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# Part 1

## General Provisions

### Part Cross-References

Duty to notify weed management district when proposed project will disturb land, 7-22-2152.

### Part Law Review Articles

The Coming of Age of State Environmental Policy Acts, Renz, 5 Pub. Land L. Rev. 31 (1984).

### Part Collateral References

National Environmental Policy Act of 1969, 42 U.S.C. § 4321, et seq.

A Guide to the Montana Environmental Policy Act, Montana Environmental Quality Council.

Improving the Montana Environmental Policy Act (MEPA) Process, Legislative Environmental Quality Council (2000).

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

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

### Cross-References

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

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

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

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

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

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

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

**History:** En. Sec. 2, Ch. 238, L. 1971; R.C.M. 1947, 69-6502; amd. Sec. 1, Ch. 352, L. 1995; amd. Sec. 5, Ch. 361, L. 2003; amd. Sec. 1, Ch. 396, L. 2011; amd. Sec. 35, Ch. 55, L. 2015.

### Compiler's Comments

*2015 Amendment:* Chapter 55 in (3)(b) substituted "75-1-201(4)(b)" for "75-1-201(6)(b)". Amendment effective October 1, 2015.

*2011 Amendment:* Chapter 396 in (1)(a) after "considered" inserted remainder of subsection; inserted (1)(b) concerning informed public; in (2) near middle inserted "mitigate"; inserted (3) regarding purpose of requiring environmental assessment and environmental impact statement; and made minor changes in

style. Amendment effective May 12, 2011.

*Severability:* Section 8, Ch. 396, L. 2011, was a severability clause.

*Applicability:* Section 10, Ch. 396, L. 2011, provided: "[This act] applies to an environmental assessment and an environmental impact statement begun on or after [the effective date of this act]." Effective May 12, 2011.

*2003 Amendment:* Chapter 361 inserted (1) relating to constitutional obligations and legislative intent; and made minor changes in style. Amendment effective April 16, 2003.

*Preamble:* The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

*Severability:* Section 39, Ch. 361, L. 2003, was a severability clause.

*Retroactive Applicability:* Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

*1995 Amendment:* Chapter 352 near beginning, after "environment", inserted "to protect the right to use and enjoy private property free of undue government regulation"; and made minor changes in style.

*1995 Statement of Intent:* The statement of intent attached to Ch. 352, L. 1995, provided: "Whenever Montana Environmental Policy Act analysis is required, it is the intent of the legislature that actions that regulate the use of private property are evaluated to ensure that alternatives that reduce, minimize, or eliminate regulatory restrictions are considered. It is not the intent of the legislature to affect in any manner other economic or social considerations or any other analysis conducted under the Montana Environmental Policy Act."

## **Cross-References**

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

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

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

## **Case Notes**

*DEQ Not Required by MEPA to Consider Environmental Impacts Not Related to Water Quality — Effect Preventable by Agency Only Through Lawful Exercise of Independent Authority:* The Montana Environmental Policy Act (MEPA) did not require the Department of Environmental Quality (DEQ) to consider non-water quality related environmental impacts of the construction and operation of a retail store facility as secondary impacts of the issuance of a Montana Water Quality Act permit to discharge facility wastewater into the ground from an onsite wastewater treatment system. The Supreme Court held that MEPA, like the National Environmental Policy Act, requires a reasonably close causal relationship between the triggering state action and the subject environmental effect. The court rejected the unyielding "but for" causation standard asserted by the plaintiffs to the effect that a state action is a cause of an environmental impact regardless of whether the agency, in the lawful exercise of its independent authority, can avoid or mitigate the effect. The Supreme Court further held that, for purposes of MEPA, an agency action is a legal cause of an environmental effect only if the agency can prevent the effect through the lawful exercise of its independent authority. Requiring a state agency to consider environmental impacts it has no authority to lawfully prevent would not serve MEPA's purposes of ensuring that agencies and the interested public have sufficient information regarding relevant environmental impacts to inform the lawful exercise of agency authority. Consequently, the Supreme Court reversed the District Court's summary judgment that DEQ violated MEPA in contravention of an administrative rule by failing to further consider the environmental impacts of the construction and operation of the facility other than water quality impacts and impacts of the related construction of the required wastewater treatment system. *Bitterrooters for Planning, Inc. v. Dept. of Environmental Quality*, 2017 MT 222, 388 Mont. 453, 401 P.3d 712.

*Allowance of Change in Grazing Permit Not Ministerial Act — EIS Required:* Shoberg transferred his grazing permit to Madden, and Madden changed from grazing cattle to grazing sheep. The Department of State Lands (now Department of Natural Resources and Conservation) allowed the grazing of sheep to continue, notwithstanding that the Department had information indicating that the grazing of sheep would adversely impact upon bighorn sheep reintroduced into the area. The plaintiffs brought an action to require the completion of an environmental impact statement (EIS). The Supreme Court held that an EIS was required because the Department was allowing an action, grazing of sheep, to go forward that could have a significant effect upon the quality of the human environment, notwithstanding statutes requiring the Department to protect the best interests of the state, including consideration of consequences to environment and wildlife. *Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands*, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995).

*Maximization of Income From School Trust Lands Not to Preclude Nonagricultural Uses:* Shoberg transferred his grazing permit to Madden, and Madden changed from grazing cattle to grazing sheep. The Department of State Lands (now Department of Natural Resources and Conservation) allowed the grazing of sheep to continue, notwithstanding that the Department had information indicating that the grazing of sheep would adversely impact upon bighorn sheep reintroduced into the area. The plaintiffs brought an action to require the completion of an environmental impact statement (EIS). The Supreme Court held that an EIS was required and that the Department's duty to maximize income from school trust lands did not exempt the Department from its obligation to comply with state environmental statutes. The Supreme Court also held that maximizing income is "a" consideration but not "the" consideration regarding school trust lands and is not paramount to the exclusion of wildlife or environmental considerations. *Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands*, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995).

## **Law Review Articles**

Of Crabbed Interpretations and Frustrated Mandates: The Effect of Environmental Policy Acts on Pre-Existing Agency Authority, Tobias & McLean, 41 Mont. L. Rev. 177, 234 (1980).

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

(2) In order to carry out the policy set forth in parts 1 through 3, it is the continuing responsibility of the state of Montana to use all practicable means consistent with other essential considerations of state policy to improve and coordinate state plans, functions, programs, and resources so that the state may:

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

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

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

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

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

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

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

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

**History:** En. Sec. 3, Ch. 238, L. 1971; R.C.M. 1947, 69-6503; amd. Sec. 2, Ch. 352, L. 1995; amd. Sec. 6, Ch. 361, L. 2003.

### **Compiler's Comments**

*2003 Amendment:* Chapter 361 in (3) in first sentence inserted reference to right to pursue life's basic necessities and inserted last sentence relating to implementation of rights; and made minor changes in style. Amendment effective April 16, 2003.

*Preamble:* The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution

as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

*Severability:* Section 39, Ch. 361, L. 2003, was a severability clause.

*Retroactive Applicability:* Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

*1995 Amendment:* Chapter 352 in (1), near middle after "development", inserted "and further recognizing that governmental regulation may unnecessarily restrict the use and enjoyment of private property" and near end, after "harmony", inserted "to recognize the right to use and enjoy private property free of undue government regulation"; inserted (2)(d) regarding the right to use and enjoy private property free of undue government regulation; in (3), near middle after "healthful environment", inserted "that each person is entitled to use and enjoy that person's private property free of undue government regulation"; and made minor changes in style.

*1995 Statement of Intent:* The statement of intent attached to Ch. 352, L. 1995, provided: "Whenever Montana Environmental Policy Act analysis is required, it is the intent of the legislature that actions that regulate the use of private property are evaluated to ensure that alternatives that reduce, minimize, or eliminate regulatory restrictions are considered. It is not the intent of the legislature to affect in any manner other economic or social considerations or any other analysis conducted under the Montana Environmental Policy Act."

### **Cross-References**

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

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

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

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

Renewable resource development, Title 90, ch. 2.

### **Case Notes**

*DEQ Not Required by MEPA to Consider Environmental Impacts Not Related to Water Quality — Effect Preventable by Agency Only Through Lawful Exercise of Independent Authority:* The Montana Environmental Policy Act (MEPA) did not require the Department of Environmental Quality (DEQ) to consider non-water quality related environmental impacts of the construction and operation of a retail store facility as secondary impacts of the issuance of a Montana Water Quality Act permit to discharge facility wastewater into the ground from an onsite wastewater treatment system. The Supreme Court held that MEPA, like the National Environmental Policy Act, requires a reasonably close causal relationship between the triggering state action and the subject environmental effect. The court rejected the unyielding

"but for" causation standard asserted by the plaintiffs to the effect that a state action is a cause of an environmental impact regardless of whether the agency, in the lawful exercise of its independent authority, can avoid or mitigate the effect. The Supreme Court further held that, for purposes of MEPA, an agency action is a legal cause of an environmental effect only if the agency can prevent the effect through the lawful exercise of its independent authority. Requiring a state agency to consider environmental impacts it has no authority to lawfully prevent would not serve MEPA's purposes of ensuring that agencies and the interested public have sufficient information regarding relevant environmental impacts to inform the lawful exercise of agency authority. Consequently, the Supreme Court reversed the District Court's summary judgment that DEQ violated MEPA in contravention of an administrative rule by failing to further consider the environmental impacts of the construction and operation of the facility other than water quality impacts and impacts of the related construction of the required wastewater treatment system. *Bitterrooters for Planning, Inc. v. Dept. of Environmental Quality*, 2017 MT 222, 388 Mont. 453, 401 P.3d 712.

