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**ANNUAL REPORT
TENTH EDITION:
RESEARCH
TOPICS**

JUNE 30, 1987

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(406) 444-3742

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GOV. TED SCHWINDEN
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March 31, 1987

This letter introduces the tenth edition of the Environmental Quality Council's Annual Report, which focuses on the work EQC does in the interims between legislative sessions.

You may have heard the joke: "The Montana Legislature meets 90 days every two years. We'd be better off if they met two days every 90 years."

Although the full Legislature meets in regular session every two years, that's far from all the work the Legislature does. Legislative committees and staff spend much of the eighteen months between sessions preparing for the problems that will confront Montana in the future.

This interim effort may be some of the most productive work of the Legislature, particularly in the environmental arena of the EQC. The complex questions surrounding Montana's resources don't lend themselves to easy answers in a hectic and often-confrontational 90-day session.

The interim allows the EQC to conduct careful research on environmental issues. We can actively solicit input from representatives of all sides of an issue, and perhaps build a consensus around resource policy options that receive broad support because they serve all segments of Montana.

The process isn't perfect. But it may be our best opportunity for resolving Montana's resource conflicts.

This report contains a number of the reports the EQC examined in the last interim. I hope they will interest and inform you, and I encourage you to get involved with the activities of EQC in this interim.

A handwritten signature in dark ink, appearing to read "Dennis Iverson", written over a horizontal line.

Dennis Iverson,
EQC Chairman

**MONTANA
ENVIRONMENTAL
QUALITY
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**ANNUAL REPORT
TENTH EDITION:
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JUNE 30, 1987

FOREWORD

During the 1985-87 legislative interim, the Environmental Quality Council undertook several in-depth studies of key issues affecting Montanans and their environment. The issues represented a mix of old and new, brought together by a common need for guidance, oversight, or action by the legislative branch of government.

In one of its major interim studies, the EQC revisited the roots of formal environmental policy in Montana — the Montana Environmental Policy Act of 1971. During the past decade and a half, consideration of environmental factors under MEPA has become an integral part of state decision-making. Natural resource agencies have established new procedures to assess and mitigate adverse impacts and to encourage public participation. During the past two years, the EQC has worked closely with these agencies to review their current MEPA implementation and underlying philosophies. Although the MEPA study will continue into the next interim, the findings reported here indicate a number of avenues to improve the efficiency and effectiveness of the environmental review process in Montana.

Subdivision regulation, another long-standing environmental issue, also played a prominent role in the EQC's 1985-87 workplan. In the face of general dissatisfaction with Montana's current subdivision law, the Council worked to develop a consensus revision. The legislative mission was three-tiered: first, to determine the kinds of regulation absolutely necessary to protect existing environmental, social and fiscal values from potential impacts of residential land development; second, to put these protections in law through specific and definable regulations; and third, to ensure that subdivisions that meet these regulations may be developed without undue interference. In drafting a new subdivision law, the Council involved all

interested parties and also sought the views of local, state and national experts. Ultimately, however, the proposed new subdivision law was not approved during the 1987 Legislature. The EQC process and findings as reported here, however, may set the stage for future efforts to resolve this important land-use issue.

The EQC also turned its attention to perhaps the most volatile environmental arena of the 1980s — the management of hazardous materials generated by modern society. New federal laws and complementary state programs have expanded greatly in recent years, reflecting an effort to repair past mistakes and to properly manage the residuals of our chemical-based society. The results of this legislative attention have included an array of new programs and new terms — Superfund, right-to-know, leaking underground storage tanks, as examples — and a public cognizant of the potentially harmful effects of chemical pollution. This report provides an overview of the major hazardous materials issues in Montana, associated legislative options, and a summary of actions taken during the 1987 session. During the legislative interim, EQC members played a major role in focusing the legislative agenda on a number of these issues.

The other interim study topics included in this report are an examination of oil and gas regulation in Montana and an overview of Montana's role in regional energy planning, reflecting the continued importance of natural resource development in the future of Montana.

There are other key resource issues not discussed in this report that have critical import for Montana's environment and people. State water policy (the subject of EQC's Ninth Annual Report) continues to draw major attention from the legislative, executive and judicial branches of government. Through staffing responsibilities to the legislative Water Policy

Committee, EQC continues to be an active participant in water issues. Water quality issues were addressed regularly by Council members, with continued attention paid to the Clark Fork River Project within the Governor's Office and to the work of the Flathead Basin Commission. And the Council kept up to date on other environmental issues and initiatives through the course of the past two years.

