district court's opinion on this point is erroneous.

We point out, however, the necessity of the project was gratuitously introduced into the Revised EIS by the Department in order to publish therein a letter by Big Sky of Montana, Inc.

which suggests that the Beaver Creek South subdivision will alleviate a housing shortage for employees at Big Sky. In response to several challenging comments received by the Department, the Revised EIS then reverses its earlier position by stating that the objections may be valid, but they have no bearing on whether or not to approve the plat.

This turnabout of the Department within the Revised EIS evidences an attitude that an environmental impact statement is simply window dressing to pacify opponents of the Department's actions. MEPA was not enacted to provide the government and public with project justifications by state agencies. We hold that if the Department deems the necessity of the development to be a critical factor in its analysis of the impact of the proposed subdivision, then it is bound at least to make a reasonable consideration of the necessity of the project in light of the reasonable objections made to the necessity premise.

The district court held that cumulative impacts must be discussed in greater detail. The Revised EIS contains a detailed analysis of the cumulative impact of increasing the nutrient load in the Gallatin River from the subdivision's domestic water sources. No other cumulative impacts are discussed in the same portion of the Revised EIS. However, the Revised EIS as a whole contains several references to anticipated future environmental impacts in the vicinity, and a reasonably detailed summary of the pending comprehensive plan for the Gallatin Canyon developed by the Gallatin Canyon Planning Study Committee. This constitutes a sufficiently detailed consideration and disclosure regarding "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity". Section 69-6504(b)(3)(iv), R.C.M. 1947.

In summary, the Revised EIS is procedurally inadequate in its analyses of economic costs and benefits, aesthetic considerations, and wildlife factors. This holding is not to be construed as a mandate for technical perfection; rather, we find simply that the Revised EIS does not sufficiently consider and balance the full range of environmental factors required under the terms of MEPA. If the policy and purpose of MEPA are to have any practical meaning, state agencies must perform their duties pursuant to the directives contained in that Act.

Having found that the district court correctly declared the Revised EIS to be procedurally inadequate and void, the final question is whether plaintiff Associations are entitled to injunctive relief as ordered by the district court.

The rule is well settled that injunction actions by private parties against public officials must be based upon irreparable injury and a clear showing of illegality. State ex rel. Keast v. Krieg, 145 Mont. 521, 402 P.2d 405. Environmental damage as alleged by the Associations is an injury within the scope of the judicial cognizance. Furthermore, the preceding discussion indicates the Revised EIS does not meet the minimum requirements of the law under MEPA and is clearly illegal.

The Department and Beaver Creek allege an injunction is barred by section 93-4203(4), R.C.M. 1947, which states:

> "An injunction cannot be granted:
>
> "* * *
>
> "(4) to prevent the execution of a public statute, by officers of the law, for the public benefit."

This argument overlooks the cases which hold that illegal actions by public officials may be enjoined. In Larson v. The State of Montana and the Department of Revenue, 166 Mont. 449, 534 P.2d 854, 32 St.Rep. 377, 384, this Court overruled the dicta in Keast to the effect that an injunction against public officers was banned by section 93-4203(4), stating:

> "The preferable law is enunciated in Hames v. City of Polson, 123 Mont. 469, 479, 215 P.2d 950, where it was held:
>
> "'* * * public bodies and public officers may be restrained by injunction from proceeding in violation of the law, to the prejudice of the public, or to the injury of individual rights * * *.'"

We affirm the district court holding that injunctive relief is proper in this case.

The summary judgment is affirmed.

Frank I. Haswell

Justice.

Mr. Justice John Conway Harrison, concurring in part and dissenting in part:

I concur in the first two issues of the majority opinion. I dissent on the third issue allowing plaintiff Associations injunctive relief.

To allow the issuance of an injunction against a public official the majority had to find the Revised EIS, in not meeting the minimum requirements set forth in MEPA in three catagories (economic analysis, aesthetic values, and wildlife),becomes so clearly illegal as to come within the exceptions set forth in State ex rel. Keast v. Krieg, 145 Mont. 521, 402 P.2d 405. I have searched in vain to find such a statutory authority allowing the courts of this state to use injunctive powers in this manner.

A more complete factual background should have been considered by the majority, particularly as to the legal and economic position of Beaver Creek South, Inc., the landowner. Beaver Creek had to intervene to get into the action to protect its property and may well be the victim of substantial injustice as a result of the action of the district court and a further prolonging of the cause by the majority opinion. Beaver Creek had no control whatsoever over the course of the action nor over the Revised EIS under attack. Beaver Creek merely owned the land it wanted to develop. Under the law Beaver Creek could have subdivided the land into twenty acre tracts, have erected large condominiums thereon, serviced them with wells and septic tanks and thereby by-passed all the environmental roadblocks that have stopped its development. Rather, Beaver Creek chose a more responsible approach, and/was that to build a planned unit development under section 11-3861(5), R.C.M. 1947.

Thereafter there followed several years of administrative and district court hearings. As to the use of the injunctive power of the district court in the February 11, 1975 order and memorandum, the district court denied injunctive relief because it could not determine what action the Department would take. In so doing, the court granted plaintiff Associations the right to seek further declaratory relief, but not injunctive relief. It would appear from the February 11, 1975 order the court contemplated the Department would thereafter do something. The Department did; it removed the sanitary restrictions and the subdivision plat was filed. Six months later the district court issued a mandatory injunction requiring the Department to undo, what it had already allowed it to do. No consideration seems to have been given to the hardships of the property owner. The parties, particularly, should have been able to rely on the district court's prior rulings as the law of the case. To reverse itself, the district court placed the whole development in jeopardy. The court should have declared the issue moot, for an injunction should not issue to restrain an act already committed. Bouma v. Bynum Irrigation Dist., 139 Mont. 360, 364 P.2d 47.

Here, the injunction granted against Beaver Creek is more unusual for it has been restrained by private citizens from the full use of its land that is fully authorized by the state and local entities that have jurisdiction over the matter, i.e., the Department and the Gallatin County Commissioners. A member of the public, without some special interest of his own, should not have a right to restrain the use of private property in this manner. To allow it makes property rights useless.

It should be noted that under Montana statutes, section 57-110, R.C.M. 1947, even if Beaver Creek were committing a public nuisance on its land a private person could not bring an action for abatement unless the public nuisance was injurious to him as opposed to other members of the public. Here the claimed interests of plaintiff Associations are no greater than the interests of the public in connection with a public nuisance, and we should give them no greater rights. Montana law should be controlling and it is unnecessary to look, as the district court did, to federal court cases to reach its conclusions.

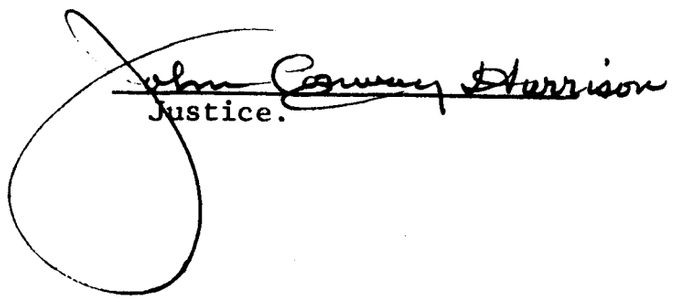
MEPA does not provide for a remedy through injunction. The case involves the review of a subdivision, the sanitation provisions of the Subdivision Act do not provide for injunctive relief. Here no administrative hearing was required to be conducted by the Department. This is not a "contested case" as defined by the Montana Administrative Procedure Act, section 82-4201 et seq., R.C.M. 1947. While section 82-4216, R.C.M. 1947, provides for judicial review of contested cases, that section is not applicable to the circumstances of the instant case.

In Leschi Improvement Council v. Washington State Hwy. Com'n, 84 Wash.2d 271, 525 P.2d 774, 786, Judge Rosellini, in his dissent, stated what I feel our position should be on this question when he noted:

> "It is my opinion that this court is neither authorized by statute nor equipped by education, experience or native endowment to review the 'adequacy' of a document so dependent upon expertise as an environmental impact statement. We can look to see if serious consideration is given to all matters set forth in the statute, but the decision whether the consideration given is 'adequate' belongs with some other agency of government. I think the legislature

intended that the Department of Ecology should have the responsibility for such decisions. I am satisfied it did not intend to rest it in the courts. Had it expressly done so, I would expect the court to view it as an unconstitutional attempt to impose upon the court a nonjudicial function."

I would deny injunctive relief.



Justice.

Mr. Justice Wesley Castles dissenting.

I dissent. I concur in Justice John Conway Harrison's dissent on the third issue. I also dissent on the Court's ruling on Issue No. 2 as to the legality of the Environmental Impact Statement. The majority limits its consideration to whether the Department sufficiently detailed the environmental factors. Then it goes on to discuss a nebulous proposition that mere transmittal of comments adverse to the proposal is insufficient. While the opinion concludes that "technical perfection" is not required, it leaves me wondering what is required.

Wesley Castles
Justice.

PETITION FOR REHEARING

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 13179

THE MONTANA WILDERNESS ASSOCIATION, and GALLATIN SPORTSMEN'S ASSOCIATION, INC.,

Plaintiffs and Respondents,

vs.

THE BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES OF THE STATE OF MONTANA: THE DEPARTMENT OF HEALTH AND ENVIRON MENTAL SCIENCES OF THE STATE OF MONTANA,

Defendants and Appellants,

and

BEAVER CREEK SOUTH, INC., a corporation,

Intervenor and Appellant.

PETITION FOR REHEARING BY BEAVER CREEK SOUTH, INC., INTERVENOR AND APPELLANT

Appealed from the
DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
In and for the County of Lewis and Clark

COMES NOW the Intervenor, Beaver Creek South, Inc., pursuant to Rule 34 of the Montana Rules of Appellate Civil Procedure, and respectfully petitions the above-entitled Court for a rehearing on the above-captioned matter on the grounds and for the reasons that facts material to the decision and questions decisive of the case submitted by counsel were overlooked by the Court in rendering its decision and that the decision is in conflict with express statutes and controlling decisions to which the attention of the Court was not directed, all of which is more fully set forth and presented below.

I.

STANDING--REMEDY

In its Opinion the majority of this Court has engaged in obvious judicial legislation in ruling that plaintiffs have standing to obtain a remedy by injunction for alleged environmental harm in the face of explicit Constitutional language in Section 1, Article IX, Montana Constitution of 1972, imposing upon the Legislature the responsibility of enforcing the duty to protect the environment and of providing remedies therefor. Appellant submits that the majority has based the need to create a judicial remedy on the mistaken premise that the Legislature has not acted pursuant to said Constitutional directives.

In fact, the Legislature has acted to protect the environment and provide remedies and on several fronts. The Subdivision and Platting Act itself, sections 11-3859 et seq. took effect concurrently with the 1972 Constitution on July 1, 1973, and guarantees a partial remedy to the citizens of this state through the requirements that all subdivisions undergo public hearings at the local level and that environmental questions must be addressed. In 1974 and 1975 the

Legislature substantially amended and revised the Water Pollution Act, sections 69-4801 et seq. which since 1971 had contained a provision authorizing any person to protest a violation of the Water Pollution Act to the Department of Health and thus require an investigation and report by the Department of Health. Likewise, the Sanitation in Subdivisions Act, sections 69-5001 et seq., was drastically amended and revised in 1973 in all of its provisions and carries a similar section authorizing a written complaint of violation to be made to the Department. Both of the foregoing acts are obviously intended to prevent degradation of the water environment of the state and do provide a limited administrative remedy to anyone aware of a violation of the acts.