*Maximization of Income From School Trust Lands Not to Preclude Nonagricultural Uses*: Shoberg transferred his grazing permit to Madden, and Madden changed from grazing cattle to grazing sheep. The Department of State Lands (now Department of Natural Resources and Conservation) allowed the grazing of sheep to continue, notwithstanding that the Department had information indicating that the grazing of sheep would adversely impact upon bighorn sheep reintroduced into the area. The plaintiffs brought an action to require the completion of an environmental impact statement (EIS). The Supreme Court held that an EIS was required and that the Department's duty to maximize income from school trust lands did not exempt the Department from its obligation to comply with state environmental statutes. The Supreme Court also held that maximizing income is "a" consideration but not "the" consideration regarding school trust lands and is not paramount to the exclusion of wildlife or environmental considerations. *Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands*, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995).

#### **Law Review Articles**

Montana's Constitutional Environmental Quality Provisions: Self-Execution or Self-Delusion?, Horwich, 57 Mont. L. Rev. 323 (1996).

The Battle for the Environmental Provisions in Montana's 1972 Constitution, Cross, 51 Mont. L. Rev. 449 (1990).

The Montana Constitution and the Right to a Clean and Healthful Environment, Schmidt & Thompson, 51 Mont. L. Rev. 411 (1990).

Symposium — The Montana Constitution: Taking New Rights Seriously, Part I, Environmental Rights, 39 Mont. L. Rev. 221 (1978).

The Doctrine of Self-Execution and the Environmental Provisions of the Montana State Constitution: "They Mean Something", Wyatt-Shaw, 15 Pub. Land L. Rev. 219 (1994).

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

- (1) comply with criteria or standards of environmental quality;
- (2) coordinate or consult with any local government, other state agency, or federal agency; or
- (3) act or refrain from acting contingent upon the recommendations or certification of any other state or federal agency.

**History:** En. Sec. 6, Ch. 238, L. 1971; R.C.M. 1947, 69-6506; amd. Sec. 1, Ch. 131, L. 2003.

#### **Compiler's Comments**

*2003 Amendment:* Chapter 131 in (2) after "any" inserted "local government"; and made minor changes in style. Amendment effective March 26, 2003.

*Applicability:* Section 4, Ch. 131, L. 2003, provided: "[This act] applies to environmental impact statements commenced on or after [the effective date of this act]." Effective March 26, 2003.

#### **Case Notes**

*DEQ Not Required by MEPA to Consider Environmental Impacts Not Related to Water Quality — Effect Preventable by Agency Only Through Lawful Exercise of Independent Authority:* The Montana Environmental Policy Act (MEPA) did not require the Department of Environmental Quality (DEQ) to

consider non-water quality related environmental impacts of the construction and operation of a retail store facility as secondary impacts of the issuance of a Montana Water Quality Act permit to discharge facility wastewater into the ground from an onsite wastewater treatment system. The Supreme Court held that MEPA, like the National Environmental Policy Act, requires a reasonably close causal relationship between the triggering state action and the subject environmental effect. The court rejected the unyielding "but for" causation standard asserted by the plaintiffs to the effect that a state action is a cause of an environmental impact regardless of whether the agency, in the lawful exercise of its independent authority, can avoid or mitigate the effect. The Supreme Court further held that, for purposes of MEPA, an agency action is a legal cause of an environmental effect only if the agency can prevent the effect through the lawful exercise of its independent authority. Requiring a state agency to consider environmental impacts it has no authority to lawfully prevent would not serve MEPA's purposes of ensuring that agencies and the interested public have sufficient information regarding relevant environmental impacts to inform the lawful exercise of agency authority. Consequently, the Supreme Court reversed the District Court's summary judgment that DEQ violated MEPA in contravention of an administrative rule by failing to further consider the environmental impacts of the construction and operation of the facility other than water quality impacts and impacts of the related construction of the required wastewater treatment system. *Bitterrooters for Planning, Inc. v. Dept. of Environmental Quality*, 2017 MT 222, 388 Mont. 453, 401 P.3d 712.

*No Violation of Clear Legal Duty to Consult With County Under MEPA — Writ of Mandamus and Injunction Improper — Action Against DEQ Dismissed:* After an exchange of information between the Department of Environmental Quality (DEQ) and Jefferson County about the Mountain States Transmission Intertie (MSTI), a proposed electric transmission line that would transect Jefferson County, the county filed a petition for a writ of mandamus and injunctive relief seeking to compel DEQ to satisfy its legal duty under the Montana Environmental Protection Act (MEPA) to consult with local government prior to issuing a draft Environmental Impact Statement (EIS) and to enjoin DEQ from issuing the draft EIS until after it had complied with its duty to consult. After a series of evidentiary hearings, the District Court concluded that DEQ had not satisfied its duty to consult with the county under MEPA and enjoined it from issuing a draft EIS on the MSTI project until DEQ had more thoroughly consulted with the county, and DEQ appealed. The Supreme Court concluded that the District Court had erred in issuing a writ of mandamus to compel DEQ to more thoroughly consult with the county because MEPA does not establish a clear legal duty for DEQ to consult with a local government to any specified degree. It also ruled that the writ of mandamus was improper because the county had other remedies available to it once DEQ rendered a final decision on the project. Because neither MEPA nor related regulations define the word "consult," DEQ is afforded some discretion in determining the extent to which it consults with a local government under 75-1-104. Because MEPA allows for some discretion on the part of DEQ on how to consult with local government, the Supreme Court held the requirement to consult was not ministerial and therefore did not establish a clear legal duty under MEPA. Accordingly, the Supreme Court remanded the matter to the District Court with instructions to dismiss without prejudice. *Jefferson County v. Dept. of Environmental Quality*, 2011 MT 265, 362 Mont. 311, 264 P.3d 715.

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

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

#### **Case Notes**

*Maximization of Income From School Trust Lands Not to Preclude Nonagricultural Uses:* Shoberg transferred his grazing permit to Madden, and Madden changed from grazing cattle to grazing sheep. The Department of State Lands (now Department of Natural Resources and Conservation) allowed the grazing of sheep to continue, notwithstanding that the Department had information indicating that the grazing of sheep would adversely impact upon bighorn sheep reintroduced into the area. The plaintiffs brought an action to require the completion of an environmental impact statement (EIS). The Supreme Court held that an EIS was required and that the Department's duty to maximize income from school trust lands did not exempt the Department from its obligation to comply with state environmental statutes. The Supreme Court also held that maximizing income is "a" consideration but not "the" consideration

regarding school trust lands and is not paramount to the exclusion of wildlife or environmental considerations. *Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands*, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995).

*MEPA Mandate Superseded*: In an action for declaratory and injunctive relief against a proposed subdivision development in which plaintiffs alleged that the Environmental Impact Statement (EIS) issued by the Department of Health and Environmental Sciences (now Department of Environmental Quality) pursuant to the Montana Environmental Policy Act (MEPA) was defective, the Supreme Court held that the legislative intent of the Sanitation in Subdivisions Act was to place control of the decisionmaking process with local governments. This was held to preclude any state level attempt to exercise authority over subdivisions except where explicitly required under the Sanitation in Subdivisions Act. *Mont. Wilderness Ass'n v. Bd. of Health & Environmental Sciences*, 171 M 477, 559 P2d 1157 (1976). (Mr. Chief Justice Haswell dissenting, MEPA imposes a supplementary responsibility to consider environmental factors not explicitly enumerated in existing permit-granting statutes.)

### Law Review Articles

Montana Land Use Law: Application of MEPA, Goetz, 38 Mont. L. Rev. 109 (1977).

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

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

### Compiler's Comments

*1995 Statement of Intent*: The statement of intent attached to Ch. 352, L. 1995, provided: "Whenever Montana Environmental Policy Act analysis is required, it is the intent of the legislature that actions that regulate the use of private property are evaluated to ensure that alternatives that reduce, minimize, or eliminate regulatory restrictions are considered. It is not the intent of the legislature to affect in any manner other economic or social considerations or any other analysis conducted under the Montana Environmental Policy Act."

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

History: En. Sec. 2, Ch. 361, L. 2003.

### Compiler's Comments

*Preamble*: The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede

other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

*Severability:* Section 39, Ch. 361, L. 2003, was a severability clause.

*Effective Date:* Section 40, Ch. 361, L. 2003, provided that this section is effective on passage and approval. Approved April 16, 2003.

*Retroactive Applicability:* Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

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

*History:* En. Sec. 37, Ch. 361, L. 2003.

### **Compiler's Comments**

*Preamble:* The preamble attached to Ch. 361, L. 2003, provided: "WHEREAS, Article II, section 3, of the Montana Constitution enumerates certain inalienable individual rights, including the right to a clean and healthful environment, the right of pursuing life's basic necessities, the right of enjoying and defending an individual's life and liberty, the right of acquiring, possessing, and protecting property, and the right of seeking individual safety, health, and happiness in all lawful ways; and

WHEREAS, the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations; and

WHEREAS, Article IX, section 1, of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations and directs the Legislature to provide for the administration and enforcement of this duty and also directs the Legislature to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources; and

WHEREAS, the Legislature has reviewed the intent of the framers of the 1972 Montana Constitution as evidenced in the verbatim transcripts of the constitutional convention; and

WHEREAS, there is no indication that one enumerated inalienable right is intended to supersede other inalienable rights, including the right to use property in all lawful means; and

WHEREAS, the Legislature, mindful of its constitutional obligation to provide for the administration and enforcement of the constitution, has enacted a comprehensive set of laws to accomplish the goals of the constitution, including the Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA; the Montana Environmental Policy Act, Title 75, chapter 1, parts 1 through 3, MCA; the Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA; water quality laws, Title 75, chapter 5, MCA; The

Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA; The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA; The Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA; the Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA; the Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA; the Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA; the Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA; the Montana Major Facility Siting Act, Title 75, chapter 20, MCA; the Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA; the Environmental Control Easement Act, Title 76, chapter 7, MCA; The Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA; The Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA; The Opencut Mining Act, Title 82, chapter 4, part 4, MCA; and The Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA."

*Severability:* Section 39, Ch. 361, L. 2003, was a severability clause.

*Effective Date:* Section 40, Ch. 361, L. 2003, provided that this section is effective on passage and approval. Approved April 16, 2003.