This tenth edition of the Environmental Quality

Council's Annual Report thus provides a status report on where Montana stands on some of the key environmental issues of the mid-1980s. Legislative progress was made on a number of fronts, while background research on others may point to avenues for consensus resolution in the future. It is likely the Council will continue to be actively involved with these issues and, as always, public participation will be both welcomed and encouraged.

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Everett E. Shuey

GOVERNOR'S REPRESENTATIVE

Brace Hayden

EQC STAFF

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Gail Kuntz, Resource Specialist
Robert J. Thompson, Environmental
Researcher and Attorney
Hugh Zackheim, Resource Scientist
Ellen Engstedt, Administrative Assistant
Alan Abramson and Karen Zackheim,
Report Staff

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SUBDIVISIONS

Montana's regulation of subdivisions — the splitting of land into parcels for development — usually attracts legislative attention during each biennial session from supporters and opponents of the controversial process.

That regulation, largely set out in the Subdivision and Platting Act and the Sanitation in Subdivisions Act, combines state and local government actions with private actions in an attempt to achieve a variety of public and private goals.

Part of the reason the process is controversial is the diversity in goals of all the participants. A developer might want a fair and quick process with the maximum opportunity for profit. A planner might want an attractive subdivision with easy access to government services. A nearby landowner might want a guarantee that upslope septic fields won't contaminate a downslope well. And a conservationist might want to protect critical wildlife habitat.

All of these goals may not be equally served at the same time by existing subdivision regulations. And if participants cannot agree on what the regulations are supposed to accomplish, it's hard to evaluate how well the regulations are doing the job. It's also hard to suggest improvements.

The 1978 interim Subcommittee on Subdivision Laws attempted to look at the entire subdivision regulation process and to suggest extensive improvements. That subcommittee recommended a number of amendments, but mentioned that should its package fail to pass, "a complete rewriting of the Montana subdivision laws" should be considered. The package was largely unsuccessful.

When the Environmental Quality Council in 1986 decided to take another look at the entire subdivision regulation process, it held a series of preliminary meetings with involved interest groups. While the

meetings revealed little enthusiasm for the existing process, there was support for changes. With this in mind, and with a new approach for gaining consensus among all the involved parties, the EQC decided to continue its study.

The usual proposals before recent legislatures dealt with the goals of one or a few of the participants; the remaining parties were not involved in drafting the legislation, and generally their opposition to the various proposals has been successful.

The EQC approach has been to involve all the interested parties in the study to bypass the polarization that has been building around subdivisions.

There are possibly some goals all interest groups would support, or at least not oppose: for example, public health, safety and welfare; a fair and efficient regulation process; ensuring necessary public services at the lowest possible cost. Any changes in the process should, at a minimum, achieve these goals after the interested parties have agreed on what they are.

There may be some goals that conflict somewhat, but leave room for negotiation. A park requirement certainly can take up land that could otherwise be sold by a developer. But if the process is responsive, the land reserved for a park might be less desirable for building, and the park itself could raise the value of the other lots. With negotiation, these somewhat conflicting goals could both be achieved if the regulation process is designed for that.

Then there are the goals that directly conflict. When a proposed subdivision would impact an endangered species, there may be little chance of satisfying both the developer and the conservationist. What an amended process could achieve, however, would be an understandable procedure where both parties know how the decisions will be made.

Can EQC succeed in helping the involved parties draft such an improved process? The following briefing papers include material the council considered as it tried to answer that question.

Montana's Subdivision Laws

The Sanitation in Subdivisions Act, enacted in 1967, and the Subdivision and Platting Act, enacted in 1973, are Montana's two principal subdivision laws. While the laws have been controversial and efforts have been made by all sides to change them in virtually every legislative session since their enactment, only minor changes have occurred. The following paper describes briefly the acts and their legislative history since 1978, when the first major interim subdivision study was conducted.

Subdivision and Platting Act

The Subdivision and Platting Act (76-3-101 to 76-3-614, MCA) has the dual purposes of: 1) achieving

accurate land records and proper surveys; and 2) attaining orderly land development through local review and approval of subdivisions. The act essentially does not apply to divisions of land into parcels larger than 20 acres. In addition, either partial or total exemptions from local government review are provided for certain land divisions, including family conveyances and occasional sales. The exemptions may not, however, be used to evade the intent of the act.