Perhaps the most significant remedy enacted by the Legislature is that contained in the amendments to the Clean Air Act in 1974 and 1975 which now provides at section 69-3911(8) that any person adversely affected by a decision of the Department of Health and Environmental Sciences on an application for an air emissions permit may demand a hearing before the Board under the Montana Administrative Procedure Act. Clearly, under the "zone of interest" rule adopted by the majority, and as actually stated by the United States Supreme Court in its SCRAP I decision (SCRAP v. U.S., 93 S.Ct. 2405, 37 L.Ed.2d 254) any person who breathes the air of the State of Montana would be entitled to contest such a permit. Query: Is it necessary and proper for this Court to grant that same person a direct right to broad injunctive relief when the Legislature acting under its Constitutional mandate has seen fit to require him to proceed administratively under the Montana Administrative Procedure Act, with only indirect recourse to the courts by seeking review of

the administrative decision?

In establishing its premise of legislative inaction, the majority has apparently also overlooked the fact that the 44th Legislature (1975) did act to pass a bill, S.B. 203, granting broad, direct standing to any person to intervene in administrative proceedings where damage to the environment might be an issue and to sue public or private persons or individuals for damaging the environment. The bill was vetoed by the Governor because of Constitutional weaknesses but clearly establishes legislative action to provide remedies where environmental matters are concerned pursuant to the Constitutional directives mentioned above. However, the Court is obliged to recognize that in vetoing the bill the Governor was also exercising Constitutional power vested in him by the people of the state. In judicially creating its own environmental remedial framework, the majority of this Court has claimed for the Court a Constitutional supremacy over the other two branches of government who have already addressed the issue under far more legitimate Constitutional authority. Intervenor respectfully submits that the majority overlooked the significance of S.B. 203.

The 1972 Constitution became effective on July 1, 1973. This action was filed by plaintiffs on July 25, 1974, approximately thirteen months later. During the intervening period there had been one session of the Legislature which was a prolonged one because of the many Constitutional matters which needed to be addressed. The rights of the parties should be determined as of the date this action was instituted. In effect the majority Opinion has created a broad and powerful judicial remedy when the framers of the Constitution intended a legislative one, using as its

rationale the fact that the Legislature failed to act on the subject during the one legislative session which had transpired at the time this action was commenced. Instead of the "period of years of inaction" claimed by the majority Opinion, it has in fact been only a period of months. Indeed, in less than two years after the 1972 Constitution took effect the Legislature did pass a bill providing a remedial structure for environmental issues which was lawfully vetoed by the Governor. Intervenor has found no authority, and the majority Opinion cites none, to the effect that a two-year delay in giving effect to a Constitutional directive which is clearly not self-executing justifies judicial legislation by this Court. The Court should clearly leave the creation of a remedial structure to the sound discretion of the Legislature.

II.

INJUNCTIVE RELIEF

This majority has affirmed the granting of a mandatory injunction against a state agency carrying out its statutory duty. In doing so, the majority has acknowledged that no express statute authorizes injunctive relief under the circumstances, and thus the conclusion is forced that the injunctive remedy authorized by the Opinion rests on the general injunction statutes set forth at sections 93-4201 et seq. In thus affirming the action below, the majority has either overlooked the basic pleading requirements for injunctive relief or should at least clarify those requirements for future litigants. The question at hand is what allegations are necessary to obtain such injunctive relief in view of the provisions of Rule 65, M.R.Civ.P., that the procedure for granting restraining orders and temporary and permanent injunctions shall be as provided by statute. The

statutes provide that an injunction may be granted on the basis of a verified complaint or on the basis of affidavits submitted subsequent to the complaint. In this action the injunction was granted on the basis of the amended second amended complaint which contains only bare conclusions and statements of opinion to the effect that Intervenor's development will irreparably damage the environment and that the actions of the Department and Intervenor will cause serious permanent and irreparable injury to plaintiffs and the environment. Nowhere are any facts alleged showing how the environment will be damaged and nowhere is it made clear how the inadequacy of the EIS itself causes any damage to the environment or to the plaintiffs.

Under prior practice such broad conclusions and opinions have been held insufficient to merit injunctive relief. As stated in Emery v. Emery, 122 Mont. 201:

> "Injunction is an equitable remedy and the pleadings therein must substantially conform to the statutory requirements of good pleading. The complaint or affidavit must contain a statement of the material facts essential to establish the applicant's right to the relief sought. . . . Irrespective of the nature of the relief sought the applicant therefor must allege the facts disclosing that he is entitled thereto. . . . Such requirement is not met by statements of the legal conclusions of the pleader or of mere matters of opinion, unsupported by specific facts sufficient to show the opinion to be well grounded. . . .
>
> . . .
>
> In 3 Bancroft's Code Pleading it is said: 'The facts entitling the plaintiff to injunctive relief, rather than mere legal conclusions must be stated. Thus an averment that the act in question will work great and irreparable injury . . . or that he has no plain, adequate and speedy remedy at law, is merely a legal conclusion and wholly insufficient in the absence of the facts from which it may be deduced.'"

Query: Can an individual obtain an injunction against alleged environmental degradation under the remedy granted by this Court against any private party or state agency by merely alleging that the environment and his alleged use of

that environment will be irreparably damaged without setting forth facts demonstrating that result? Intervenor submits that in affirming the mandatory injunction granted below the majority has overlooked the sparceness of the allegations upon which injunctive relief was granted and ought clearly to rule whether or not an allegation stating generally that the environment and the plaintiff will be irreparably damaged is sufficient to obtain injunctive relief under these circumstances. If it is not, Intervenor submits that the decision below should be reversed.

What are the limits of the remedy authorized by the majority? Are there any limits at all? No mention is made of any need to show an irreparable injury as usually required for injunctive relief. A person need allege only a "past, present, or threatened injury" (Opinion, p.13), which apparently is no more than the requirement that he be "aggrieved" under the Federal Administrative Procedure Act. Clearly the injunctive relief authorized is not limited to state agencies, but may be obtained against private citizens and landowners as well, as has been done in this case. (At least under the Administrative Procedure Act federal injunctions are granted only to enjoin action by administrative agencies within the context of administrative proceedings, and are not authorized directly against private parties.) Since it seems obvious that some environmental degradation will result from any activity, any individual may thus enjoin any activity with the mere showing that he will be affected by the ensuing environmental degradation in some slight manner. Under the broad rule announced an individual may very well be able to enjoin industrial activity anywhere in the state because air pollution is bound to occur as a result thereof. Intervenor respectfully submits that the

majority has overlooked the drastic consequences of the remedy it has authorized and ought to reconsider its position.

At page 34 of the Opinion, the majority states that the argument with respect to section 93-4203(4) overlooks the cases which hold that illegal action by public officials may be enjoined. The majority then erroneously cites Larson v. The State of Montana and Department of Revenue, 166 Mont. 449, 534 P.2d 854, 32 St.Rep. 377, 384. Larson clearly holds only that there is no substantive difference between an "appraisal" and a "tax," and that the affected taxpayer may enjoin an "illegal appraisal" as well as an "illegal tax" under the express language of section 84-4505 authorizing such an injunction. Only to that extent did it overrule the prior, contrary holding of Keast v. Krieg, 145 Mont. 521, 402 P.2d 405.

The reference in Larson to Hames v. Polson, 123 Mont. 469, 215 P.2d 950, is itself dictum and clearly inapplicable to the issue raised by section 93-4203(4). There is nothing to indicate that that section was ever called to the attention of the Hames court. And the Hames decision was followed by the series of cases expressly relying upon section 93-4203(4) as a ground for denying injunctive relief against public officers. See: Jeffries Coal Co. v. IAB, 126 Mont. 411, 252 P.2d 1046; State ex rel. Mitchell v. District Court, 128 Mont. 325, 275 P.2d 642; Steele v. Board of Railroad Commissioners, 144 Mont. 432, 397 P.2d 101; and State ex rel. Lord v. District Court, 154 Mont. 269, 463 P.2d 323, as well as Keast v. Krieg, above. In most of those decisions it was clearly alleged that the state official involved was acting illegally, and in each of those decisions section 93-4203(4) was cited as a ground for denying injunctive relief separate and distinct from the issue

of standing.

Especially see State ex rel. Mitchell v. District Court, above, which is most pertinent, since obviously a prospective voter ought to fall within a judicially cognizable zone of interest when his franchise is defeated by the Secretary of State illegally certifying certain candidates for election. Clearly the exercise of the franchise is as important as the right to a clean environment, and the damage suffered by a voter is different from that suffered by the public generally, since many citizens are not qualified to vote and thus affect the election outcome. Accordingly, Intervenor respectfully submits that it is the Mitchell decision, not Hames, and the several cases subsequent to Mitchell which also rely on section 93-4203(4) which establish the proper Montana rule covering injunctions against public officers.

THE INTENTION OF THE LEGISLATURE AND STATUTORY CONSTRUCTION--COST-BENEFIT ANALYSIS AND AESTHETICS

In its Opinion, a majority of this Court discussed at length the question of whether MEPA was inconsistent with and repugnant to the Subdivision and Platting Act, sections 11-3859 et seq., (see pages 19 through 21 of the Opinion). The majority held that MEPA supplements the provisions of the Subdivision and Platting Act and that the environmental review contemplated by the Subdivision and Platting Act ". . . does not approach the scope of the inquiry required by MEPA Section 69-6504, R.C.M. 1947" (see pages 19 and 20 of the Opinion). Finally, a majority of the Court ruled that there is ". . . no irreconcilable repugnancy between these acts which would render either the Subdivision and Platting Act or MEPA a nullity . . . " and that ". . . the statutes must be read together as creating a complementary scheme of environmental protection" (see page 21 of the Opinion). In reaching this decision, however, the majority has overlooked the specific statutory provisions of the separate and distinct Sanitation in Subdivisions Act which both trigger and control the issues discussed in the majority Opinion. Furthermore, the Opinion has overlooked controlling decisions concerning the interpretation of legislative intent and the manner in which specific statutory provisions are to be interpreted when conflicts with general statutory language arise.

The subdivision application before the Department of Health which is the focal point of this litigation was filed under the Sanitation in Subdivisions Act and <u>not</u> the Subdivision and Platting Act. Furthermore, there is no application procedure under MEPA. Thus, the Opinion's detailed

discussion and reconciliation of MEPA with the Subdivision and Platting Act does not address the determinative question raised in the litigation. That is, must the Legislature's specific language limiting the authority and power of the Department to review applications for subdivisions under the Sanitation in Subdivisions Act be given effect? Or, should the specific limitations contained in the Sanitation in Subdivisions Act be ignored and in effect repealed by the general language of MEPA?

The Opinion appears to assume that all of the criteria that the majority concludes must be discussed in a MEPA environmental impact statement are readily available to the Department. Stated another way, the Opinion implies that the applicant is required to submit to the Department detailed information concerning expected markets, prospective buyers, the financing for the subdivision, the architectural design of proposed facilities in the subdivision, projected housing costs, projected lot costs, alternatives the developer has considered, and a general justification for the subdivision. However, a close look at the authority of the Department to adopt rules requiring a developer to submit information under the provisions of the Sanitation in Subdivisions Act clearly indicates that the Department does not have such broad and expansive authority. It is within this context that the Court's consideration of the adequacy of the Revised Impact Statement prepared for the Beaver Creek South Subdivision must be considered.