*Retroactive Applicability:* Section 41, Ch. 361, L. 2003, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to actions for judicial review or other causes of action challenging the issuance of a permit, petition for review, amendment, license, arbitration, action, certificate, or inspection that are pending but not yet decided on or after [the effective date of this act]." Effective April 16, 2003.

#### **75-1-109 reserved.**

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

(2) There must be deposited in the account:

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

(b) reimbursements received pursuant to 75-10-1403;

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

(d) interest earned on the account.

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

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

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

(c) remediation of sites containing hazardous wastes as defined in 75-10-403, hazardous or deleterious substances as defined in 75-10-701, or solid waste as defined in 75-10-203; or

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

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

**History:** En. Sec. 1, Ch. 338, L. 2001; amd. Sec. 98, Ch. 2, L. 2009; amd. Sec. 1, Ch. 107, L. 2009; amd. Sec. 8, Ch. 200, L. 2009.

#### **Compiler's Comments**

*2009 Amendments — Composite Section:* Chapter 2 in (2)(c) at end after "82-4-424" deleted "and 82-4-426"; and made minor changes in style. Amendment effective October 1, 2009.

Chapter 107 in (3)(c) after "wastes" substituted "as defined in 75-10-403, hazardous or deleterious substances as defined in 75-10-701, or solid waste as defined in 75-10-203" for "or hazardous substances for which the department may not recover costs from a legally responsible party"; and made minor changes in style. Amendment effective July 1, 2009.

Chapter 200 inserted (2)(b) regarding reimbursements; and made minor changes in style. Amendment

effective April 9, 2009.

*Saving Clause:* Section 10, Ch. 200, L. 2009, was a saving clause.

*Severability:* Section 8, Ch. 338, L. 2001, was a severability clause.

*Effective Date:* Section 9, Ch. 338, L. 2001, provided that this act is effective July 1, 2001.

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## Part 2

### Environmental Impact Statements

#### Part Collateral References

National Environmental Policy Act of 1969, 42 U.S.C. § 4332.

A Guide to the Montana Environmental Policy Act, Montana Environmental Quality Council.

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

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

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

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

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

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

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

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

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

(A) the environmental impact of the proposed action;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) (a) Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) may not include a review of actual or potential impacts beyond Montana's borders. It may not include actual or potential impacts that are regional, national, or global in nature.

(b) An environmental review conducted pursuant to subsection (1) may include a review of actual or potential impacts beyond Montana's borders if it is conducted by:

(i) the department of fish, wildlife, and parks for the management of wildlife and fish;

(ii) an agency reviewing an application for a project that is not a state-sponsored project to the extent that the review is required by law, rule, or regulation; or

(iii) a state agency and a federal agency to the extent the review is required by the federal agency.

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

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

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

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

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

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

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

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

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

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

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

(iii) Except as provided in subsection (6)(b), the court shall confine its review to the record certified by the agency. The court shall affirm the agency's decision or the environmental review unless the court specifically finds that the agency's decision was arbitrary and capricious or was otherwise not in accordance with law.

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

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

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

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

(c) The remedy in any action brought for failure to comply with or for inadequate compliance with a requirement of parts 1 through 3 of this chapter is limited to remand to the agency to correct deficiencies in the environmental review conducted pursuant to subsection (1).

(d) A permit, license, lease, or other authorization issued by an agency is valid and may not be enjoined, voided, nullified, revoked, modified, or suspended pending the completion of an environmental review that may be remanded by a court.

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

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

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

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

(9) A project sponsor may request a review of the significance determination or recommendation made under subsection (8) by the appropriate board, if any. The appropriate board may, at its discretion, submit an advisory recommendation to the agency regarding the issue. The period of time between the request for a review and completion of a review under this subsection may not be included for the purposes of determining compliance with the time limits established for environmental review in 75-1-208. *(Terminates on occurrence of contingency—sec. 11, Ch. 396, L. 2011.)*

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

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

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

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

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

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

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

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

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

(A) the environmental impact of the proposed action;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) (a) Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) may not include a review of actual or potential impacts beyond Montana's borders. It may not include actual or potential impacts that are regional, national, or global in nature.

(b) An environmental review conducted pursuant to subsection (1) may include a review of actual or potential impacts beyond Montana's borders if it is conducted by:

(i) the department of fish, wildlife, and parks for the management of wildlife and fish;

(ii) an agency reviewing an application for a project that is not a state-sponsored project to the extent that the review is required by law, rule, or regulation; or

(iii) a state agency and a federal agency to the extent the review is required by the federal agency.

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

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

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

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

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

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

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

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

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

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

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

(iii) Except as provided in subsection (6)(b), the court shall confine its review to the record certified by the agency. The court shall affirm the agency's decision or the environmental review unless the court specifically finds that the agency's decision was arbitrary and capricious or was otherwise not in accordance with law.

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

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

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

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

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

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

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

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

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

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

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

(d) The court may issue a temporary restraining order, preliminary injunction, permanent injunction, or other injunctive relief only if the party seeking the relief provides a written undertaking to the court in an amount reasonably calculated by the court as adequate to pay the costs and damages sustained by any party that may be found to have been wrongfully enjoined or restrained by a court through a subsequent judicial decision in the case. If the party seeking an injunction or a temporary restraining order objects to the amount of the written undertaking for any reason, including but not limited to its asserted inability to pay, that party shall file an affidavit with the court that states the party's income, assets, and liabilities in order to facilitate the court's consideration of the amount of the written undertaking that is required. The affidavit must be served on the party enjoined.

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

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

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

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

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

**History:** En. Sec. 4, Ch. 238, L. 1971; R.C.M. 1947, 69-6504; amd. Sec. 1, Ch. 391, L. 1979; amd. Sec. 1, Ch. 473, L. 1987; amd. Sec. 1, Ch. 566, L. 1989; amd. Sec. 1, Ch. 331, L. 1995; amd. Sec. 3, Ch. 352, L. 1995; amd. Sec. 177, Ch. 418, L. 1995; amd. Sec. 67, Ch. 545, L. 1995; amd. Sec. 1, Ch. 223, L. 1999; amd. Sec. 1, Ch. 186, L. 2001; amd. Sec. 1, Ch. 267, L. 2001; amd. Sec. 1, Ch. 268, L. 2001; amd. Sec. 3, Ch. 299, L. 2001; amd. Sec. 1, Ch. 300, L. 2001; amd. Sec. 1, Ch. 125, L. 2003; amd. Sec. 2, Ch. 131, L. 2003; amd. Sec. 3, Ch. 469, L. 2007; amd. Sec. 3, Ch. 416, L. 2009; amd. Secs. 6, 7, Ch. 396, L. 2011.

## Compiler's Comments

*Contingent Effective Date:* Section 9(2), Ch. 396, L. 2011, provided: "The amendments to 75-1-201 contained in [section 7] are effective on the date that the contingency provided for in [section 11] occurs."

*Contingent Termination:* Section 11, Ch. 396, L. 2011, provided: "If either subsection (6)(c) or (6)(d) of 75-1-201, as included in [section 6], is invalidated or found to be unconstitutional by the Montana supreme court, then the amendments to 75-1-201 contained in [section 6] terminate on the date of the invalidation or the finding of unconstitutionality."

*2011 Amendment:* Chapter 396 in (1)(b) inserted reference to (3); in (1)(b)(i)(A) inserted "for a state-sponsored project", "Montana", and "by projects in Montana"; in (1)(b)(ii) inserted "for state-sponsored projects"; in (1)(b)(iii) and (1)(b)(iv) inserted "in Montana"; in (1)(b)(iv)(B) substituted "effects on Montana's environment" for "environmental effects"; deleted former (1)(b)(iv)(C)(III) that read: "if the project sponsor believes that an alternative is not reasonable as provided in subsection (1)(b)(iv)(C)(I), the project sponsor may request a review by the appropriate board, if any, of the agency's determination regarding the reasonableness of the alternative. The appropriate board may, at its discretion, submit an advisory recommendation to the agency regarding the issue. The agency may not charge the project sponsor for any of its activities associated with any review under this section. The period of time between the request for a review and completion of a review under this subsection may not be included for the purposes of determining compliance with the time limits established for environmental review in 75-1-208"; in (1)(b)(v) inserted second and third sentences regarding alternatives analysis; in (1)(b)(vi) substituted "potential" for "national and", substituted "impacts in Montana" for "problems", after "maximize" deleted "national", and substituted "Montana's" for "the world"; in (1)(b)(vii) substituted "Montana's environment" for "the environment"; in (1)(b)(ix) inserted "legislature and the"; in (1)(c) in three places inserted reference to Montana; inserted (2) regarding environmental review; deleted former (3) and (4) that read: "(3) (a) In any action challenging or seeking review of an agency's decision that a statement pursuant to subsection (1)(b)(iv) is not required or that the statement is inadequate, the burden of proof is on the person challenging the decision. Except as provided in subsection (3)(b), in a challenge to the adequacy of a statement, a court may not consider any issue relating to the adequacy or content of the agency's environmental review document or evidence that was not first presented to the agency for the agency's consideration prior to the agency's decision. A court may not set aside the agency's decision unless it finds that there is clear and convincing evidence that the decision was arbitrary or capricious or not in compliance with law. A customer fiscal impact analysis pursuant to 69-2-216 or an allegation that the customer fiscal impact analysis is inadequate may not be used as the basis of any action challenging or seeking review of the agency's decision.

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

(4) To the extent that the requirements of subsections (1)(b)(iv)(C)(I) and (1)(b)(iv)(C)(III) are inconsistent with federal requirements, the requirements of subsections (1)(b)(iv)(C)(I) and (1)(b)(iv)(C)(III) do not apply to an environmental review that is being prepared by a state agency pursuant to this part and a federal agency pursuant to the National Environmental Policy Act or to an environmental review that is being prepared by a state agency to comply with the requirements of the National Environmental Policy Act"; inserted (6) regarding judicial remedies in legal action alleging noncompliance; inserted (7) regarding inconsistency with National Environmental Policy Act; and made minor changes in style. Amendment to temporary version effective May 12, 2011, and amendment to contingent version effective on occurrence of contingency.