Subdivisions must receive local approval from the governing body of the county, city or town in which the subdivision will occur. Extensive review is given to divisions with more than five parcels (major subdivisions). For these divisions, an environmental assessment is generally required in addition to a preliminary plat. Local governments evaluate the proposal according to public interest criteria: the basis of need for the subdivision; expressed public opinion; and the effects of the proposed subdivision on agriculture, local services, taxation, the natural environment, wildlife and wildlife habitat, and public

health and safety. The local government also considers input from public hearings on the proposal and from the local planning board, if one exists.

A summary review process is often used for divisions of land into five or fewer parcels (minor subdivisions). For these divisions, a public hearing and environmental assessment are not required, and a 35-day time frame for processing is provided.

Sanitation in Subdivisions Act

The Sanitation in Subdivisions Act (76-4-101 to 76-4-131, MCA) requires review of preliminary plats or certificates of survey by either the Department of Health and Environmental Sciences (DHES) or the local review authority. The review ensures that water supply, sewage disposal and solid waste disposal needs are fulfilled. Most divisions of land into parcels smaller than 20 acres are examined under this act, including most of the divisions that receive exemptions under the Subdivision and Platting Act.

For major subdivisions, DHES staff review the application and accompanying materials submitted by the developer to ensure adequate water supplies and sewage and solid waste disposal are provided. For divisions of land into five or fewer parcels or for divisions that will be serviced by an adjacent municipal system, this review may be undertaken by local government personnel certified by DHES.

Approval by the reviewing authority is required before the county clerk and recorder can file the subdivision plat, unless the proposed subdivision is within a master planning area or Class 1 or Class 2 municipality and will tie into facilities for water supplies and disposal of sewage and solid waste.

Legislative Activity

Both acts have undergone minor changes since the 1978 study of the interim Subcommittee on Subdivision Laws:

1979 Session

Ten bills were recommended by the interim Subcommittee on Subdivisions. Successful legislation included a specification of the duties of clerks and

recorders and city attorneys in regard to subdivision filing requirements and a waiver of park dedication requirements for any division of land that creates only one additional lot.

Unsuccessful recommendations were for major modifications to the subdivision laws, including a more specific statement of the public interest criteria in the Subdivision and Platting Act; a redefinition of "subdivision" to delete the 20-acre limitation, a limitation on the family conveyance exemption, and the elimination of the occasional sale exemption. The proposals also would have provided for special summary review of minor subdivisions, subdivisions consisting exclusively of parcels larger than 40 acres, and subdivisions within an incorporated municipality or within an area for which a qualified master plan had been adopted.

1981 Session

Six bills dealing with subdivision regulation were enacted into law. The laws removed authority of the Department of Commerce to prescribe requirements for local subdivisions, required certification that no delinquent taxes exist on property proposed for subdivision, provided for joint hearings when a proposed subdivision calls for annexation to a municipality, increased the approval period for a preliminary plat to allow for phased-in development, and required subdividers to certify that consent to subdivide a property has been given by record landowners and lienholders.

Two bills that failed to pass would have exempted "minor subdivisions" from full scale public interest review and would have modified local governmental review of subdivisions to restrict the use of exemptions.

1983 Session

The legislature adopted a resolution requesting DHES to revise its rules under the Sanitation in Subdivisions Act to minimize the cost of subdivision review. In addition, successful bills allowed a local government to increase from one year to three years the initial period of approval for preliminary plats of proposed subdivisions and authorized a change in the lot fee for subdivision review under the Sanitation in Subdivisions Act from \$30 to \$48 per lot.

Ten bills on subdivision review failed during the 1983 session. Included were proposals to supplant DHES review under the Sanitation in Subdivisions Act with local sanitary review; to require that certificates of survey include diagrams of all easements and rights-of-way of record existing at the time of filing; to allow local governing bodies to define "subdivision" more inclusively than under state law; to restrict or eliminate the use of exemptions under the Subdivision

and Platting Act; to provide tighter definitions of “occasional sales,” “minor subdivisions,” “common boundary relocations,” and “subdivision”; and to eliminate exemptions for “court-ordered divisions,” “reservations of life estates,” and “use for agricultural purposes.”