Section 69-5005, R.C.M. 1947, is the specific section of the Sanitation in Subdivisions Act which clearly limits the Department's authority to adopt rules requiring an applicant to submit information for the review of subdivisions. It is this section of the law which Intervenor believes is the

controlling statute in determining whether the Department can discuss and analyze the expansive factors that the Opinion states must be evaluated under MEPA. The text of Section 69-5005, R.C.M. 1947, in effect at the time the Beaver Creek South application was filed read as follows:

> "69-5005. Rules for administration and enforcement of chapter. (1) The department shall adopt reasonable rules, including adoption of sanitary standards, . . . necessary for administration and enforcement of this chapter.
>
> (2) The rules and standards shall provide the basis for approving subdivision plats for various types of water, sewage facilities, and solid waste disposal, both public and private, and shall be related to size of lots, contour of land, porosity of soil, ground water level, distance from lakes, streams, and wells, type and construction of private water and sewage facilities, and other factors affecting public health and the quality of water for uses relating to agriculture, industry, recreation, and wildlife.
>
> (3) The rules shall further provide for:
>
> (a) the furnishing to the department of a copy of the plat and other documentation showing the layout or plan of development, including:
>
> (i) total development area,
>
> (ii) total number of proposed dwelling units;
>
> (b) adequate evidence that a water supply that is sufficient in terms of quality, quantity and dependability will be available to ensure an adequate supply of water for the type of subdivision proposed;
>
> (c) evidence concerning the potability of the proposed water supply for the subdivision;
>
> (d) standards and technical procedures applicable to storm drainage plans and related designs, in order to ensure proper drainage ways;
>
> (e) standards and tecnical procedures applicable to sanitary sewer plans and designs, including soil percolation testing and required percolation rates and site design standards for on-lot sewage disposal systems when applicable;
>
> (f) standards and technical procedures applicable to water systems;
>
> (g) standards and technical procedures applicable to solid waste disposal;

> (h) requiring evidence to establish that, if a public sewage disposal system is proposed, provision has been made for the system and, if other methods of sewage disposal are proposed, evidence that the systems will comply with state and local laws and regulations which are in effect at the time of submission of the preliminary or final plan or plat." (Emphasis added. This section of the Sanitation in Subdivisions Act was amended by the 1975 Legislature, Chapter 529, Laws of Montana, to authorize the Department to assess fees for the review of subdivisions. The text of the language just quoted was not changed, however.)

These provisions in the Sanitation in Subdivisions Act clearly limit the Department's authority to require an applicant to submit the information that will be needed to discuss the factors described in the majority Opinion. The information cannot be obtained from anyone else. Only Beaver Creek South knows which markets will be selected for sale of the subdivision if it is approved. Only Beaver Creek South knows which prospective buyers will be appealed to. Only Beaver Creek South can provide information concerning the financial feasibility of the project. Only Beaver Creek South can provide information concerning the cost of lots, the cost of dwellings, the cost of water supply, sewage and solid waste disposal systems. Only Beaver Creek South can provide information concerning the architectural design of dwellings. (This is assuming, of course, that Beaver Creek South intends to construct dwellings on the lots that will be sold. If only lots without dwellings are going to be sold, then even Beaver Creek South cannot provide information concerning the architectural design of the dwellings in the subdivision.) Only Beaver Creek South can provide information concerning the alternatives that it has considered. Not only has Intervenor never been asked to provide such information, but nowhere in the provisions of the Sanitation in Subdivisions Act is the Department authorized by the Legislature of the State of Montana to require the information

that the majority says must be analyzed in order to do a comprehensive cost-benefit analysis and aesthetic impact evaluation of the subdivision. The Court also rules that the scope of the inquiry under MEPA is much broader than that conducted by an appropriate local governing body under the Subdivision and Platting Act. Thus, the Department cannot rely upon the information submitted at the local level under the provisions of the Subdivision and Platting Act. The Department's only recourse is to come to the developer to obtain the detailed economic and architectural design information that the majority indicates must be analyzed in an environmental impact statement.

Does the majority Opinion expand the rule-making authority of the Department to require a developer to submit the necessary information concerning economic and aesthetic impacts? Or, are the specific limitations imposed by the Legislature of the State of Montana on the authority of the Department to secure information from an applicant and review subdivisions under the Sanitation in Subdivisions Act to be given effect? Intervenor respectfully submits that the specific provisions of the Sanitation in Subdivisions Act must be controlling in this situation.

new issue?

In reconciling specific versus general statutory mandates, there are two provisions of Montana law that have been consistently upheld and ruled upon by this Court.

Section 93-401-15, R.C.M. 1947, reads as follows:

> "Construction of statutes and instruments--general rule. In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such a construction is, if possible, to be adopted as will give effect to all." (Emphasis added.)

Section 93-401-16, R.C.M. 1947, reads as follows:

> "In the construction of a statute the intention of the legislature, and in the construction of the instrument the intention of the parties, is to be pursued if possible, and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it." (Emphasis added.)

These statutory provisions have been interpreted on numerous occasions by this Court. Justice Haswell, who wrote the Opinion for the majority in this case, has cited and relied upon these basic tenets of Montana law in the case of the Montana Association of Tobacco and Candy Distributors v. the State Board of Equalization, 156 Mont. 108, 476 P.2d 775 (1970). In quoting from language in the case of In re Stevenson, 87 Mont. 486, 289 Pac. 566 (1930), Justice Haswell ruled in the Tobacco and Candy Distributors case that:

> "'Where one statute deals with a subject in general and comprehensive terms and another deals with a part of the same subject in a more minute and definite way, to the extent of any necessary repugnancy between them, the special will prevail over the general statute.'" (Emphasis added.)

See also City of Billings v. Smith, 158 Mont. 197, at 211, where the Court stated:

> "'* * * [I]t is a canon of statutory construction that a later statute general in its terms and not expressly repealing a prior special or specific statute, will be considered as not intended to affect the special or specific provisions of the earlier statute, unless the intention to effect the repeal is clearly manifested or unavoidably implied by the irreconcilability of the continued operation of both, or unless there is something in the general law or in the course of legislation upon its subject matter that makes it manifest that the legislature contemplated and intended a repeal.'"

Intervenor respectfully submits that there is a necessary repugnancy between the Opinion of the Court requiring the Department to conduct a detailed cost-benefit analysis and an aesthetic examination of proposed dwellings in a subdivision in light of the limited statutory authority of the Department to acquire the information in question. The

Opinion states that ". . . unwarranted clairvoyance . . ." is not required in an environmental impact statement (see page 30 of the Opinion). However if the Department cannot acquire the necessary economic and aesthetic information from the applicant, then it appears that clairvoyance will be needed. The majority of this Court has overlooked the crucial question of whether there is, in fact, a repugnancy between the specific limitations placed upon the Department under the Sanitation in Subdivisions Act and the general language of MEPA.

Are the requirements of MEPA general in nature? By the majority's own admission, they are. The Opinion explicitly states that MEPA is ". . . a broadly worded policy enactment. . . " (See page 17 of the Opinion). On page 18 of the Opinion, the majority cites the provisions of Section 69-6504, R.C.M. 1947, and states that this section of MEPA contains "general directions to state agencies." Intervenor respectfully submits that the majority has failed to consider how the general statutory language of MEPA is to be considered in light of the specific rule-making and decision-making limitations imposed by the Legislature in Section 69-5005, R.C.M. 1947, of the Sanitation in Subdivisions Act.

IV.

SCOPE OF REVIEW

In limiting the scope of judicial rule to procedural matters, the majority relies upon the decision in Trout Unlimited v. Morton, 509 F.2d 1276, 1282 (9th Cir., 1974), and quotes the requirement that an EIS contain "an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in the light of its environmental consequences." (Opinion, p.24) Yet in its discussion of the Revised EIS and its treatment

of the matters of wildlife and aesthetic impact the Court has gone beyond the requirement of a reasonable disclosure and seems to require that the Department somehow lessen or obviate the environmental impact disclosed or answer that impact in some way. It is difficult to understand what more the majority opinion requires of the Department. As stated by the Ninth Circuit Court in the Trout Unlimited decision, 509 F.2d at 1283, "a reasonably thorough discussion of the significant aspects of the probable environmental consequences is all that is required by an EIS." With respect to the impact on wildlife, the Revised EIS fully discloses that the development will damage a portion of the wintering range of ten elk, plus deer, moose, and gamebirds. Even the majority opinion acknowledges that all concede that that environmental impact cannot be avoided. More details are certainly not available and the environmental disclosure required by Trout Unlimited seems to be complete. Is the Department somehow obliged to avoid the environmental impact? It can only do so by denying subdivision approval. By ruling this portion of the Revised EIS inadequate, does the majority intend to substitute its judgment for that of the Department with respect to the "balancing" of environmental factors and subdivision approval? Intervenor respectfully submits that the majority opinion has misapplied the procedural rule enunciated in Trout Unlimited.

In requiring a more detailed treatment of the presumed aesthetic impact of the subdivision, Intervenor submits that the majority has again acknowledged that the Revised EIS demonstrates and acknowledges that the subdivision will produce a visual impact which would be considered aesthetically offensive by a majority of people. Again the Opinion seems to require that the Department obviate or answer the

admitted impact, when under Trout Unlimited disclosure is deemed sufficient. In ruling that a detailed discussion of the aesthetic impact is absent, the majority has overlooked the detailed discussion on page 3 of the Revised EIS describing the vegetative cover of the area of the development, pointing out that it borders U.S. Highway 191, and describing the aesthetics of a tree-covered hill which dominates the southwestern border of the land, but is not included within the boundaries of the subdivision. With respect to visual impact, the EIS at page 3 also points out that the land-use plan calls for a natural open-space parkway dedication 300 feet wide along Beaver Creek itself where no buildings nor building lots will be permitted, and further states that open-space and recreation areas will make up over 22% of the development. Intervenor submits that this discussion, when combined with the Department's acknowledgement that the subdivision will result in an adverse visual impact, satisfies the full disclosure requirement enunciated in Trout Unlimited.

V.

ECONOMIC ANALYSIS

In ruling that an economic cost-benefit analysis must be included in an EIS the majority Opinion has plainly overlooked the contrary ruling by the Ninth Circuit Court of Appeals in Trout Unlimited v. Morton, 509 F.2d 1276, 1286, where that court held:

> ". . . Appellants insist that the EIS is inadequate because it does not contain a formal and mathematically expressed cost-benefit analysis. We do not believe such an analysis is necessary to enable an EIS to serve the purposes for which it is designed.
>
> This conclusion rests upon the hard fact that there is sufficient disagreement about how environmental amenities should be valued to permit any value so assigned to be challenged on the grounds of its subjectivity. It follows that in most, if not all, projects the ultimate

> decision to proceed with the projects, whether made by Congress or an agency, is not strictly a mathematical determination. Public affairs defy the control that precise quantification of its issues would impose.
>
> This is not to say that progress is not being made in devising techniques which will make cost-benefit analyses more reliable. Nor is it to say that under no circumstances should the EIS contain a numerically expressed cost-benefit analysis. We intend merely to say that under the circumstances of this case the absence of such an analysis in the EIS is not fatal."

To the same effect see Judge Battin's decision in Montana Wildlife Federation v. Morton, 33 St.Reptr. 251, 254 (Jan. 19, 1976).

It should also be pointed out that the required contents of an environmental impact statement are set forth at section 69-6504(3), which does not contain any requirement that an economic cost-benefit analysis be included in an EIS. By inserting the requirement of an economic analysis the majority has overlooked the prohibition contained in section 93-401-15 that a court is "not to insert what has been omitted" when construing a statute. The fact that the Legislature itself acknowledged the omission by attempting to correct it in House Joint Resolution No. 73 should not justify the majority in engaging in questionable statutory construction. As this Court has often stated: "Where the language of a statute is plain, unambiguous, direct and certain, the statute speaks for itself and there is nothing left for the court to construe." Dunphy v. Anaconda Co., 151 Mont. 76, 438 P.2d 660. It is thus improper to look behind the statute for legislative intent, as that intent is taken from the plain words of the statute themselves. In treating the question whether "necessity" need be discussed in the environmental impact statement the majority adhered to these principles of statutory construction (Opinion, p.31); its treatment of the requirement for an economic

analysis is entirely inconsistent therewith.

CONCLUSION

For all of the foregoing reasons and authorities, Intervenor respectfully submits that the Supreme Court should grant rehearing in the above-entitled case and should reconsider its decision herein.