The amendments to this section made by sec. 2, Ch. 396, L. 2011, were rendered void by sec. 6, Ch.

396, L. 2011, a coordination instruction.

*Severability:* Section 8, Ch. 396, L. 2011, was a severability clause.

*Applicability:* Section 10, Ch. 396, L. 2011, provided: "[This act] applies to an environmental assessment and an environmental impact statement begun on or after [the effective date of this act]." Effective May 12, 2011.

*2009 Amendment:* Chapter 416 inserted (6)(c) requiring that a district court action involving an equine slaughter or processing facility must comply with 81-9-240 and 81-9-241. Amendment effective October 1, 2009.

*2007 Amendment:* Chapter 469 inserted (1)(b)(iv)(G) referring to the customer fiscal impact analysis; in (3)(a) inserted fourth sentence providing that the agency's decision may not be challenged or reviewed based on customer fiscal impact analysis; and made minor changes in style. Amendment effective May 8, 2007.

*Applicability:* Section 10, Ch. 469, L. 2007, provided: "[This act] applies to applications received by the department of environmental quality on or after [the effective date of this act]." Effective May 8, 2007.

*2003 Amendments — Composite Section:* Chapter 125 inserted (6)(a)(iii) defining final agency action for action taken by board or department under Title 77; and made minor changes in style. Amendment effective March 26, 2003.

Chapter 131 in (1)(c) at end of first sentence inserted "and with any local government, as defined in 7-12-1103, that may be directly impacted by the project". Amendment effective March 26, 2003.

*Applicability:* Section 4, Ch. 131, L. 2003, provided: "[This act] applies to environmental impact statements commenced on or after [the effective date of this act]." Effective March 26, 2003.

*2001 Amendments — Composite Section:* Chapter 186 in (3)(a) in second sentence near middle after "may not consider any issue" inserted "relating to the adequacy or content of the agency's environment review document"; in (3)(b) in four places inserted references to issues relating to the adequacy or content of the agency's environmental review document; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 267 inserted (1)(b)(i)(B) providing that all state agencies, with exceptions, must to the fullest extent possible use a systematic, interdisciplinary approach that ensures that an environmental review that is not subject to subsection (1)(b)(iv) for which an agency considers alternatives has an alternative analysis in compliance with subsections (1)(b)(iv)(C)(I) through (1)(b)(iv)(C)(III) and, if requested by the project sponsor or if determined by the agency to be necessary, subsection (1)(b)(iv)(C)(IV); in (1)(b)(iv)(C) inserted "An analysis of any alternative included in the environmental review must comply with the following criteria:

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

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

(III) if the project sponsor believes that an alternative is not reasonable as provided in subsection (1)(b)(iv)(C)(I), the project sponsor may request a review by the appropriate board, if any, of the agency's determination regarding the reasonableness of the alternative. The appropriate board may, at its discretion, submit an advisory recommendation to the agency regarding the issue. The agency may not charge the project sponsor for any of its activities associated with any review under this section. The period of time between the request for a review and completion of a review under this subsection may not be included for the purposes of determining compliance with the time limits established for environmental review in 75-1-208.

(IV) the agency shall complete a meaningful no-action alternative analysis. The no-action alternative analysis must include the projected beneficial and adverse environmental, social, and economic impact of the project's noncompletion"; inserted (1)(b)(iv)(G) relating to "the details of the beneficial aspects of the proposed project, both short-term and long-term, and the economic advantages and disadvantages of the proposal"; at beginning of (1)(b)(v) inserted "in accordance with the criteria set forth in subsection (1)(b)(iv)(C)"; inserted (4) providing: "To the extent that the requirements of subsections (1)(b)(iv)(C)(I)

and (1)(b)(iv)(C)(III) are inconsistent with federal requirements, the requirements of subsections (1)(b)(iv)(C)(I) and (1)(b)(iv)(C)(III) do not apply to an environmental review that is being prepared by a state agency pursuant to this part and a federal agency pursuant to the National Environmental Policy Act or to an environmental review that is being prepared by a state agency to comply with the requirements of the National Environmental Policy Act"; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 268 inserted (5) providing that the agency may not withhold, deny, or impose conditions on a permit or other authority to act based on parts 1 through 3 of this chapter, that subsection (5) does not prevent a project sponsor and an agency from mutually developing measures that may, at the request of the project sponsor, be incorporated into a permit or other authority to act, and that parts 1 through 3 of this chapter do not confer authority to an agency that is a project sponsor to modify a proposed project or action. Amendment effective April 20, 2001.

Chapter 299 in (1)(b) at beginning inserted "under this part"; inserted (6) providing that challenge to agency action may be brought only against final agency action in district or federal court, requiring action alleging failure to comply with part 2 to be brought within 60 days, and requiring action or proceeding to take precedence over other cases in district court; and made minor changes in style. Amendment effective October 1, 2001.

Chapter 300 inserted (7) requiring responsible agency directors to endorse determination or recommendation for determination of significance; and inserted (8) authorizing a project sponsor to request a review of a significance determination, allowing a board to submit an advisory recommendation, and establishing that time for the review may not be included in determining compliance with time limits for environmental reviews. Amendment effective April 20, 2001.

*Applicability:* Section 16, Ch. 299, L. 2001, provided: "[This act] applies to environmental reviews that are begun after [the effective date of this act]." Effective October 1, 2001.

*1999 Amendment:* Chapter 223 inserted (1)(d) exempting transfer of ownership interest from review if no material change in terms or conditions; in (3)(a) near middle of first sentence inserted "or that the statement is inadequate" and inserted second sentence limiting court's review to issues or evidence presented to agency; inserted (3)(b) requiring new, material, and significant evidence to be remanded by court for agency consideration; and made minor changes in style. Amendment effective April 1, 1999.

*Retroactive Applicability:* Section 5, Ch. 223, L. 1999, provided: "[This act] applies retroactively, within the meaning of 1-2-109, to all matters pending before an agency on [the effective date of this act]." Effective April 1, 1999.

*1995 Amendments:* Chapters 331, 352, 418, and 545 deleted former (3) that read: "(3) (a) Until the board of oil and gas conservation adopts a programmatic environmental statement, but no later than December 31, 1989, the issuance of a permit to drill a well for oil or gas is not a major action of state government as that term is used in subsection (1)(b)(iii).

(b) The board of oil and gas conservation shall adopt a programmatic statement by December 31, 1989, that must include but not be limited to:

(i) such environmental impacts as may be found to be associated with the drilling for and production of oil and gas in the major producing basins and ecosystems in Montana;

(ii) such methods of accomplishing drilling and production of oil and gas as may be found to be necessary to avoid permanent impairment of the environment or to mitigate long-term impacts so that the environment and renewable resources of the ecosystem may be returned to either conditions similar to those existing before drilling or production occurs or conditions that reflect a natural progression of environmental change;

(iii) the process that will be employed by the board of oil and gas conservation to evaluate such environmental impacts of individual drilling proposals as may be found to exist;

(iv) an appropriate method for incorporating such environmental review as may be found to be necessary into the board's rules and drill permitting process and for accomplishing the review in an expedient manner;

(v) the maximum time periods that will be required to complete the drill permitting process, including any environmental review; and

(vi) a record of information and analysis for the board of oil and gas conservation to rely upon in responding to public and private concerns about drilling and production.

(c) The governor shall direct and have management responsibility for the preparation of the programmatic statement, including responsibility on behalf of the board of oil and gas conservation for the disbursement and expenditure of funds necessary to complete the statement. The facilities and personnel of appropriate state agencies must be used to the extent the governor deems necessary to complete the statement. The governor shall forward the completed draft programmatic statement to the board of oil and gas conservation for hearing pursuant to the provisions of the Montana Administrative Procedure Act, Title 2, chapter 4. Following completion of a final programmatic statement, the governor shall forward the statement to the board for adoption and use in the issuance of permits to drill for oil and gas.

(d) Until the programmatic environmental statement is adopted, the board of oil and gas conservation shall prepare a written progress report after each regular meeting of the board and after any special board meeting that addresses the adoption or implementation of the programmatic environmental statement. A copy of each report must be sent to the environmental quality council."

Chapter 331 in (1)(b), after "except", inserted "the legislature and except"; in (1)(b)(iv), after "programs", deleted "legislation"; inserted (3) establishing burden of proof in action challenging agency decision that environmental impact statement is not required; and made minor changes in style.

Chapter 352 inserted (1)(b)(iii) requiring the identification and development of methods to ensure that state government actions that may impact the human environment are evaluated for regulatory restrictions on private property; inserted (1)(b)(iv)(D) requiring that regulatory impacts on property rights be included in every recommendation or report on proposals for major actions of state government involving regulation of private property; in (1)(c) inserted second sentence requiring consultation with regard to the regulation of private property; adjusted subsection references; and made minor changes in style.

Chapter 418 made minor changes in style. Amendment effective July 1, 1995.

Chapter 545 made minor changes in style. Amendment effective July 1, 1995.

*1995 Statement of Intent:* The statement of intent attached to Ch. 352, L. 1995, provided: "Whenever Montana Environmental Policy Act analysis is required, it is the intent of the legislature that actions that regulate the use of private property are evaluated to ensure that alternatives that reduce, minimize, or eliminate regulatory restrictions are considered. It is not the intent of the legislature to affect in any manner other economic or social considerations or any other analysis conducted under the Montana Environmental Policy Act."

*Transition:* Section 499, Ch. 418, L. 1995, provided: "The provisions of 2-15-131 through 2-15-137 apply to [this act]."

*Saving Clause:* Section 503, Ch. 418, L. 1995, was a saving clause.

*1995 Transition:* Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

*1989 Amendment:* In (3)(a) and (3)(b) substituted "December 31, 1989" for "June 30, 1989"; and inserted (3)(d) relating to reporting requirements concerning programmatic environmental statements not yet adopted.