1985 Session

Seven subdivision bills passed the 1985 Legislature. The new laws included a directive to local governing bodies and DHES to apply only those rules in effect at the time a subdivision application is submitted for review. The legislature also required that property taxes be paid before parcels of land are divided and that divisions of land into parcels of 20 acres or larger be evaluated for access.

The legislature exempted apartments and other parts of buildings from review as subdivisions and exempted from DHES review subdivisions, including condominiums, that will be served by municipal water and sewage facilities in Class 1 and Class 2 municipalities. Finally, DHES was directed to adopt rules for local review of certain divisions of land under the Sanitation in Subdivisions Act. Local review is authorized, upon DHES certification, for divisions of land containing five or fewer parcels whenever each parcel will contain on-site water and sewage disposal

facilities, and for divisions of land proposed to connect to existing municipal water and waste water systems if no extension of the systems is required.

Three bills failed to pass, including a proposal to redefine “subdivision,” modify the exemptions, and modify the review of minor subdivisions in the Subdivision and Platting Act.

1987 Session

The legislature amended the Sanitation in Subdivisions Act by requiring certification from a registered professional engineer that a public water supply system or a public sewage disposal system has been constructed according to approved specifications. A bill enabling local governments to require licensing of on-site sewage systems failed to pass, however.

As to the Subdivision and Platting Act, the legislature repealed the 1985 law requiring that divisions of land into parcels twenty acres or larger be reviewed for access. Subdivision survey requirements for parcels that existed before July 1, 1973 were also removed under certain circumstances. House Bill 809, the comprehensive subdivision regulation and development proposal developed by the EQC, and a realty transfer tax proposal were among the bills that did not pass.

Comparing State Subdivision Laws

Throughout the study the EQC sought regional and national perspectives on subdivision regulation along with the input of Montana interest groups. The summary of state subdivision laws provided below established an early conceptual framework by acquainting study participants with approaches used by other states. The summary indicated, however, that no easy solution to the Montana subdivision controversy exists and that the council would have to select various approaches and concepts and tailor them to address Montana’s concerns.

State laws addressing subdivision development range from very brief to very extensive. The brief subdivision laws (e.g., South Dakota and Utah) generally address platting requirements and then delegate general authority to local governments.

The more extensive laws (e.g., Montana, Oregon and Vermont) provide definitions, procedural requirements and substantive requirements for local governments. Because of this detail, these statutes may encourage more consistency statewide in local regulation of subdivisions.

This survey looks primarily at western states with population characteristics similar to Montana: North Dakota, South Dakota, Wyoming, Idaho, Oregon, Washington, Nevada, Utah, Colorado and New Mexico. Vermont, a low-population eastern state, was added because of its unique land use regulatory system.

We evaluated state statutory systems in four areas. First, the statutes were examined to determine if policies or purposes were expressed. Second, the definitions and exemptions were studied to determine the target of the legislation. Third, we catalogued state procedural and substantive requirements. Finally, we looked at executive agency involvement in the subdivision review process.

Why Regulate Subdivisions?

Both legislative and judicial bodies have proposed purposes for subdivision regulation. Yokley's *Law of Subdivisions* summarizes purposes stated in various state supreme court cases:

*** to promote the intelligent, orderly and planned growth of undeveloped areas;

*** to provide for the general welfare of the purchasers of divided lands and the community in general;

*** to protect the health and welfare of a community by regulating the laying out and construction of ways in subdivisions providing access to the several lots therein, but which have not become public ways, and insuring sanitary conditions in subdivisions, and, in proper cases, parks and open areas.

State statutes also demonstrate a variety of purposes for subdivision regulation. Some states (e.g. Idaho, South Dakota, Utah and Wyoming) do not provide a purpose section; they rely on the public health, welfare and safety rationale provided in the enabling legislation for local governments. Other states include the public health, welfare and safety rationale within the subdivision statutes, either as a sole policy statement or as a general policy statement accompanying more specific purposes.

Montana, Washington, Oregon, Colorado and Vermont are among the states that provide more specific statements of purpose. The summary of purposes below groups them by general area (note that they can be in more than one area; the categories are only for organization).