Respectfully submitted,

DZIVI, CONKLIN, JOHNSON & NYBO

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DECISION

No. 13179

IN THE SUPREME COURT OF THE STATE OF MONTANA

1976

THE MONTANA WILDERNESS ASSOCIATION, and
GALLATING SPORTMEN'S ASSOCIATION, INC.,

Plaintiffs and Respondents,

-vs-

THE BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES
OF THE STATE OF MONTANA; THE DEPARTMENT OF HEALTH
AND ENVIRONMENTAL SCIENCES OF THE STATE OF MONTANA,

Defendants and Appellants,

and

BEAVER CREEK SOUTH, INC., a corporation,

Intervenor and Appellant.

Appeal from: District Court of the First Judicial District,
Honorable Gordon R. Bennett, Judge presiding.

Counsel of Record:

For Appellants:

G. Steven Brown argued, Helena, Montana

For Intervenor:

Dzivi, Conklin, Johnson and Nybo, Great Falls,
Montana
William P. Conklin argued, Great Falls, Montana

For Respondents:

James Goetz argued, Bozeman, Montana

For Amicus Curiae:

Steven J. Perlmutter, Environmental Quality Council,
argued, Helena, Montana
Richard M. Weddle, Community Affairs, Helena, Montana
Donald R. Marble, Women Voters, Chester, Montana
Anderson, Symmes, Forbes, Peete & Brown, Home Builders,
Billings, Montana

Submitted: December 6, 1976

Decided: DEC 30 1976

Filed: DEC 30 1976

Thomas J. Kearney
Clerk

2nd decision

Mr.Justice Wesley Castles delivered the Opinion of the Court.

This is an action by the Montana Wilderness Association and the Gallatin Sprttmen's Association, Inc., for declaratory and injunctive relief against a proposed subdivision development in Gallatin County known as Beaver Creek South. The district court of Lewis and Clark County entered summary judgment (1) that the environmental impact statement on the proposed subdivision was void, (2) ordering reinstatement of the prior sanitary restrictions on the proposed subdivision, and (3) enjoining further development of the proposed subdivision until the reimposed sanitary restrictions are legally removed. One of the defendants and intervenor, appeal.

The instant appeal is on rehearing and the opinion previously promulgated on July 22, 1976, is withdrawn.

Plaintiffs in the district court were the Montana Wilderness Association, a Montana nonprofit corporation dedicated to the promotion of wilderness areas and aiding environmental causes generally, and Gallatin Sportmen's Association, Inc., a Montana nonprofit corporation organized for charitable, educational and scientific purposes including the conservation of wildlife, wildlife habitat and other natural resources.

Defendants are (1) the Board of Health and Environmental Sciences and, (2) the Department of Health and Environmental Sciences of the State of Montana. Intervenor Beaver Creek South, Inc. is a Montana corporation and the developer of the proposed subdivision and has been made a party to the judgment. The Montana Environmental Quality Council, a statutory state agency, appeared in the district court as amicus curiae. The Montana Department of

Community Affairs appears as amicus curiae. Other amicus curiae appeared by brief.

Beaver Creek South owns a tract of approximately 160 acres adjacent to U.S. Highway 191 in the Gallatin Valley seven miles south of Big Sky of Montana. Early in 1973 Beaver Creek submitted to the Bozeman City-County Planning Board a subdivision plat for approval by that board and the Gallatin County Commissioners, contemplating development of 95 acres of that tract as a planned unit development in two phases. This submission and approval was required by sections 11-3859 through 11-3876, R.C.M. 1947, known as the Montana Subdivision and Platting Act. After publication of notice a public hearing was held on October 11, 1973 where the only public reaction was from the State Department of Fish and Game, expressing concern about possible infringement of wildlife habitat along the highway. Again, on January 10, 1974, a second public hearing was held after notice concerning a second phase of the development was given. At this second hearing, no public comments were received. Approval of the subdivision was recommended and carried out, subject to approval of water and sewer systems by the Montana Department of Health and Environmental Sciences as required by sections 69-4801 through 69-4827, R.C.M. 1947. The application for this approval had been made by the owner early in 1973 also. At the local level, neither plaintiff appeared at the public hearings.

After several months of conferences and tests the Department issued a draft environmental impact statement on April 8, 1974. The draft statement was issued purportedly because of the requirements of section 69-6504(b)(3), R.C.M. 1947, the Montana Environmental Policy Act (MEPA). A final impact statement was issued on June 26, 1974.

On July 26, 1974, the Department issued and delivered to Beaver Creek its certificate removing the sanitary restrictions on the plat.

On that same day, July 26, 1974, after the issuance of the certificate, the Department was served with an order to show cause and a temporary restraining order issued on the basis of this action filed by plaintiffs on July 25, 1974.

Even though it had already lifted the sanitary restrictions before service of the temporary restraining order, the Department chose on July 29, 1974 to rescind and invalidate its earlier certificate. Following this a series of procedural matters were had and the Department undertook to revise its Environmental Impact statement. At this point, the landowner, Beaver Creek, was not a party to the proceedings. It was allowed to intervene in September, 1974. The Gallatin County Board of County Commissioners was never a party to the action.

Motions to dismiss and briefs were filed, and on February 11, 1975, the district court ordered the temporary restraining order be dissolved, and the Associations be given an opportunity to file an amended complaint seeking a declaratory judgment on any impact statement other than the one filed in June 1974. In its memorandum and order, the district court found the Associations had standing to sue a state agency, but the Department must be given an opportunity to exercise its discretion and that an injunction would lie "only after the Department has acted unlawfully".

On February 14, 1975 the Department again conditionally removed the sanitary restrictions on Beaver Creek South.

On February 21, 1975, plaintiffs filed their second amended complaint seeking: (1) declaratory judgment that the Revised EIS

of the Department was inadequate in law; (2) a permanent injunction prohibiting Beaver Creek from selling any of the lots or further developing Beaver Creek South until compliance with the laws of Montana was effected; and (3) a mandatory injunction ordering the Department to reimpose sanitary restrictions on Beaver Creek South.

The focus of the second amended complaint is that the Revised EIS does not comply with legal requirements of MEPA in these particulars:

(1) The Revised EIS does not disclose that the Department used to the fullest extent possible a systematic, interdisciplinary approach as required by section 69-6504(b)(1), R.C.M. 1947.

(2) The Revised EIS does not include a detailed statement of alternatives to the proposed action nor were such alternatives studied, developed or described to the fullest extent possible as required by section 69-6504(b)(3)(iii) and 69-6504(b)(4), R.C.M. 1947.

(3) The Revised EIS does not contain a detailed statement of the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity as required by section 69-6504(b)(3)(iv), R.C.M. 1947.

(4) The Revised EIS does not include to the fullest extent possible a detailed statement of the environmental impact of the proposed subdivision as required by section 69-6504(b)(3)(i), R.C.M. 1947.

(5) The Revised EIS contains no adequate consideration of the full range of the economic and environmental costs and benefits of the alternative actions available.

Defendants and intervenor filed motions to dismiss the second amended complaint. This complaint was further amended; the Environmental Quality Council was granted leave to file a brief as amicus curiae; briefs were filed by all parties; and the matter was submitted to the district court for decision.

The district court considered the motions to dismiss as motions for summary judgment under Rule 12(b)(6), M.R.Civ.P. and considered matters outside the pleadings, principally interrogatories and answers.

On August 29, 1975, the district court issued its opinion and declaratory judgment. In substance the district court held the plaintiffs have standing to prosecute this action, that the Revised EIS does not meet statutory requirements in various particulars, and plaintiffs are entitled to injunctive relief. Judgment was entered accordingly.

Defendant Department of Health and Environmental Sciences and intervenor Beaver Creek South, Inc. appeal from the judgment.

The single determinative issue here is the function of the Department in land use decisions such as is involved in this case; that is, a simple subdivision plat. Other ancillary issues as to "standing" of the plaintiff associations to sue and the right to injunctive relief have been briefed and argued but need not be determined here because of our view of the law of Montana. It is seen that the district court findings and judgment are premised on the MEPA being the ruling statute; and that the Department of Health is required to file an impact statement; and, further, that the Department has the final land use decision over and above the water supply, sewage and solid waste disposal issues. Although the district court did not specifically discuss this problem, it can be the only basis for its decision.

In analyzing the law of Montana, three acts of the Montana legislature are involved. The three acts which must be looked to and harmonized are:

(1) The 1967 Subdivision Sanitation Act, sections 69-5001 through 5009, R.C.M. 1947.

This Act prohibits the recording of any subdivision plat until the Department issues its certificate removing sanitary restrictions from the plat. It is primarily a public health measure and is designed to protect the quality and potability of public water supplies.

(2) The 1971 Montana Environmental Policy Act, sections 69-6501 through 6518, R.C.M. 1947. This Act declares as its purpose in section 69-6502:

> "The purpose of this act is to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the state; and to establish an environmental quality council."

The MEPA then goes on to describe in general terms the environmental impacts that must be assessed when agencies of the state make major decisions having a significant impact on the human environment. Section 69-6504 requires state agencies to prepare detailed statements analyzing the impacts of major actions of state government in several categories. In that same section the "responsible state official" shall consult with other state agencies, and, in subdivision (6) provides that state agencies shall:

> "make available to counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment".

staff guidance for on EIS

The MEPA also created a legislative branch entity known as the Environmental Quality Council. This group has been vested with legislative watchdog authority as a sort of legislative auditor within the legislative branch of government. This Act was amended in 1975 to that all voting members of the council are legislative members. The original Act was passed prior to the effective date of the 1972 Montana Constitution.

(3) The 1973 Subdivision and Platting Act, sections 11-3859 through 11-3876, R.C.M. 1947. This Act confers upon local governing bodies the authority to approve or disapprove a subdivision based on a variety of environmental, economic and social factors (section 11-3863). That section, 11-3863, describes the content of the regulations that must be adopted by every local governing body to insure the "* * * orderly development of their jurisdictional areas * * *." The factors that must be considered include the impact on roads, the need for additional roadways and utility easements, adequate open spaces, water, drainage, sanitation facilities and others, including environmental factors. Also in that section it is provided that the state department of intergovernmental relations shall prescribe reasonable minimum requirements for the local governmental units' regulations which shall include "detailed criteria for the content of the environmental assessment required by the act." Public hearings are required and the local governing body "shall consider all relevant evidence relating to the public health, safety and welfare, including the environmental assessment * * *."

It is also noted that section 69-5001 of the 1967 Subdivision Sanitation Act (also amended in 1973) limited expressly the involvement of the Department to "water supply, sewage disposal, and solid waste disposal".

Further analysis of the 1973 Subdivision and Platting Act will demonstrate unequivocally a legislative intent to place control of subdivision development in local governmental units in accordance with a comprehensive set of social, economic, and environmental criteria and in compliance with detailed procedural requirements.

Significantly, no similar mandate is given in the 1971 MEPA. Thus we conclude that the district court's reasoning, necessarily implied from its holding, that MEPA extends the Department's control over subdivisions beyond matters of water supply, sewage and solid waste disposal is in error as it is in direct conflict with the legislature's undeniable policy of local control as expressed in the Subdivision and Platting Act.

A further comparison of the local control versus State control over subdivisions is this---the 1973 legislature charged local governing bodies with comprehensive control over subdivision development, and amended that law in 1974 and 1975. If the 1971 MEPA already lodged this control in the state Department, such legislation was superfluous. Also, the express purpose of MEPA set out previously herein states to "encourage", "promote" and "enrich" [understanding]. Nowhere in the MEPA is found any regulatory language.

We refer back to the procedures here. The local governing unit, the Gallatin County Commission, had already complied with the laws. It was not made a party to this action. It had a statutory duty and right to act. The MEPA does not change the law with regard to that. Accordingly the judgment directed to the Department's failure to adequately write an environmental impact statement has nothing to do with the authority of the county commission to act. As to the Department, it of course, can

supplement information available to local governing bodies, but its only regulatory function is in the statutorily prescribed areas of water supply, sewage and solid waste disposal.