*1987 Amendment:* Inserted (3) providing that until June 30, 1989, the issuance of a permit to drill for oil and gas is not a major action requiring an environmental impact review until the Board adopts a programmatic environmental statement.

### **Cross-References**

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

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

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

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

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

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

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

### **Administrative Rules**

Title 17, chapter 4, subchapter 6, ARM Montana Environmental Policy Act.

Title 17, chapter 4, subchapter 7, ARM Environmental impact statement — fees.

### **Case Notes**

*DEQ Not Required by MEPA to Consider Environmental Impacts Not Related to Water Quality — Effect Preventable by Agency Only Through Lawful Exercise of Independent Authority:* The Montana Environmental Policy Act (MEPA) did not require the Department of Environmental Quality (DEQ) to consider non-water quality related environmental impacts of the construction and operation of a retail store facility as secondary impacts of the issuance of a Montana Water Quality Act permit to discharge facility wastewater into the ground from an onsite wastewater treatment system. The Supreme Court held that MEPA, like the National Environmental Policy Act, requires a reasonably close causal relationship between the triggering state action and the subject environmental effect. The court rejected the unyielding "but for" causation standard asserted by the plaintiffs to the effect that a state action is a cause of an environmental impact regardless of whether the agency, in the lawful exercise of its independent authority, can avoid or mitigate the effect. The Supreme Court further held that, for purposes of MEPA, an agency action is a legal cause of an environmental effect only if the agency can prevent the effect through the lawful exercise of its independent authority. Requiring a state agency to consider environmental impacts it has no authority to lawfully prevent would not serve MEPA's purposes of ensuring that agencies and the interested public have sufficient information regarding relevant environmental impacts to inform the lawful exercise of agency authority. Consequently, the Supreme Court reversed the District Court's summary judgment that DEQ violated MEPA in contravention of an administrative rule by failing to further consider the environmental impacts of the construction and operation of the facility other than water quality impacts and impacts of the related construction of the required wastewater treatment system. *Bitterrooters for Planning, Inc. v. Dept. of Environmental Quality*, 2017 MT 222, 388 Mont. 453, 401 P.3d 712.

*Leasing State Land Mineral Interests Without Environmental Review — No Violation of Right to Clean and Healthful Environment:* Plaintiffs sought declaratory rulings that the State Land Board wrongfully failed to conduct environmental studies required by the Montana Constitution prior to entering leases with the coal company. Section 77-1-121(2) expressly exempts the State Land Board from conducting any environmental review under the Montana Environmental Policy Act (MEPA) prior to issuing a lease as long as the lease is subject to further state permitting regulations. The Supreme Court held that because the leases did not remove any action by the coal company from environmental review or regulation provided by Montana law, such environmental review was only deferred from the leasing stage to the permitting stage. The terms of the leases required the coal company to comply with all applicable state and federal laws and specifically with Montana laws regarding mine siting and reclamation as well as with the provisions of MEPA. Because the leases themselves did not allow for any degradation of the environment, the act of issuing the leases without environmental review under 77-1-121(2), did not violate Article II, section 3, or Article IX, section 1, 2, or 3, of the Montana Constitution. *N. Plains Resource Council v. Mont. Bd. of Land Comm'rs*, 2012 MT 234, 366 Mont. 399, 288 P.3d 169.

*Environmental Assessment Adequate — Environmental Impact Statement Not Required:* Plaintiffs appealed the Board of Oil and Gas Conservation's issuance of 23 gas well permits, arguing that the environmental assessments (EAs) prepared by the Board were inadequate because the Board failed to

take a "hard look" at the environmental impacts and to "tier" or explicitly reference previous analyses relied upon in the EAs and that the Board was required to prepare an environmental impact statement. The Supreme Court affirmed, concluding that because the Board implicitly tiered the EAs to older analyses and considered cumulative impacts, the EAs were adequate and that the drilling of the wells in an existing field of over 1,000, with most infrastructure in place and minimum anticipated impacts, did not constitute a major state action necessitating an environmental impact statement. *Mont. Wildlife Fed'n v. Bd. of Oil & Gas Conserv.*, 2012 MT 128, 365 Mont. 232, 280 P.3d 877.

*Review of MEPA Case Proper:* Plaintiffs appealed the District Court's application of 82-11-144 to a review, for compliance with the Montana Environmental Policy Act (MEPA), of the Board of Oil and Gas Conservation's issuance of gas well permits, arguing that 82-11-144 does not apply to a MEPA claim and that, in accordance with 75-1-201, the court should not have considered evidence outside of the administrative record. The Supreme Court affirmed, concluding that 82-11-144 applies to any act of the Board within its regulatory jurisdiction. *Mont. Wildlife Fed'n v. Bd. of Oil & Gas Conserv.*, 2012 MT 128, 365 Mont. 232, 280 P.3d 877.

*No Violation of Clear Legal Duty to Consult With County Under MEPA — Writ of Mandamus and Injunction Improper — Action Against DEQ Dismissed:* After an exchange of information between the Department of Environmental Quality (DEQ) and Jefferson County about the Mountain States Transmission Intertie (MSTI), a proposed electric transmission line that would transect Jefferson County, the county filed a petition for a writ of mandamus and injunctive relief seeking to compel DEQ to satisfy its legal duty under the Montana Environmental Protection Act (MEPA) to consult with local government prior to issuing a draft Environmental Impact Statement (EIS) and to enjoin DEQ from issuing the draft EIS until after it had complied with its duty to consult. After a series of evidentiary hearings, the District Court concluded that DEQ had not satisfied its duty to consult with the county under MEPA and enjoined it from issuing a draft EIS on the MSTI project until DEQ had more thoroughly consulted with the county, and DEQ appealed. The Supreme Court concluded that the District Court had erred in issuing a writ of mandamus to compel DEQ to more thoroughly consult with the county because MEPA does not establish a clear legal duty for DEQ to consult with a local government to any specified degree. It also ruled that the writ of mandamus was improper because the county had other remedies available to it once DEQ rendered a final decision on the project. Because neither MEPA nor related regulations define the word "consult," DEQ is afforded some discretion in determining the extent to which it consults with a local government under 75-1-104. Because MEPA allows for some discretion on the part of DEQ on how to consult with local government, the Supreme Court held the requirement to consult was not ministerial and therefore did not establish a clear legal duty under MEPA. Accordingly, the Supreme Court remanded the matter to the District Court with instructions to dismiss without prejudice. *Jefferson County v. Dept. of Environmental Quality*, 2011 MT 265, 362 Mont. 311, 264 P.3d 715.

*Challenge of Environmental Assessment — No Jurisdiction for Administrative Review:* A grain company sought a permit to build a high-speed grain loading terminal near Pompeys Pillar national monument. The permit was granted and plaintiff, a nonprofit association supporting the monument's preservation, began administrative proceedings in an effort to overturn the permit issuance on grounds that the Department of Environmental Quality erred in its preparation of the environmental assessment related to the permit. An administrative law judge concluded that the Department acted arbitrarily and capriciously by issuing a permit without preparing an environmental impact statement. The Department filed exceptions to the administrative law judge's conclusions with the Board of Environmental Review. The Board ultimately affirmed the Department's decision to issue the permit, and plaintiff appealed to District Court. The Department contended that because the challenge to the administrative decisions did not contain any air quality issues, but only addressed environmental assessment issues governed by the Montana Environmental Policy Act (MEPA), and that because MEPA does not provide for administrative review of challenges to MEPA compliance, the administrative law judge and the Board did not have jurisdiction to preside over the appeal, nor did the District Court have jurisdiction to review the administrative proceedings. The District Court agreed and dismissed plaintiff's petition for lack of subject matter jurisdiction. Plaintiff appealed, but the Supreme Court affirmed. Had plaintiff challenged air quality issues, it would have been entitled to administrative proceedings. However, plaintiff's challenge pertained only to issues related to the environmental assessment, which is governed by MEPA. MEPA requires that a compliance challenge be brought in District Court, rather than through administrative proceedings.

Thus, the administrative law judge and the Board did not have jurisdiction to preside over the appeal, nor did the District Court have jurisdiction to review the administrative proceedings. Plaintiff's petition was properly dismissed. *Pompeys Pillar Historical Ass'n v. Dept. of Environmental Quality*, 2002 MT 352, 313 M 401, 61 P3d 148 (2002).

*Failure to Include Adequate Cumulative Impacts Analysis — Insufficient Environmental Impact Statement:* The District Court held that the environmental impact statement (EIS) prepared for the Middle Soup Creek logging project was insufficient because it did not adequately analyze and discuss the cumulative impacts of the project in accordance with the definitions of cumulative impact and human environment in ARM 36.2.522 or include discussion of reconciliation of the proposed project with the state forest land management plan (SFLMP). The Department of Natural Resources and Conservation (DNRC) argued on appeal that the court failed to comprehend that a new course filter ecological analysis took into account all of the prevailing conditions of the affected lands and therefore incorporated a cumulative effects analysis into the EIS. The DNRC also contended that even though ARM 36.2.529 requires a cumulative impacts analysis, the rule does not dictate a particular methodology. The Supreme Court disagreed. ARM 36.2.529 clearly states that the EIS must contain a description of the cumulative impacts and does not allow a mere analysis implicit within the EIS. The public is not benefited by reviewing an EIS that does not explicitly set forth the actual cumulative impacts analysis and the facts that form the basis for the analysis. Further, ARM 36.2.524 requires consideration of potential conflicts with formal plans, such as the SFLMP. Here, the EIS discussed old growth and fragmentation as concerns, but did not discuss the SFLMP objective to preserve old growth, reduce fragmentation, and protect unique habitat. The District Court did not err when it held that the DNRC violated MEPA as a result of its failure to include an adequate cumulative impacts analysis in the EIS. *Friends of the Wild Swan v. Dept. of Natural Resources and Conservation*, 2000 MT 209, 301 M 1, 6 P3d 972, 57 St. Rep. 816 (2000).