We have not herein set out the function of the Montana Department of Community Affairs which has submitted a brief amicus curiae. But we do observe that detailed procedures for intergovernmental functions are set out by statutes, regulations, and procedures for protection of the environment.

Finding, as we have, that the regulatory function of subdivisions is local, the judgment and injunctive order of the district court is reversed and the complaint ordered dismissed.

Wesley Castles
Justice.

We concur.

A. B. Martin
Honorable A. B. MARTIN
Sitting for Honorable JAMES T. HARRISON

John Conway Harrison
Justice.

Mr. Justice Frank I. Haswell dissenting:

The decision of the Court today deals a mortal blow to environmental protection in Montana. With one broad sweep of the pen, the majority has reduced constitutional and statutory protections to a heap of rubble, ignited by the false issue of local control.

This case does not concern local approval of subdivision plats by county commissioners under the Subdivision & Platting Act. Neither the county commissioners nor the city-county planning board is a party to this litigation. Nobody claims that the county commissioners do not have the power of approval of subdivision plats in conformity with the Subdivision & Platting Act. State v. local control is simply a "red herring" in this case.

The real issues in this case concern the right of two essentially local environmental organizations whose members make substantial use of nearby public lands for recreational purposes to compel a state agency to conform to the requirements of the Montana Environmental Policy Act regarding an Environmental Impact Statement to the end that an adequate environmental assessment will be made and considered by the decision makers, be they local or state or whoever they may be. If they cannot, the inalienable right of all persons to a clean and healthful environment guaranteed by Montana's Constitution confers a right without a remedy; the requirements of Montana's Environmental Policy Act and related environmental legislation become meaningless and illusory; and the mandatory Environmental Impact Statement deteriorates into a meaningless gibberish, providing protection to no one. These issues

are embodied in the three principal issues raised by the parties, viz. standing, the validity of the Environmental Impact Statement, and injunctive relief.

In my view, the majority neatly sidesteps these real issues in this case. Instead, the majority decision effectively nullifies express state policy on environmental matters contained in the Montana Environmental Policy Act, House Joint Resolution 73 approved March 16, 1974, and substantially interferes with and limits the effective operation of the legislature's Environmental Quality Council.

Because this Court has made a 180° turn from its original position, I set out the original decision of this Court for comparison. I believe the original decision is correct, legally sound, and effectuates the purposes and objective of Montana's Constitution and its statutes relating to the environment.

OPINION

* * * * * *

This is an action by the Montana Wilderness Association and the Gallatin Sportsmen's Association, Inc., for declaratory and injunctive relief against a proposed subdivision development in Gallatin County known as Beaver Creek South. The district court of Lewis and Clark County entered summary judgment (1) that the environmental impact statement on the proposed subdivision was void, (2) ordering reinstatement of the prior sanitary restrictions on the proposed subdivision, and (3) enjoining further development of the proposed subdivision until the reimposed sanitary restrictions are legally removed. One of the defendants and intervenor appeal.

Plaintiffs in the district court were the Montana Wilderness Association, a Montana nonprofit corporation dedicated to the promotion of wilderness areas and aiding environmental causes generally, and Gallatin Sportsmen's Association, Inc., a Montana nonprofit corporation organized for charitable, educational and scientific purposes including the conservation of wildlife, wildlife habitat and other natural resources.

Defendants are (1) the Board of Health and Environmental Sciences and, (2) the Department of Health and Environmental Sciences of the State of Montana. Intervenor Beaver Creek South, Inc. is a Montana corporation and the developer of the *[171 Mont.*

488] proposed subdivision. The Montana Environmental Quality Council, a statutory state agency, appeared in the district court as amicus curiae.

Beaver Creek South is located in the canyon of the West Gallatin River adjacent to U.S. Highway 191 about seven miles south of Meadow Village of Big Sky of Montana. Beaver Creek crosses a portion of the property for about one-quarter mile along the north side. The general area where the proposed subdivision is located is a scenic mountain canyon area presently utilized as a wildlife habitat and a grazing area for livestock. Beaver Creek supports a salmonoid fishery. A two lane public highway, U.S. 191, runs through the canyon.

The developer Beaver Creek South, Inc., hereinafter called Beaver Creek, intends to subdivide approximately 95 acres into 75 lots for single-family and multi-family residences and a maximum of seven and one-half acres abutting U.S. Highway 191, for a neighborhood commercial area. The development of the subdivision is to be accomplished in two phases.

In 1973 Beaver Creek submitted to the Bozeman City-County Planning Board its subdivision plat contemplating Beaver Creek South for approval by the board and the county commissioners as required by sections 11-3859 through 11-3876, R.C.M. 1947, the Montana Subdivision and Platting Act. In the spring of 1974 Beaver Creek filed the subdivision plat and plans and specifications for a water supply and sewer system with the Montana Department of Health and Environmental Sciences (hereinafter called the Department) for review and approval as required by sections 69-5001 through 69-5009, R.C.M. 1947, the Sanitation in Subdivisions Act. Section 69-5003(2)(b) provides that a subdivision plat may not be filed with the county clerk and recorder until the Department has certified "that it has approved the plat and plans and specifications and that the subdivision is subject to no sanitary restriction".

In April 1974 the Department circulated a "draft" environmental impact statement on the proposed subdivision in order to *[171 Mont. 489]* obtain comments on the proposal pursuant to section 69-6504 (b)(3), R.C.M. 1947, of the **Montana Environmental Policy Act** (MEPA). Written comments were received and the Department issued its "final" environmental impact statement in June 1974. The following month plaintiff Associations commenced this action seeking a permanent injunction against the Department's removal of sanitary restrictions on the proposed Beaver Creek South. The Associations alleged failure of compliance with subdivision laws, administrative rules, Environmental Quality Council guidelines, and MEPA. The district court issued a temporary restraining order and an order to show cause. The Department and the Associations entered into a stipulation vacating the show cause hearing and the Department revised its final environmental impact statement, submitting a copy to the district court in October 1974. This revised final environmental impact statement is hereinafter called the revised EIS.

Meanwhile, in September 1974, Beaver Creek was granted leave to intervene. Motions to dismiss and briefs were filed, and on February 11, 1975, the district court ordered the temporary restraining order be dissolved, and the Associations be given an opportunity to file an amended complaint seeking a declaratory judgment on any impact statement other than the one filed in June 1974. In its memorandum and order, the district court found the Associations had standing to sue a state agency, but the Department must be given an opportunity to exercise its discretion and that an injunction would lie "only after the Department has acted unlawfully".

On February 14, 1975 the Department conditionally removed the sanitary restrictions on Beaver Creek South.

On February 21, 1975, plaintiffs filed their second amended complaint seeking: (1) declaratory judgment that the Revised EIS of the Department was inadequate in law; (2) a

permanent injunction prohibiting Beaver Creek from selling any of the lots or further developing Beaver Creek South until compliance with the laws of Montana was effected; and (3) a mandatory injunc- *[171 Mont. 490]* tion ordering the Department to reimpose sanitary restrictions on Beaver Creek South.

The focus of the second amended complaint is that the Revised EIS does not comply with legal requirements of MEPA in these particulars:

(1) The Revised EIS does not disclose that the Department used to the fullest extent possible a systematic, interdisciplinary approach as required by section 69-6504(b)(1), R.C.M. 1947.

(2) The Revised EIS does not include a detailed statement of alternatives to the proposed action nor were such alternatives studied, developed or described to the fullest extent possible as required by section 69-6504(b)(3)(iii) and 69-6504(b)(4), R.C.M. 1947.

(3) The Revised EIS does not contain a detailed statement of the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity as required by section 69-6504(b)(3)(iv), R.C.M. 1947.

(4) The Revised EIS does not include to the fullest extent possible a detailed statement of the environmental impact of the proposed subdivision as required by section 69-6504(b)(3)(i), R.C.M. 1947.

(5) The Revised EIS contains no adequate consideration of the full range of the economic and environmental costs and benefits of the alternative actions available.

Defendants and intervenor filed motions to dismiss the second amended complaint. This complaint was further amended; the Environmental Quality Council was granted leave to file a brief as amicus curiae; briefs were filed by all parties; and the matter was submitted to the district court for decision.

The district court considered the motions to dismiss as motions for summary judgment under Rule 12(b)(6), M.R.Civ.P. and considered matters outside the pleadings, principally interrogatories and answers.

On August 29, 1975 the district court issued its opinion and *[171 Mont. 491]*

declaratory judgment. In substance the district court held the plaintiffs have standing to prosecute this action, that the Revised EIS does not meet statutory requirements in various particulars, and plaintiffs are entitled to injunctive relief. Judgment was entered accordingly.

Defendant Department of Health and Environmental Sciences and intervenor Beaver Creek South, Inc. appeal from the judgment.

The issues can be summarized in this fashion:

1) Do plaintiff Associations have standing to maintain this action?

2) Does the Revised EIS satisfy the procedural requirements of the **Montana Environmental Policy Act** (MEPA)?

3) Are plaintiff Associations entitled to injunctive relief?

Appellants challenge the standing of the Associations to bring this suit. Appellants' arguments fall into three main categories: a) that the Associations have suffered no

cognizable injury; b) that any injury suffered or threatened is indistinguishable from the injury to the public generally; and c) that neither MEPA, the Montana Administrative Procedure Act, nor any other statute grants standing to these Associations to sue agencies of the state.

Initially, the question of environmental standing under MEPA is one of first impression in Montana. Therefore, the Associations and amicus curiae have presented this Court with numerous authorities from other jurisdictions on the issue of environmental standing. We find none are controlling as to the question before us, but a brief review of such authorities aids in the illumination of the determinative factors regarding this issue.

The Associations urge this Court to adopt the rationale of the federal courts in finding environmental standing because the relevant portions of MEPA in issue here are patterned virtually verbatim after corresponding portions of the National Environmental Policy Act of 1969, 42 U.S.C. Secs. 4321 through 4347, (NEPA). *[171 Mont. 492]*

In the federal courts, citizen challenges to alleged illegal agency action are often brought pursuant to the federal Administrative Procedure Act, 5 U.S.C. Sec. Sec. 701 through 706. The companion cases of Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184, 188; and Barlow v. Collins, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970), established the federal two-pronged test for standing to sue administrative agencies. The United States Supreme Court held that persons have standing to obtain judicial review of federal agency action under the Federal Administrative Procedure Act where they allege that the challenged action causes them injury in fact and where the alleged injury is to an interest "arguably within the zone of interests to be protected or regulated" by the statutes that the agencies are claimed to have violated.

Data Processing and Barlow did not concern environmental matters, but such a case was presented in Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636, 641 (1972). In Sierra Club, a conservation organization alleged its "special interest" in conservation and sound management of public lands, and sued the Secretary of the Interior for declaratory and injunctive relief against the granting of approval or issuance of permits for commercial exploitation of a national game refuge area in California. Petitioner invoked the judicial review provisions of the federal Administrative Procedure Act. The Supreme Court commenced its discussion of standing with this statement:

"* * * Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a `personal stake in the outcome of the controversy,' Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663, 678, as to ensure that `the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' Flast v. Cohen, 392 U.S. 83, 101, 88 S.Ct. 1942, 1953, 20 L.Ed.2d 947, 962. Where, *[171 Mont. 493]* however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff."

The Supreme Court held that petitioner lacked standing solely because it did not sufficiently allege "injury in fact" to its "individualized interests", that is, its individual members. Thus the Court did not reach the question of whether petitioner satisfied the "zone of interest" test.

In United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254, 269 (1973), proceedings were brought against the Interstate Commerce Commission (ICC) to enjoin the enforcement of certain administrative orders. Plaintiff organization alleged injury in that each of its members used the natural

resources in the area of their legal residences for camping, hiking, fishing, sightseeing, and other recreational and aesthetic purposes. The alleged illegal activity was that the ICC failed to include with its orders a detailed environmental impact statement as required by NEPA. The Court found the allegations of the complaint with respect to standing were sufficient to withstand a motion to dismiss in the district court. The Court also reiterated from Sierra Club that "injury in fact" is not confined to economic harm:

"* * * Rather, we explained [in Sierra Club]: `Aesthetic and environmental well-being, like economic well-being, are important ingredients in the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.' * * Consequently, neither the fact that the appellees here claimed only a harm to their use and enjoyment of the natural resources of the Washington area, nor the fact that all those who use those resources suffered the same harm, deprives them of standing." *[171 Mont. 494]*

It was undisputed that the "environmental interests" asserted by plaintiff were within the "zone of interests" to be protected or regulated by NEPA, the statute claimed to have been violated.

Sierra Club and SCRAP underscore the fact that in the federal courts environmental standing has developed in the statutory context of the federal Administrative Procedure Act.

The lower federal courts have, of course, followed the "injury in fact" and "zone of interest" test. For example, in the Ninth Circuit Court: National Forest Preservation Group v. Butz, 485 F.2d 408(9 Cir., 1973); Cady v. Morton, 8 ERC 1097, 527 F.2d 786 (9 Cir., 1975); City of Davis v. Coleman, 521 F.2d 661 (9 Cir.; 1975).

Here, the Associations also cite several cases from California and Washington in support of their standing argument. The experience in the state of Washington has some pertinence to our inquiry. Washington's State Environmental Policy Act, Washington Revised Code, Ch. 43.2 1C (1974) (SEPA), is also modeled after NEPA and has been interpreted by the Washington courts in several cases. The leading case as to standing is Leschi Improvement Council v. Washington State Highway Commission, 84 Wash.2d 271, 525 P.2d 774, 786 (1974). Washington's SEPA, like MEPA, contains no express provision for judicial review at the behest of private parties. In Leschi petitioners obtained review of a state highway commission's limited access and design hearings and of the commission's environmental impact statement, not pursuant to any statutory grant of standing, but by way of certiorari in the state's lower court. Petitioners also sought an injunction. The Washington Supreme Court held the petitioners had standing because they raised the question of whether a nonjudicial administrative agency committed an illegal act violative of fundamental rights. An illegal act was said to be one which is contrary to statutory authority. More important, the court held that petitioners sufficiently alleged violation of a fundamental right because of the language in SEPA that each person has a "fundamental and inalienable right to a *[171 Mont. 495]* healthful environment." Washington Revised Code Sec. 43.21 C.020(3). This section schematically corresponds to MEPA section 69-6503(b), which recognizes that "each person shall be entitled to a healthful environment * * *."

In Leschi four justices dissented. They objected to the standing of petitioners because:

"* * * Judicial review of the administrative proceeding involved, at the instance of persons standing in the position of the appellants, is not authorized by any statute or any doctrine of common law, and there is no suggestion that it is mandated by any provision of the state or federal constitutions." (Emphasis supplied.)

Here, appellants suggest this Court follow certain Montana cases in denying standing on the ground that the Associations lack standing to enjoin public officers from acting. This

argument fails to distinguish between the separate questions of standing and of injunctive relief. The particular issue of injunctions will be treated separately hereinafter.

In Montana, the question of standing to sue government agencies has arisen in the context of taxpayer and elector suits. State ex rel. Mitchell v. District Court, 128 Mont. 325, 339, 275 P.2d 642, 649, involved a complaint seeking to enjoin the secretary of state from certifying nominees for election to a certain office. This Court said:

"The complaint which the plaintiff * * * filed in the district court shows that his only interest is as a taxpaying, private citizen and prospective absentee voter. It wholly fails to show that he will be injured in any property or civil right. Thus does [his] own pleading show him to be without standing or capacity to invoke equitable cognizance of a purely political question * * *." (Emphasis supplied.)

Holtz v. Babcock, 143 Mont. 341, 380, 390 P.2d 801, 805, was an action to enjoin the governor and other state officers from performing an agreement regarding an airplane lease. It was held that plaintiff lacked standing to sue as a citizen, resi- *[171 Mont. 496]* dent, taxpayer and airplane owner. On petition for rehearing the Court stated:

* * * The only complaint a taxpayer can have is when [the alleged state action] affects his pocketbook by unlawfully increasing his taxes. Appellant here does not allege any particular injury which he personally would suffer." (Emphasis supplied.)

In State ex rel. Conrad v. Managhan, 157 Mont. 335, 338, 485 P.2d 948, 950, the Court summarily stated:

"* * * We hold that relators as affected taxpayers, have standing to bring a declaratory judgment action [against county assessors and the state board of equalization] concerning a tax controversy * * *." (Emphasis supplied.)

Chovanak v. Matthews, 120 Mont. 520, 525-527, 188 P.2d 582, 584-585, concerns an attack against the constitutionality of a statute rather than a challenge to particular agency action. However, we look to Chovanak for its general discussion of the principles of standing. There the plaintiff sued the state board of equalization for a declaratory judgment that a slot machine licensing act was constitutionally void. Plaintiff alleged he was a resident, citizen, taxpayer and elector of the county where the action was commenced. We quote Chovanak for the sound rules of jurisprudence enunciated:

"It is by reason of the fact that it is only judicial power that the courts possess, that they are not permitted to decide mere differences of opinion between citizens, or between citizens and the state, or the administrative officials of the state, as to the validity of statutes. * * *

"* * * The judicial power vested in the district courts and the Supreme Court of Montana, by the provisions of the Montana Constitution extend to such `cases at law and in equity' as are within the judicial cognizance of the state sovereignty. Article 8, secs. 3, 11. By `cases' and `controversies' within the judicial power to determine, is meant real controversies and not abstract differences of opinion or moot questions. Neither federal nor state Constitution has granted such power. *[171 Mont. 497]*

"* * *

"The only interest of the appellant in the premises appears to be that he is a resident, citizen, taxpayer and elector of the county * * *. He asserts no legal right of his that the said board has denied him, and sets forth no wrong which they have done to him, or threatened to inflict upon him.

"Appellant's complaint is in truth against the law, not against the board of equalization. He

represents no organization that has been denied a slot machine license. He seeks no license for himself. In fact it appears from his complaint that slot machines, licensed or unlicensed, are utterly anathema to him. There is no controversy between him and the board of equalization.

"* * *

"It is held in Montana, as it is held in the United States Supreme Court, and by courts throughout the nation, that a showing only of such interest in the subject of the suit as the public generally has is not sufficient to warrant the exercise of judicial power. * * *"

It is clear from these Montana cases that the following factors constitute sufficient minimum criteria, as set forth in a complaint, to establish standing to sue the state:

1) The complaining party must clearly allege past, present or threatened injury to a property or civil right.

2) The alleged injury must be distinguishable from the injury to the public generally, but the injury need not be exclusive to the complaining party.

3) The issue must represent a "case" or "controversy" as is within the judicial cognizance of the state sovereignty.

With the foregoing criteria in mind, we hold plaintiff Associations have standing to seek judicial review of the Department's actions under MEPA.

First, the complaint alleges a threatened injury to a civil right of the Associations' members, that is, the "inalienable * * * right to a clean and healthful environment", Article II, Section 3, *[171 Mont. 498]* 1972 Montana Constitution. This constitutional provision, enacted in recognition of the fact that Montana citizens' right to a clean and healthful environment is on a parity with more traditional inalienable rights, certainly places the issue of unlawful environmental degradation within the judicial cognizance.

We have studied appellants' arguments that Article IX, Section 1, 1972 Montana Constitution, states that the legislature shall provide for the enforcement of the state's duty to "maintain and improve a clean and healthful environment in Montana", and the legislature shall provide for "adequate remedies" to protect it. We have studied the Constitutional Convention minutes surrounding Article IX and are aware the intent of the delegation was for the legislature to act pursuant to Article IX. But, we cannot ignore the bare fact that the legislature has not given effect to the Article IX, Section 1 mandate over a period of years. Moreover, the declaration of rights in Article II, the Article dealing with citizens' fundamental rights, gives "All persons" in Montana a sufficient interest in the Montana environment to enable them to bring an action based on those rights, provided they satisfy the other criteria set forth.

Intervenors urge this Court to consider the lengthy dissent in the Washington Leschi case as persuasive authority that the plaintiff Associations lack standing. The portion of that dissent relied upon, deals with the proposition the petitioners there came under no statutory grant of standing and were therefore excluded from the courts in a SEPA case. However, that dissent actually supports our holding here. The dissent assails the purported statutory creation of a "fundamental right" in SEPA upon which standing may be founded, and argues that a fundamental right can only be derived from the fundamental law. We concur and find an inalienable, or fundamental, right was created in our fundamental law, Article II, Section 3, 1972 Montana Constitution.

Second, the complaint alleges on its face an injury to the Associations which is distinguishable from the injury to the general *[171 Mont. 499]* public. When the plaintiffs

do not rely on any statutory grant of standing, as here, courts must look to the nature of the interests of plaintiffs to determine whether plaintiffs are in a position to represent a "personal stake in the outcome of the controversy" ensuring an "adversary context" for judicial review. Sierra Club v. Morton, supra; Chovanak v. Matthews, supra. Both Associations allege, in effect, that they are relatively large, permanent, nonprofit corporations dedicated to the preservation and enhancement of wilderness, natural resources, wildlife and associated concerns. Both Associations allege substantial use of the public lands adjacent to Beaver Creek South by their members for various recreational purposes. The Gallatin Sportsmen's Association contributed to the Department's Revised EIS by way of written comments to the draft environmental impact statement. These facts are sufficient to permit the Associations to complain of alleged illegal state action resulting in damage to the environment.

Third, there can be no doubt that unlawful environmental degradation is within the judicial cognizance of the state sovereignty. The constitutional provisions heretofore discussed and MEPA itself unequivocally demonstrate the state's recognition of environmental rights and duties in Montana. The courts of the state are open to every person for the remedy of lawfully cognizable injuries. Article II, Section 16, 1972 Montana Constitution; Section 93-2203, R.C.M. 1947.

Finally, we reiterate these Associations are citizen groups seeking to compel a state agency to perform its duties according to law. This concept is novel in Montana only insofar as it is raised here in the context of the state's explicit environmental policy. Were the Associations denied access to the courts for the purpose of raising the issue of illegal state action under MEPA, the foregoing constitutional provisions and MEPA would be rendered useless verbiage, stating rights without remedies, and leaving the state with no checks on its powers and duties under that act. The statutory functions of state agencies under MEPA can- *[171 Mont. 500]* not be left unchecked simply because the potential mischief of agency default in its duties may affect the interests of citizens without the Associations' membership. United States v. SCRAP, supra.

The second major issue concerns the adequacy of the Revised EIS filed by the Department on the Beaver Creek South subdivision.

Throughout the argument Beaver Creek has maintained that MEPA has no bearing upon the Department's review of the proposed subdivision plant and an environmental impact statement is not required. If such statement is required, then Beaver Creek allies itself with the Department's position. The Department concedes that an environmental impact statement is required, but contends its responsibilities under MEPA are circumscribed by other statutory authority. In both Beaver Creek's and the Department's arguments, the thrust is that subdivision review has been comprehensively provided for in two acts hereinbefore cited: the Subdivision and Platting Act and the Sanitation in Subdivisions Act. They allege the clear legislative intent of the Subdivision and Platting Act is to place final subdivision approval authority in the hands of local government (e.g., section 11-3866, R.C.M. 1947), and the Department can interfere with town, city, or county subdivision approval only to the extent of its particular expertise and authority under the Sanitation In Subdivisions Act. Thus, they allege, if a Department environmental impact statement is required, it need deal in detail only with the environmental effects related to water supply, sewage disposal, and solid waste disposal.