*Substantial Economic Change as Basis for Supplemental EIS:* The District Court held that a supplemental environmental impact statement (EIS) was required for the Middle Soup Creek logging project in light of changed economic circumstances of the sale. The sale was originally proposed as a revenue source for the school trust, before revenue reestimation revealed that the sale would actually cost the state about \$150,000. The state contended that a supplemental EIS was not required absent proof that a reduction in the total timber sale revenue would result in physical impact to the environment, arguing that ARM 36.2.522 does not compel preparation of a supplemental EIS based on economic impacts alone. The Supreme Court disagreed, noting that nothing in ARM 36.2.533 requires that a substantial change must result in additional environmental impact before a supplemental EIS is required, nor is there a limitation on what may be considered a substantial change. Thus, a substantial economic change in a project can serve as the basis for requiring a supplemental EIS. Here, a timber sale that would ultimately cost the state money rather than raise revenue as originally anticipated was considered a substantial change sufficient to warrant a supplemental EIS, and the state erred in not preparing one. *Friends of the Wild Swan v. Dept. of Natural Resources and Conservation*, 2000 MT 209, 301 M 1, 6 P3d 972, 57 St. Rep. 816 (2000).

*New Circumstances Requiring Supplemental Environmental Impact Statement — Arbitrary Agency Decision to Not Prepare Supplemental Constituting Reversible Error:* Under ARM 18.2.247, an agency is required to prepare a supplemental EIS when there are significant new circumstances that change the basis for the agency's decision and the supplement is required to describe any impacts, alternatives, or other items that were not covered in the original statement or that must be revised based on the new information or circumstances concerning the proposed agency action. When an agency action is challenged for failure to prepare a supplemental EIS, the reviewing court must consider whether the agency made a reasoned decision based on its evaluation of the significance or lack of significance of the new information, whether the decision was based on a consideration of the relevant factors, and whether there has been a clear error of judgment. Here, the decision of the Department of Transportation to build the Forestvale interchange in the Helena Valley was challenged on grounds that the Department did not comply with the supplemental EIS requirements of ARM 18.2.247. The Department conducted an in-house review and determined in 1999 that a supplemental EIS to the original 1991 draft EIS was not necessary because the changes in the proposed project's scope of work and the new information did not result in any significant environmental impacts. The Supreme Court disagreed. The change in traffic patterns, the development around the Capitol interchange, the patterns of development in Helena, and

the proposed alternatives to the Forestvale interchange were all significant new circumstances that required a supplemental EIS, and the Department's decision not to prepare one was arbitrary, constituting reversible error. *Mont. Env'tl. Information Center, Inc. v. Dept. of Transportation*, 2000 MT 5, 298 M 1, 994 P2d 676, 57 St. Rep. 18 (2000), following *N. Fork Preservation Ass'n v. Dept. of State Lands*, 238 M 451, 778 P2d 862, 46 St. Rep. 1409 (1989), and *Marsh v. Oreg. Natural Resources Council*, 490 US 360 (1989).

*Standard of Review Applicable to Noncontested Cases — Approval of Plan for Drilling Exploratory Well:* The District Court incorrectly applied the "clearly erroneous" standard set out in 2-4-704 when reviewing whether the Department of State Lands (functions now transferred to Department of Natural Resources and Conservation) properly approved a plan proposing drilling of an exploratory well on a leased tract near Glacier Park. The court found that shortcomings in the approval procedure, coupled with the fact that information gathered by the Department indicating that the well would generate a significant environmental impact, necessitated preparation of an environmental impact statement. However, 2-4-704 was inapplicable because the case was not truly contested. No hearing was requested or held before the Department, there was no action initiated until after the Department had approved the operating plan, and there was no evidentiary record against which to measure the Department's decision and determine whether it was clearly erroneous. Rather, the proper standard of review was whether the record established that the Department acted arbitrarily, capriciously, or unlawfully. The fact that the Department conducted two preliminary environmental reviews, conditioned approval on 42 protective stipulations, and considered the concerns raised in the approval process and took significant steps to address them indicated that the decision to forego preparation of an environmental impact statement was not arbitrary, capricious, or illegal. *N. Fork Preservation Ass'n v. Dept. of State Lands*, 238 M 451, 778 P2d 862, 46 St. Rep. 1409 (1989), distinguishing *Conner v. Burford*, 605 F. Supp. 107 (D.C. Mont. 1985), and followed in *Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands*, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995), *Mont. Env'tl. Information Center, Inc. v. Dept. of Transportation*, 2000 MT 5, 298 M 1, 994 P2d 676, 57 St. Rep. 18 (2000), and *Friends of the Wild Swan v. Dept. of Natural Resources and Conservation*, 2000 MT 209, 301 M 1, 6 P3d 972, 57 St. Rep. 816 (2000), in which omission of a cumulative impact analysis was directly related to the "unlawful" portion of the MEPA standard of review. See also *Madison River R.V. Ltd. v. Ennis*, 2000 MT 15, 298 M 91, 994 P2d 1098, 57 St. Rep. 84 (2000).

*Environmental Impact Statements — Scope of Appellate Review of Findings of Sufficiency of Statement:* Following the completion of an environmental impact statement under the Montana Environmental Policy Act, the Board of Natural Resources and Conservation (now Board of Environmental Review) issued a certificate of environmental compatibility and public need under the Montana Utility Siting Act of 1973 (now the Montana Major Facility Siting Act of 1975) for the construction of several powerlines. The Supreme Court refused to apply a de novo standard of review of the District Court's finding that the impact statement was sufficient. The court held that the correct scope of appellate review of agency decisions was stated in *N. Plains Resources Council v. Bd. of Natural Resources and Conserv.*, 181 M 500, 594 P2d 297 (1979), to be whether the agency's decision was clearly erroneous in light of substantial evidence on the whole record. *Mont. Wilderness Ass'n v. Bd. of Natural Resources and Conserv.*, 200 M 11, 648 P2d 734, 39 St. Rep. 1238 (1982).

*Sufficiency of Environmental Impact Statement — Failure to Consider Alternatives — Failure to Prepare Cost Benefit Analysis:* Following the completion of an environmental impact statement under the provisions of the Montana Environmental Policy Act (MEPA), the Board of Natural Resources and Conservation (now Board of Environmental Review) issued a certificate of environmental compatibility and public need under the Montana Utility Siting Act of 1973 (now the Montana Major Facility Siting Act of 1975) for the construction of a powerline. The Supreme Court affirmed the holding of the District Court that the impact statement sufficiently considered the alternative of "no action" and that neither the siting act nor MEPA explicitly requires a formal, mathematically expressed cost/benefit analysis. The language of the impact statement makes clear that the "no action" alternative was considered and rejected and that the relative costs and benefits of the proposed powerline were considered in the impact statement. (See 2001 amendment.) *Mont. Wilderness Ass'n v. Bd. of Natural Resources and Conserv.*, 200 M 11, 648 P2d 734, 39 St. Rep. 1238 (1982).

*Laches:* An objection that various state and federal agencies failed to follow the requirements of the National Environmental Policy Act (NEPA) and the Montana Environmental Policy Act (MEPA) in initiating

construction of a four-lane highway was not barred by laches on the grounds that the four-lane proposal had been before the public for 10 years. Here, respondents failed to consider secondary impacts and the alternative of constructing an improved two-lane road. Regarding the issue of laches, NEPA and MEPA by their very nature contemplate delay in implementing plans for construction of a highway. The expenditure of \$1 million is not alone sufficient prejudice to warrant a finding of laches; a finding of prejudice depends on what Congress defines as prejudicial. *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774 (9th Cir. 1980), overruling 479 F. Supp. 815 (D.C. Mont. 1979).

*Federal Authority Interpreting MEPA:* Federal case law is an appropriate guide in interpreting the Montana Environmental Policy Act (MEPA). *Kadillak v. The Anaconda Co.*, 184 M 127, 602 P2d 147, 36 St. Rep. 1820 (1979), followed in *Ravalli County Fish & Game Ass'n, Inc. v. Dept. of State Lands*, 273 M 371, 903 P2d 1362, 52 St. Rep. 996 (1995).

*Necessity for Statement — Conflict With MEPA Time Limit:* Where Hard Rock Mining Act (HRMA) provision requires that the state Board of Land Commissioners (functions now transferred to Department of Environmental Quality) act within 60 days of receipt of complete application and reclamation plan and it would have been impossible to complete preparation of an Environmental Impact Statement (EIS) before taking action on HRMA application, the Montana Environmental Policy Act (MEPA) requirement is inapplicable. *Kadillak v. The Anaconda Co.*, 184 M 127, 602 P2d 147, 36 St. Rep. 1820 (1979); following *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 US 776 (1976).

*Statutory Requirement Not Constitutionally Mandated:* The requirement that an agency prepare an environmental impact statement was not constitutionally mandated because of a subsequent adoption of a constitutional provision in 1972 (Art. II, sec. 3, Mont. Const.), guaranteeing a clean and healthful environment. *Kadillak v. The Anaconda Co.*, 184 M 127, 602 P2d 147, 36 St. Rep. 1820 (1979).

### **Attorney General's Opinions**

*When Environmental Impact Statement Required in Conjunction With Loan Participation Agreement:* A determination by the Montana Board of Investments to enter into a loan participation agreement constitutes a major action of state government under the Montana Environmental Policy Act (MEPA). Therefore, the Board must comply with the environmental impact statement requirements of MEPA when considering whether to enter into a loan participation agreement when the underlying project benefiting from the agreement may significantly affect the quality of the human environment. 43 A.G. Op. 62 (1990).

*Emergency Exception Inapplicable to Foreseeable Situations — Environmental Policy Act Applicable:* The Department of Agriculture did not follow the directive of ARM 4.2.308 (repealed in 1988) in dealing with an emergency infestation of grasshoppers when it failed to file a report with the Governor and the Environmental Quality Council. While an emergency situation is a legitimate exception to the requirements of the Montana Environmental Policy Act (MEPA), the Department should comply with MEPA before participating in a grasshopper spraying program if the need for such a program is reasonably foreseeable. 42 A.G. Op. 62 (1988).