Montana's Environmental Policy Act was enacted in 1971 and is patterned after the National Environmental Policy Act. It is a broadly worded policy enactment in response to growing public concern over the innumerable forms of environmental degradation occurring in modern society. The first two sections of MEPA state:

"69-6502. Purpose of act. The purpose of this act is to declare *[171 Mont. 501]* a state policy which will encourage productive and enjoyable harmony between man and his

environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the state; and to establish an environmental quality council.

"69-6503. Declaration of state policy for the environment. The legislative assembly, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density organization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the state of Montana, in cooperation with the federal government and 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 man and nature can coexist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Montanans.

"(a) In order to carry out the policy set forth in this act, 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 to the end that the state may--

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

"(2) assure for all Montanans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

"(3) attain the widest range of beneficial uses of the environ- *[171 Mont. 502]* ment without degradation, risk to health or safety, or other undesirable or unintended consequences;

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

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

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

"(b) The legislative assembly recognizes that each person shall be entitled to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."

These sections unequivocably express the intent of the Montana legislature regarding environmental policy.

But MEPA does more than express lofty policies which want for any means of legislative or agency implementation. Section 69-6504, R.C.M. 1947, contains "General directions to state agencies" and provides:

"The legislative assembly authorizes and directs that to the fullest extent possible.

"(a) The policies, regulations, and laws of the state shall be interpreted and administered in

accordance with the policies set forth in this act, and

"(b) all agencies of the state shall

"(1) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;

"(2) identify and develop methods and procedures, which will insure that presently unquantified environmental amenities and *[171 Mont. 503]* values may be given appropriate consideration in decision making along with economic and technical considerations;

"(3) include in every recommendation or report on proposals for projects, programs, legislation and other major actions of state government significantly affecting the quality of the human environment, a detailed statement on-

"(i) the environmental impact of the proposed action,

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"(iii) alternatives to the proposed action,

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

"Prior to making any detailed statement, the responsible state official shall consult with and obtain the comments of any state agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate state, federal, and local agencies, .which are authorized to develop and enforce environmental standards, shall be made available to the governor, the environmental quality council and to the public, and shall accompany the proposal through the existing agency review processes. * * *"

The "detailed statement" described by subsection (b)(3) is referred to as the environmental impact statement, or EIS.

Appellants emphasize that the Subdivision and Platting Act was passed two years after MEPA, and this circumstance expresses a legislative intent that local review of environmental factors, particularly under sections 11-3863 and 11-3866, R.C.M. 1947, obviates the necessity for departmental review. Such an interpretation, however, conflicts with the terms of MEPA, in section 69-6507, R.C.M. 1947: *[171 Mont. 504]*

"The policies and goals set forth in this act are supplementary to those set forth in existing authorizations of all boards, commissions, and agencies of the state."

Had the legislature intended local review to replace the rigorous review required by responsible state agencies, it could easily have so stated. The existing statutes evince a legislative intent that subdivision decisions be made at the local planning level based upon factors with an essentially local impact, and that state involvement triggers a comprehensive review of the environmental consequences of such decisions which may be of regional or statewide importance.

An illustration of this interpretation is provided by a comparison of the provisions of MEPA, hereinbefore set forth, with certain provisions of the Subdivision and Platting Act. The statement of policy in the Subdivision and Platting Act contains a mandate to "require development in harmony with the natural environment", section 11-3860, R.C.M. 1947. Section 11-3863 (1), R.C.M. 1947, requires local governing bodies to adopt regulations and enforcement measures for, inter alia, "the avoidance of subdivision which would involve unnecessary environmental degradation * * *." Subsection (2) requires the department of community affairs to prescribe minimum requirements for local government subdivision regulations, including "criteria for the content of the environmental assessment required by this act." Subsection (3) provides that this "environmental assessment" must be submitted to the governing body by the subdivider. Subsection (4) describes the environmental assessment which emphasizes research as to water, sewage, soil and local services. While these factors may be among the more significant immediate environmental problems created by a subdivision, an assessment of them does not approach the scope of the inquiry required by MEPA section 69-6504, R.C.M. 1947.

Furthermore, there is no irreconcilable repugnancy between these acts which would render either the Subdivision and Platting Act or MEPA a nullity. It is suggested the district court's *[171 Mont. 505]* judgment leads to the proposition that the Department could "veto" a local subdivision approval solely on the basis of its EIS--In direct contravention of the intent of the Subdivision and Platting Act. While this "veto" prospect is feasible, two points are disregarded by the argument. First, MEPA was enacted to mitigate environmental degradation "to the fullest extent possible". Second, MEPA does not call for a halt to all further development; its express direction to agencies is to "utilize a systematic, interdisciplinary approach" to foster sound environmental planning and decision making. A state agency acting pursuant to this directive does not invoke the specter of state government vetoing viable local decisions. The concurrent functions of local and state governments with respect to environmental decisions serve to enhance the environmental policy expressed in all of the statutes here considered, that action be taken only upon the basis of wellinformed decisions.

Thus, the statutes must be read together as creating a complementary scheme of environmental protection. As stated in Fletcher v. Paige, 124 Mont. 114, 119, 220 P.2d 484, 486:

"The general rule is that for a subsequent statute to repeal a former statute by implication, the previous statute must be wholly inconsistent and incompatible with it. United States v. 196 Buffalo Robes, 1 Mont. 489, approved in London Guaranty & Accident Co. v. Industrial Accident Board, 82 Mont. 304, 309, 266 P. 1103, 1105. The court in the latter case continued: `The presumption is that the Legislature passes a law with deliberation and with a full knowledge of all existing ones on the same subject, and does not intend to interfere with or abrogate a former law relating to the same matter unless the repugnancy between the two is irreconcilable.'

See: City of Billings v. Smith, 158 Mont. 197, 490 P.2d 221; State ex rel. Esgar v. District Court, 56 Mont. 464, 185 P. 157.

Support for our interpretation of the scope of MEPA is found in a leading federal case interpreting the NEPA. In Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic *[171 Mont. 506]* Energy Commission, 146 U.S.App.D.C. 33, 449 F.2d 1109, 1112, 17 A.L.R.Fed. 1 (1971), regulations proposed by the Atomic Energy Commission (AEC) were challenged on the basis that the proposed regulations did not adequately provide for consideration of all environmental factors as mandated by NEPA. The AEC argued that its authority extended only to nuclear related matters and that it was prohibited from independently evaluating and balancing environmental factors which were considered and certified by other federal agencies. The Calvert Cliffs' court found the AEC's interpretation of NEPA unduly restricted, stating:

"NEPA * * * makes environmental protection a part of the mandate of every federal agency and department. The Atomic Energy Commission, for example, had continually asserted, prior to NEPA, that it had no statutory authority to concern itself with the adverse environmental effects of its actions. Now, however, its hands are no longer tied. It is not only permitted, but compelled, to take environmental values into account."

The district court was correct in treating MEPA as the controlling statute in this case.

The district court held the Revised EIS does not comply procedurally with MEPA on eight separate grounds. The court expressly declined to venture into a review of the substantive merits of the Department's reasoning and conclusions.

A preliminary question is the inquiry into the proper scope of review of the Revised EIS by the courts. Because MEPA is modeled after NEPA, it is appropriate to look to the federal interpretation of NEPA. This Court follows the rule found in Ancient Order of Hiberians v. Sparrow, 29 Mont. 132, 135, 74 P. 197, 198:

"* * * that the construction put upon statutes by the courts of the state from which they are borrowed is entitled to respectful consideration, and * * * only strong reasons will warrant a departure from it.'" *[171 Mont. 507]*

Again, in State v. King Colony Ranch, 137 Mont. 145, 151, 350 P.2d 841, 844:

"The State Board of Equalization was and is warranted in following the Federal interpretation of the language which the Legislature of this state adopted from the Act of Congress."

See: Cahill-Mooney Construction Co. v. Ayres, 140 Mont. 464, 373 P.2d 703; Roberts v. Roberts, 135 Mont. 149, 338 P.2d 719; Lowe v. Root, 166 Mont. 150, 531 P.2d 674.

In determining the proper scope of judicial review of environmental impact statements under NEPA, the federal courts have framed the question in terms of whether NEPA is merely a procedural statute or whether it is a substantive statute creating substantive duties reviewable by the courts. See Note: The Least Adverse Alternative Approach to Substantive Review under NEPA, 88 Harvard Law Review 735 (1975). However because the district court ruled on procedural grounds, we limit our inquiry to procedural matters.

The United States Supreme Court recently stated in Aberdeen & Rockfish R.R. Co. v. SCRAP, 422 U.S. 289, 95 S.Ct. 2336, 2355, 45 L.Ed.2d 191, 215 (1975):

"* * * NEPA does create a discreet procedural obligation on government agencies to give written consideration of environmental issues in connection with certain major federal actions * * *."

In Calvert Cliffs', supra, (449 F.2d 1109, 1115), the District of Columbia Court of Appeals stated:

"* * * But if the decision was reached procedurally without individualized consideration and balancing of environmental factors--conducted fully and in good faith--it is the responsibility of the courts to reverse. * * *"

The Ninth Circuit Court of Appeals firmly bases its reviewing standard on the federal Administrative Procedure Act. Lathan v. Brinegar, 9 Cir., 506 F.2d 677 (1974); Cady v. Morton, 9 Cir., 527 F.2d 786 (1975); Trout Unlimited v. Morton, 9 Cir., 509 *[171 Mont. 508]* F.2d 1276, 1282, 1283 (1974). In Trout Unlimited the court expanded on its explanation:

"The `without observance of procedure required by law' Sec. 706(2)(D) standard, however, is less helpful in reviewing the sufficiency of an EIS than one might wish * * *

"* * *

"It follows, therefore, that in determining whether the appellees prepared an adequate EIS we will be guided in large part by `procedural rules' rooted in case law. * * * All such rules should be designed so as to assure that the EIS serves substantially the two basic purposes for which it was designed. That is, in our opinion an EIS is in compliance with NEPA when its form, content, and preparation substantially (1) provide decisionmakers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in the light of its environmental consequences, and (2) make available to the public, information of the proposed project's environmental impact and encourage public participation in the development of that information."

We are also mindful that the policies set forth in section 69-6503, R.C.M. 1947, are to be implemented by state agencies in accordance with sections 69-6504(a) and 69-6507, R.C.M. 1947.

In light of the foregoing, the scope of judicial review of the Revised EIS in this case is limited to a consideration of whether the Department provided a sufficiently detailed consideration and balancing of environmental factors which will ensure that the procedure followed will give effect to the policies of MEPA, aid the Department in decision making, and publicize the environmental-impact of its action.

We will consider each factor of the Revised EIS found legally deficient by the district court in the sequence set forth in its opinion.

The district court held the Department failed to include in the Revised EIS anything rising to the dignity of an economic analysis, as required by MEPA and by House Joint Resolution No. 73, *[171 Mont. 509]* approved March 16, 1974. A joint resolution is not binding as law on this Court, but we give it consideration as a clear manifestation of the legislative construction of MEPA. State v. Toomey, 135 Mont. 35, 335 P.2d 1051; State ex rel. Jones v. Erickson, 75 Mont. 429, 244 P. 287. House Joint Resolution No. 73 states in relevant part:

"WHEREAS, it is a matter of serious concern to the legislature that this enactment [MEPA] be fully implemented in all respects,

"NOW, THEREFORE, BE IT RESOLVED * * *

"That all agencies of state government are hereby directed to achieve forthwith the full implementation of the **Montana Environmental Policy Act** including the economic analysis requirements of sections 69-6504 through 69-6514 * * * and

"* * * that economic analysis shall accompany environmental impact statements as required by the foregoing sections of the act and shall encompass an analysis of the costs and benefits to whomsoever they may accrue, including considerations of employment, income, investment, energy, the social costs and benefits of growth, opportunity costs, and the distribution effects * * *."

With the exception of a discussion of educational costs, the Revised EIS contains scant economic analysis. The Department seeks to explain this away with a reference to the function of local governing bodies in compiling economic data, and states it would be a duplication of effort for the Department to so engage itself. Earlier in this opinion we discussed this attempt to circumvent the intent of MEPA as expressed by the legislature--in

this instance as recently as 1974. The Department may not abdicate its duties under MEPA to local governments.

The cost-benefit analysis required by MEPA, as construed by the legislature, encompasses a broad consideration of several factors categorized in House Joint Resolution No. 73, approved March 16, 1974. A reasonable cost-benefit economic analysis undertaken pursuant to these criteria would, in effect, accomplish most of the purposes sought to be served by an environ- *[171 Mont. 510]* mental impact statement. Here, for example, the Revised EIS asserts that Beaver Creek South will provide necessary housing for many employees at nearby Big Sky of Montana. This comment, however, is not accompanied by any data to support the conclusion that Big Sky employees could afford, or would desire, to live at Beaver Creek South. In other words, the Revised EIS does not consider or disclose the approximate costs of the residential units, the average incomes of Big Sky employees, or even the likelihood that this projected housing use will come to pass. Such data is contemplated by MEPA.

The Department clearly ignored its duties to provide an economic analysis in its Revised EIS, as the district court found. Also the cooperative interand intra-governmental approach fostered by MEPA section 69-6503, R.C.M. 1947, should encourage the free exchange of data compiled by local and state agencies; if the local government prepares an economic analysis, such could be incorporated as part of the Department's environmental impact statement.

The gist of the Revised EIS, p. 23, with respect to aesthetic considerations is demonstrated by its comments on visual impact:

"A visual impact would certainly result from the proposed development. The severity of this visual impact is purely speculation, and the desirability is a matter of personal aesthetic values.

"* * *

"* * * Any development, including the proposed Beaver Creek South, placed within this scenic canyon setting would be considered aesthetically offensive by a majority of people."

Again, the Revised EIS, p. 24, affirms that visual impact is a matter of "speculation" because "Economists have not developed an acceptable process to place an economic valuation on such intangibles as aesthetics."

This latter comment betrays a fundamental weakness of the Department's approach to its responsibilities under MEPA. In *[171 Mont. 511]* decrying the absence of a precise quantitative or qualitative measure, the Department ignores the recognition of this variable factor in section 69-6504(b)(2), as one which must "be given appropriate consideration in decision making along with economic and technical considerations". (Emphasis supplied). Under section 69-6504(b)(3)(i), the Department is required to prepare a detailed statement on "the environmental impact of the proposed action" and visual impact falls within the meaning of this subsection. There is no detailed description of the design of the proposed residential units, the compatibility of the architecture with the surrounding landscape, the obstruction or availability of views, or the relationship of the open spaces to these factors. The Revised EIS comments in this regard are not sufficiently detailed under any standard conceivable to give meaning to the act or inform decision makers and the public of the probable aesthetic consequences of the development.

Section 69-6504(b)(3)(iii), R.C.M. 1947, requires an environmental impact statement to contain "alternatives to the proposed action". Section 69-6504(b)(4), R.C.M. 1947, requires agencies to "study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses

of available resources". The latter section appears to be operable whether or not an environmental impact statement is prepared. Trinity Episcopal School Corporation v. Romney, 8 ERC 1033, 523 F.2d 88, (2d Cir. 1975). The district court correctly concluded the subsection (b)(4) description is to be included in a subsection (b)(3) environmental impact statement.

However, the district court erred in its opinion that discussion of alternatives in the Revised EIS is "patently inadequate". The district court merely viewed the last two pages of the Revised EIS under the "Alternatives" heading, wherein various alternatives are essentially stated as conclusions. This review ignores the reasonable discussion of alternatives contained in other portions of the Revised EIS regarding such factors as water supply, *[171 Mont. 512]* wastewater, and police and fire protection. As stated by the Ninth Circuit Court of Appeals in Life of the Land v. Brinegar, 9 Cir., 485 F.2d 460, 472(1973):

"NEPA's `alternatives' discussion is subject to a construction of reasonableness. * * * Certainly, the statute should not be employed as a crutch for chronic fault-finding. Accordingly, there is no need for an EIS to consider an alternative whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative."

The discussion of alternatives in the Revised EIS viewed in its entirety is sufficiently detailed to comply with the procedural requirements of MEPA.

The Revised EIS contains reproductions of lengthy comments from the state Department of Fish and Game and the Gallatin Sportsmen's Association regarding impact of the proposed development on wildlife in the Gallatin Canyon. Other comments are also mentioned. All of the comments indicated that an adverse environmental effect on wildlife could not be avoided if the proposal were to be implemented. Section 69-6504(b)(3) (ii), R.C.M. 1947. The Revised EIS, p. 28, rather than dealing with a consideration of these adverse effects, contains a pro-tracted discussion of the legislative history of the Subdivision and Platting Act and the local level hearings on the instant plat proposal, and concludes by stating:

"Therefore, there is an opportunity to effect rejection or revision of a subdivision for environmental reasons at the county level. This would appear to satisfy the spirit in which the **Montana Environmental Policy Act** was enacted."

We find this justification for inaction and ad hoc agency "legislating" to be inappropriate in an environmental impact statement. The Department's responsibility in pursuing its duties under MEPA is to consider all relevant environmental values along with other factors and come to a conclusion with regard to them. Although we do not suggest the Department has the internal resources and expertise with which to expand upon or *[171 Mont. 513]* refute the wildlife comments received from outside sources, we do hold it is within the Department's province under MEPA to reach its decision based upon a procedure which encompasses a consideration and balancing of environmental factors. The district court was correct in holding that the mere transmittal of comments adverse to the proposal is insufficient.

The department of Highways commented on the effect of the proposed subdivision with respect to traffic flow on U.S. Highway 191. The Department of Highways states the Beaver Creek South Subdivision "will generate a large amount of traffic", citing figures, and states this increased volume "will not warrant the construction of a four lane facility in this vicinity." Several challenging comments call for more detailed and accurate information, but the Revised EIS, at p. 33, states the Department of Highways reaffirms its statement and on that basis says:

"* * * Beaver Creek South would not be the development that would make reconstruction [of the highway] necessary."

The district court found this portion of the Revised EIS lacking because the treatment of highways was "incomplete", there was no discussion of the effect of future highway construction, and also no discussion of cumulative social, economic and environmental impacts of continued development in the Gallatin Canyon.

We believe the highway discussion is procedurally adequate and that the district court's opinion on this point requires an unwarranted clairvoyance on the part of the Department. In contradistinction to the wildlife discussion where the agency with the greatest expertise in the field (Department of Fish and Game) raised serious adverse questions which were not addressed, here the Department is justified in relying on the Department of Highways projections for future traffic flow. The published comments and accompanying discussion demonstrate a reasonable consideration and balancing of environmental factors.

Comments of Montana Power Company in the Revised EIS *[171 Mont. 514]* indicate to the Department that the company would have "no problem" in supplying the electricity needs of the proposed subdivision, and that this capacity could be met with present transmission lines. The Revised EIS notes at p. 36, that the proposed subdivision "would be a contributing factor toward any future necessity for additional service." The adverse comments to this in the Revised E1S concentrate on the issue of whether or not Montana Power Company is counting on the use of a proposed new power line into the canyon from the west. The Department's conclusion does not dispute the information provided it by the power company. The district court held that this analysis is superficial at best.

The energy needs of the Gallatin Canyon with respect to Beaver Creek South, and future development, are sufficiently considered and balanced in the Revised EIS. The Department, through its inclusion in the Revised EIS of conflicting comments, cannot be expected to provide detail beyond that which is reasonably foreseeable. The Department reasonably concluded the proposed development would contribute to the total power needs of the area and to any future necessity for additional service. This constitutes procedural compliance with MEPA in that the Departmental decision makers are made aware of the environmental consequences regarding energy, and the same information is made available to other branches of government and the public. Trout Unlimited v. Morton, 509 F.2d 1276.

The district court held that the "actual necessity" for the proposed subdivision must be analyzed. As the appellants correctly point out, there is no provision in MEPA which requires a study of necessity. Therefore, the district court's opinion on this point is erroneous.

We point out, however, the necessity of the project was gratuitously introduced into the Revised EIS by the Department in order to publish therein a letter by Big Sky of Montana, Inc. which suggests that the Beaver Creek South subdivision will alleviate a housing shortage for employees at Big Sky. In re *[171 Mont. 515]* sponse to several challenging comments received by the Department, the Revised EIS then reverses its earlier position by stating that the objections may be valid, but they have no bearing on whether or not to approve the plat.

This turnabout of the Department within the Revised EIS evidences an attitude that an environmental impact statement is simply window dressing to pacify opponents of the Department's actions. MEPA was not enacted to provide the government and public with project justifications by state agencies. We hold that if the Department deems the necessity of the development to be a critical factor in its analysis of the impact of the proposed subdivision, then it is bound at least to make a reasonable consideration of the necessity of the project in light of the reasonable objections made to the necessity premise.

The district court held that cumulative impacts must be discussed in greater detail. The Revised EIS contains a detailed analysis of the cumulative impact of increasing the nutrient load in the Gallatin River from the subdivision's domestic water sources. No other

cumulative impacts are discussed in the same portion of the Revised EIS. However, the Revised EIS as a whole contains several references to anticipated future environmental impacts in the vicinity, and a reasonably detailed summary of the pending comprehensive plan for the Gallatin Canyon Planning Study Committee. This constitutes a sufficiently detailed consideration and disclosure regarding "the relationship between local shortterm uses of man's environment and the maintenance and enhancement of long-term productivity". Section 69-6504(b)(3)(iv), R.C.M. 1947.

In summary, the Revised EIS is procedurally inadequate in its analyses of economic costs and benefits, aesthetic considerations, and wildlife factors. This holding is not to be construed as a mandate for technical perfection; rather, we find simply that the Revised EIS does not sufficiently consider and balance the full range of environmental factors required under the terms of MEPA. If the policy and purpose of MEPA are to have any *[171 Mont. 516]* practical meaning, state agencies must perform their duties pursuant to the directives contained in that Act.

Having found that the district court correctly declared the Revised EIS to be procedurally inadequate and void, the final question is whether plaintiff Associations are entitled to injunctive relief as ordered by the district court.

The rule is well settled that injunction actions by private parties against public officials must be based upon irreparable injury and a clear showing of illegality. State ex rel. Keast v. Krieg, 145 Mont. 521, 402 P.2d 405. Environmental damage as alleged by the Associations is an injury within the scope of the judicial cognizance. Furthermore, the preceding discussion indicates the Revised EIS does not meet the minimum requirements of the law under MEPA and is clearly illegal.

The Department and Beaver Creek allege an injunction is barred by section 93-4203(4), R.C.M. 1947, which states:

"An injunction cannot be granted:

"* * * "(4) To prevent the execution of a public statute, by

officers of the law, for the public benefit."

This argument overlooks the cases which hold that illegal actions by public officials may be enjoined. In Larson v. The State of Montana and the Department of Revenue, 166 Mont. 449, 534 P.2d 854, 32 St.Rep. 377, 384, this Court overruled the dicta in Keast to the effect than an injunction against public officers was banned by section 93-4203(4), stating:

"The preferable law is enunciated in Hames v. City of Polson, 123 Mont. 469, 479, 215 P.2d 950, where it was held: " `* * * public bodies and public officers may be restrained by injunction from proceeding in violation of law, to the prejudice of the public, or to the injury of individual rights * * *.'"

We affirm the district court holding that injunctive relief is proper in this case.

The summary judgment is affirmed. *[171 Mont. 517]*

MR. JUSTICE DALY dissenting:

Time being short and to preclude another opinion I again dissent and comment that my original objection to legal principles concerning standing to bring suit have not been discussed nor answered.