*State Participation in Spraying Program — Environmental Policy Act Triggered:* State participation in a grasshopper spraying program in which the state paid up to one-third of the costs and provided financial management and technical expertise was a major state action in which compliance with the Montana Environmental Policy Act was required. 42 A.G. Op. 62 (1988).

### **Law Review Articles**

Application of NEPA to Leasing of Property for Strip Mining on Reservation Lands, Anderson, 35 Mont. L. Rev. 209, 220 (1974).

### **Collateral References**

National Environmental Policy Act of 1969, 42 U.S.C. § 4332.

A Guide to the Montana Environmental Policy Act, Montana Environmental Quality Council.

**75-1-202. Agency rules to prescribe fees.** Each agency of state government charged with the responsibility of issuing a lease, permit, contract, license, or certificate under any provision of state law may adopt rules prescribing fees that must be paid by a person, corporation, partnership, firm, association, or other private entity when an application for a lease, permit, contract, license, or certificate will require an agency to compile an environmental impact statement as prescribed by 75-1-201 and the agency has not made the finding under 75-1-205(1)(a). An agency shall determine whether it will be necessary to compile an environmental impact statement and assess a fee as prescribed by this section within any statutory timeframe for issuance of the lease, permit, contract, license, or certificate or, if no statutory timeframe is provided, within 90 days. Except as provided in 85-2-124, the fee assessed under this section may be used only to gather data and information necessary to compile an environmental impact statement as defined in parts 1 through 3. A fee may not be assessed if an agency intends only to file a negative declaration stating that the proposed project will not have a significant impact on the human environment.

**History:** En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(1); amd. Sec. 1, Ch. 337, L. 2005.

### **Compiler's Comments**

*2005 Amendment:* Chapter 337 at end of first sentence inserted reference to lack of agency finding under 75-1-205(1)(a); in second sentence near beginning after "determine" deleted "within 30 days after a completed application is filed" and at end substituted "this section" for "this part" and inserted references to statutory timeframes and 90-day timeframe; in third sentence at beginning inserted exception clause and substituted "under this section may be used" for "under this part shall be used"; and made minor changes in style. Amendment effective April 21, 2005.

*Applicability:* Section 22, Ch. 337, L. 2005, provided: "[This act] applies to environmental impact statements on which the agency responsible for preparation commenced preparation after December 31, 2004."

### **Cross-References**

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

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

### **Administrative Rules**

Title 17, chapter 4, subchapter 7, ARM Environmental impact statement — fees.

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

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

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

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

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

**History:** En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(2), (7); amd. Sec. 47, Ch. 112, L. 1991; amd. Sec. 41, Ch. 349, L. 1993; amd. Sec. 1, Ch. 251, L. 2001; amd. Sec. 3, Ch. 396, L. 2011.

### **Compiler's Comments**

*2011 Amendment:* Chapter 396 in (1) in second sentence near end substituted "\$2,501" for "\$2,500".

Amendment effective May 12, 2011.

*Severability:* Section 8, Ch. 396, L. 2011, was a severability clause.

*Applicability:* Section 10, Ch. 396, L. 2011, provided: "[This act] applies to an environmental assessment and an environmental impact statement begun on or after [the effective date of this act]." Effective May 12, 2011.

*2001 Amendment:* Chapter 251 inserted (5) relating to calculating fees based on the estimated project cost and acquisition of information; and made minor changes in style. Amendment effective April 16, 2001.

*1993 Amendment:* Chapter 349 deleted second sentence of (4) that read: "Furthermore, each agency shall, pursuant to 5-11-210, provide the legislature with a complete report on the fees collected prior to the time that a request for an appropriation is made to the legislature"; and made minor changes in style.

*1991 Amendment:* In second sentence of (4) inserted reference to 5-11-210. Amendment effective March 20, 1991.

### Law Review Articles

Mont. Code Ann. § 75-1-203(2)—What Is It Good For? Absolutely Nothing!, Vachowski, 60 Mont. L. Rev. 139 (1999).

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

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

### Cross-References

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**History:** En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(5); amd. Sec. 1, Ch. 277, L. 1983; amd. Sec. 2, Ch. 337, L. 2005; amd. Sec. 4, Ch. 469, L. 2007.

#### **Compiler's Comments**

*2007 Amendment:* Chapter 469 in (1)(a) inserted second sentence providing that an applicant pay the consumer counsel's cost in preparing customer fiscal impact analysis; and made minor changes in style. Amendment effective May 8, 2007.

*Applicability:* Section 10, Ch. 469, L. 2007, provided: "[This act] applies to applications received by the department of environmental quality on or after [the effective date of this act]." Effective May 8, 2007.

*2005 Amendment:* Chapter 337 inserted (1) requiring applicants to pay costs or fees for application requiring preparation of environmental impact statement; inserted (2) including certain costs of compiling information, attending meetings, and preparing, printing, and distributing draft statements in costs to be paid under subsection (1); inserted (3) including certain personnel costs, payments, salaries, and expenses in costs to be paid under subsection (1); inserted (4) relating to scoping process, third-party contractors, agreement negotiation for preparation of statement, and informal review process; in (5) in two places after "fees" inserted "and costs"; and made minor changes in style. Amendment effective April 21, 2005.

*Applicability:* Section 22, Ch. 337, L. 2005, provided: "[This act] applies to environmental impact statements on which the agency responsible for preparation commenced preparation after December 31, 2004."

*1983 Amendment:* Substituted reference to state special revenue fund for reference to earmarked revenue fund.

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

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

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

(2) The department of environmental quality may require payment of costs under 75-1-205(1)(a) by a person who files a petition under 75-20-201(5).

**History:** En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(3); amd. Sec. 3, Ch. 337, L. 2005; amd. Sec. 37, Ch. 19, L. 2011.

#### **Compiler's Comments**

*2011 Amendment:* Chapter 19 in (2) after "department" inserted "of environmental quality". Amendment effective October 1, 2011.

*2005 Amendment:* Chapter 337 at beginning of (1) inserted exception clause; inserted (2) authorizing department to require applicants to pay costs or fees for application requiring preparation of environmental impact statement; and made minor changes in style. Amendment effective April 21, 2005.

*Applicability:* Section 22, Ch. 337, L. 2005, provided: "[This act] applies to environmental impact statements on which the agency responsible for preparation commenced preparation after December 31, 2004."

#### **Administrative Rules**

ARM 36.2.608 Exceptions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**History:** En. Sec. 1, Ch. 299, L. 2001; amd. Sec. 4, Ch. 337, L. 2005; amd. Sec. 1, Ch. 366, L. 2009; amd. Sec. 4, Ch. 396, L. 2011; amd. Sec. 3, Ch. 122, L. 2015; amd. Sec. 4, Ch. 344, L. 2017; amd. Sec. 1, Ch. 80, L. 2019.

### **Compiler's Comments**

*2019 Amendment:* Chapter 80 in (4)(b) removed brackets around reference to 76-4-111. Amendment effective July 1, 2019.

*Termination Provision Repealed:* Section 18, Ch. 80, L. 2019, repealed sec. 13, Ch. 344, L. 2017, which terminated the 2017 amendments to this section September 30, 2019. Effective July 1, 2019.

*2017 Amendment:* Chapter 344 in (4)(b) substituted "76-4-114" for "76-4-125". Amendment effective October 1, 2017, and terminates September 30, 2019.

*Applicability:* Section 12, Ch. 344, L. 2017, provided: "[This act] applies to subdivision applications submitted on or after October 1, 2017."

*2015 Amendment:* Chapter 122 in (2) at beginning inserted exception clause; inserted (2)(b) concerning the environmental review of a project involving issues of water quality or quantity; and made minor changes in style. Amendment effective March 25, 2015.

*2011 Amendment:* Chapter 396 in (4)(b) in first sentence substituted "75-1-201(9)" for "75-1-201(1)(b)(iv)(C)(III) or (8)"; and in (11) near beginning substituted "evaluate" for "consider". Amendment effective May 12, 2011.

*Severability:* Section 8, Ch. 396, L. 2011, was a severability clause.

*Applicability:* Section 10, Ch. 396, L. 2011, provided: "[This act] applies to an environmental assessment and an environmental impact statement begun on or after [the effective date of this act]." Effective May 12, 2011.

*2009 Amendment:* Chapter 366 in (4)(b) near end after "75-2-218" deleted "75-10-922"; and made minor changes in style. Amendment effective April 27, 2009.

*2005 Amendment:* Chapter 337 near beginning of (1)(a) in exception clause inserted reference to 75-1-205(4); near end of (4)(a)(ii) inserted "or 75-1-205(4)"; and made minor changes in style. Amendment effective April 21, 2005.

*Applicability:* Section 22, Ch. 337, L. 2005, provided: "[This act] applies to environmental impact statements on which the agency responsible for preparation commenced preparation after December 31, 2004."

*Effective Date:* This section is effective October 1, 2001.

*Applicability:* Section 16, Ch. 299, L. 2001, provided: "[This act] applies to environmental reviews that are begun after [the effective date of this act]." Effective October 1, 2001.

### **Cross-References**

Public scoping process defined, 75-1-220.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) The term does not include:

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

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

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

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

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

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

**History:** En. Sec. 2, Ch. 267, L. 2001; en. Sec. 2, Ch. 268, L. 2001; en. Sec. 2, Ch. 299, L. 2001; en. Sec. 2, Ch. 300, L. 2001; amd. Sec. 15(3), (4), Ch. 299, L. 2001; amd. Sec. 99, Ch. 2, L. 2009; amd. Sec. 5, Ch. 396, L. 2011; amd. Sec. 21, Ch. 235, L. 2013.

### Compiler's Comments

*2013 Amendment:* Chapter 235 in (2)(b) substituted "fish and wildlife commission" for "fish, wildlife, and parks commission" and at end inserted "and the state parks and recreation board, as provided for in 2-15-3406". Amendment effective July 1, 2013.

*Saving Clause:* Section 40, Ch. 235, L. 2013, was a saving clause.

*2011 Amendment:* Chapter 396 inserted definitions of alternatives analysis and state-sponsored project; in definitions of cumulative impacts and environmental review inserted "within the borders of Montana"; and made minor changes in style. Amendment effective May 12, 2011.

*Severability:* Section 8, Ch. 396, L. 2011, was a severability clause.

*Applicability:* Section 10, Ch. 396, L. 2011, provided: "[This act] applies to an environmental assessment and an environmental impact statement begun on or after [the effective date of this act]." Effective May 12, 2011.

*2009 Amendment:* Chapter 2 in definition of project sponsor at end of second sentence after "through" substituted "329" for "328". Amendment effective October 1, 2009.

*Effective Dates:* Section 2, Ch. 267, and sec. 2, Ch. 299, L. 2001, are effective October 1, 2001.

Section 4, Ch. 268, and sec. 5, Ch. 300, L. 2001, provided: "[This act] is effective on passage and approval." (definitions of appropriate board and environmental review) Approved April 20, 2001.

*Applicability:* Section 16, Ch. 299, L. 2001, provided: "[This act] applies to environmental reviews that are begun after [the effective date of this act]." Effective October 1, 2001.

### Case Notes

*Identification of Actual Owner or Operator Required in Permit Application Based on Administrative Rules:* The Montana Environmental Policy Act requires the Department of Environmental Quality (DEQ) to identify the actual owner or operator of a proposed retail facility prior to issuing a Montana Water Quality Act groundwater discharge permit. The Supreme Court reasoned that Board of Environmental Review administrative rules expressly provide that the owner or operator of any proposed source that may discharge pollutants into state ground waters is required to file a completed Montana groundwater pollution control system permit application. Moreover, pursuant to 75-5-402, the Supreme Court held that DEQ must issue, suspend, revoke, modify, or deny permits to discharge sewage into state waters consistently with Board rules. *Bitterrooters for Planning, Inc. v. Dept. of Environmental Quality*, 2017 MT 222, 388 Mont. 453, 401 P.3d 712.

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## Part 3 Environmental Quality Council

### Part Collateral References

A Council Member's Guide to the Environmental Quality Council, Montana Environmental Quality Council.

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

*History:* En. by Code Commissioner, 1979.

### Cross-References

Qualifications, 5-16-102.

Term of membership, 5-16-103.

Officers, 5-16-105.

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

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

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

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

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

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

History: En. Sec. 16, Ch. 238, L. 1971; R.C.M. 1947, 69-6516; amd. Sec. 2488, Ch. 56, L. 2009.

#### **Compiler's Comments**

*2009 Amendment:* Chapter 56 made section gender neutral; and made minor changes in style. Amendment effective October 1, 2009.

#### **Cross-References**

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

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

Criminal contempt, 45-7-309.

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

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

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

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

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

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

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

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

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

(2) When practical, reporting required in subsection (1) should include quantitative trend information.  
History: En. Sec. 1, Ch. 38, L. 1997.

#### **Compiler's Comments**

*Effective Date:* Section 3, Ch. 38, L. 1997, provided: "[This act] is effective July 1, 1997."

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

**75-1-321. Repealed.** Sec. 82, Ch. 545, L. 1995.  
History: En. Sec. 11, Ch. 238, L. 1971; R.C.M. 1947, 69-6511.

**75-1-322. Repealed.** Sec. 82, Ch. 545, L. 1995.  
History: En. Sec. 13, Ch. 238, L. 1971; R.C.M. 1947, 69-6513.

**75-1-323. Staff for environmental quality council.** The legislative services division shall provide sufficient and appropriate support to the environmental quality council in order that it may carry out its statutory duties, within the limitations of legislative appropriations. The environmental quality council staff is a principal subdivision within the legislative services division. There is within the legislative services division a legislative environmental analyst. The legislative environmental analyst is the primary staff person for the environmental quality council and shall supervise staff assigned to the environmental quality council. The environmental quality council shall select the legislative environmental analyst with the concurrence of the legislative council.

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

#### **Compiler's Comments**

*1995 Amendment:* Chapter 545 substituted language outlining duties of the staff of the Environmental Quality Council for former language that read: "The executive director, subject to the approval of the council, may appoint whatever employees are necessary to carry out the provisions of parts 1 through 3, within the limitations of legislative appropriations." Amendment effective July 1, 1995.

*1995 Transition:* Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995]."

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

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

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

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

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

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

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

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

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

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

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

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

(a) department of environmental quality;

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

(c) department of natural resources and conservation.

**History:** En. Sec. 14, Ch. 238, L. 1971; R.C.M. 1947, 69-6514; amd. Sec. 42, Ch. 349, L. 1993; amd. Sec. 69, Ch. 545, L. 1995; amd. Sec. 47, Ch. 19, L. 1999; amd. Sec. 19, Ch. 210, L. 2001; amd. Sec. 1, Ch. 33, L. 2003; amd. Sec. 4, Ch. 122, L. 2015.

### **Compiler's Comments**

*2015 Amendment:* Chapter 122 in (10) at beginning inserted exception clause; and made minor changes in style. Amendment effective March 25, 2015.

*Interim Study of Hunting and Fishing License Statutes and Fees:* Chapter 395, L. 2013, required the environmental quality council to conduct a study of Montana's hunting and fishing license statutes and fees, prepare a final report, and prepare draft legislation. Chapter 395 was effective May 6, 2013, and terminates December 31, 2014.

*Preamble:* The preamble attached to Ch. 395, L. 2013, provided: "WHEREAS, the Montana Legislature establishes hunting and fishing license fees; and

WHEREAS, hunting and fishing license fees provide approximately \$34 million annually to fund most of the operations of the department of fish, wildlife, and parks; and

WHEREAS, hunting and fishing license fees are historically set at a stable level for 8 to 10 years, when revenue exceeds expenses and creates a surplus in the general license account; and

WHEREAS, revenue from hunting and fishing licenses no longer matches expenses, and the general license account has declined since fiscal year 2010; and

WHEREAS, the last major adjustment to hunting and fishing license fees was in 2005; and

WHEREAS, reduced cost hunting and fishing licenses for certain population groups result in approximately \$4 million less in general license account revenue; and

WHEREAS, the sale of hunting and fishing licenses has declined in recent years, most notably in 2011; and

WHEREAS, the general license account may be close to a critical point, and hunting and fishing license fee increases may be necessary to fund current operations."

*2003 Amendment:* Chapter 33 in (10) at end of introductory clause after "committee for the" inserted

"following executive branch agencies and the entities attached to the agencies for administrative purposes". Amendment effective February 18, 2003.

*2001 Amendment:* Chapter 210 in (10) inserted "draft legislation review". Amendment effective April 6, 2001.

*1999 Amendment:* Chapter 19 inserted (10) requiring the environmental quality council to act as an interim committee with respect to certain state agencies; and made minor changes in style. Amendment effective February 17, 1999.

*1995 Amendment:* Chapter 545 in introductory clause substituted "The environmental quality council shall" for "It shall be the duty and function of the executive director and the staff to"; and made minor changes in style. Amendment effective July 1, 1995.

*1995 Transition:* Section 81, Ch. 545, L. 1995, provided: "(1) The members of the legislative council, as provided in 5-11-101, the members of the legislative finance committee, as provided in 5-12-202, the members of the legislative audit committee, as provided in 5-13-202, and the members of the environmental quality council, as provided in 5-16-101, must be appointed as soon as possible following [the effective date of this section] [effective April 27, 1995].

(2) To implement the changes provided in [this act], the office of the legislative council, the office of budget and program planning, and the department of administration shall establish all necessary authorizations during the accounting preparation process known as the "turnaround" process, beginning in April or May 1995, to administer the several appropriations made by any means to programs of the legislative branch agencies consolidated under [sections 3 and 4] [5-2-503 and 5-2-504] for fiscal year 1996 or 1997 or the biennium ending June 30, 1997, as appropriations to a single legislative agency while maintaining the specific identification, legislative intent, and purpose for which the appropriations were made. During this transition, the executive director may authenticate documents as required to accomplish the purposes of [this act]. Appropriate changes on the statewide budgeting and accounting system and the payroll, personnel, and position control system must also be made and authorized as required to accomplish the purposes of [this act].

(3) Personnel and property of the environmental quality council are transferred to the legislative services division effective July 1, 1995."

*1993 Amendment:* Chapter 349 deleted (10) that read: "(10) annually, beginning July 1, 1972, transmit to the governor and the legislature and make available to the general public an environmental quality report concerning the state of the environment, which shall contain:

(a) the status and condition of the major natural, manmade, or altered environmental classes of the state, including but not limited to the air, the aquatic (including surface water and ground water) and the terrestrial environments, including but not limited to the forest, dryland, wetland, range, urban, suburban, and rural environments;

(b) the adequacy of available natural resources for fulfilling human and economic requirements of the state in the light of expected population pressures;

(c) current and foreseeable trends in the quality, management, and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the state in the light of expected population pressures;

(d) a review of the programs and activities (including regulatory activities) of the state and local governments and nongovernmental entities or individuals, with particular reference to their effect on the environment and on the conservation, development, and utilization of natural resources; and

(e) a program for remedying the deficiencies of existing programs and activities, together with recommendations for legislation"; and made minor changes in style.

### **Law Review Articles**

Of Crabbed Interpretations and Frustrated Mandates: The Effect of Environmental Policy Acts on Pre-Existing Agency Authority, Tobias & McLean, 41 Mont. L. Rev. 177, 237 (1980).

### **Collateral References**

Our Montana Environment . . . Where Do We Stand?, Montana Environmental Quality Council (1996).  
Environmental Quality Council, Research Issues, Twelfth Annual Report, 1991.