Accurate Records

- assure proper mapping and recordation
- provide expeditious and uniform handling of subdivision applications that conform to established standards

Quality Development

1. Consumer purposes
 - ensure adequate access
 - ensure adequate drainage
 - provide adequate sewage disposal and water supply
 - provide affordable and adequate housing
2. Community goals
 - prevent overcrowding
 - provide adequate streets
 - allocate suitable space for recreation and, if necessary, for schools
 - provide for intelligent and orderly growth
 - reduce infrastructure costs associated with serving subdivisions

Environmental Protection

C. Avoid Environmental Degradation

- protect water quality
- protect agricultural soils
- provide adequate light and air
- shoreline protection
- wildlife protection

A public health, welfare and safety rationale is normally used to supplement any specific purposes provided by a state.

Discussion Areas

1. Do certain purposes have a higher priority than others? If so, what are those purposes?
2. Should subdivision laws be tailored to achieve the priority purposes?
3. Do conflicts among the purposes make it difficult to fulfill all of them in the regulatory process?

Which Subdivisions Should Be Regulated?

Yokley's *Law of Subdivisions* defines a subdivision as "a smaller part or parcel of land taken from a larger tract of land by reason of a divisional process by the landowner." The Standard City Planning Enabling Act, proposed by the U.S. Department of Commerce in 1928 as a model for local governments, defines a subdivision as "the division of a lot, tract, or parcel of land into two or more lots, plats, sites, or other divisions of land for the purpose, whether immediate or future, of sale or of building development."

States have generally varied from these definitions in adopting subdivision laws, however. Only two of the states surveyed — South Dakota and North Dakota — provide local governments with explicit authority to regulate subdivisions as defined in the Standard City Planning Enabling Act. Most states exempt some subdivisions that seem unlikely to conflict with stated purposes or public policy concerns.

Large-plot Exemption

One fairly common exemption from subdivision regulation involves divisions where the resulting parcels are all greater than a designated acreage. Often, this exemption is included in the definition of "subdivision." The sizes mentioned include:

- a) Colorado — 35 acres;
- b) Montana — 20 acres;
- c) Nevada — 40 or 10 acres (counties have the option of reducing the acreage exemption to 10 acres. Presumably, counties with limited subdivision growth might elect this option);
- d) Washington — 5 or more acres, unless the local government has approved a subdivision ordinance requiring plat approval of these larger divisions. Counties experiencing subdivision growth might elect this option;
- e) Wyoming — 35 acres.

Few-Parcels Exemption

States may also exempt or reduce review requirements for land divisions when few parcels are created. The following examples illustrate threshold levels for local government review:

- a) Idaho — five or more parcels (but Idaho law provides that "cities or counties may adopt their own

definition in lieu of" the statutory definition);

- b) Montana — five or fewer parcels (minor subdivision); six or more parcels (major subdivision);
- c) Nevada — five or more parcels (subdivision); two to four parcels (parcel map requirement);
- d) New Mexico — five or more parcels within three years;
- e) Oregon — four or more lots within a calendar year (subdivision); two or three lots within a calendar year (partition);
- f) Utah — three or more parts;
- g) Vermont — ten or more lots within a radius of 5 miles and within any ten-year period;
- h) Washington — five or more parcels (major subdivision); four or fewer parcels (short subdivision, though a local government can increase this number to nine); and
- i) Wyoming — three or more parcels.

The time limitation used by Oregon, New Mexico and Vermont represents a less restrictive approach. Developers in New Mexico, for example, could time their divisions so that no more than four parcels are created in any three-year period.

Montana, Nevada, Oregon and Washington vary their requirements according to the type of land division. Their systems will be discussed in a later section.

Other Exemptions

Several other exemptions are used to limit the applicability of subdivision laws:

- a) occasional sales of land — Montana (one per year);
- b) family conveyances — Colorado and Montana;
- c) cemetery lots — Colorado, Montana, Wyoming and Washington
- d) continued agricultural use — Montana, Wyoming, Idaho, New Mexico and Nevada (if all parcels are larger than 10 acres);
- e) boundary adjustments — Montana, Washington, Oregon (limited) and Nevada;
- f) court-ordered divisions — Colorado, Montana, Oregon (limited) and Nevada;
- g) lots within a platted subdivision — Montana (limited) and Oregon (limited);
- h) testamentary laws (wills and bequests) — Montana and Washington;
- i) rent or lease agreements — Montana, Washington and New Mexico (agriculture only); and
- j) industry or commercial uses for which site plans have been approved — Washington.

At least three states — Nevada, Colorado and Montana — provide qualifying language that exemptions may not be used to evade the subdivision laws.

Some states, including Montana, offer varying levels of exemptions. For example, parcels created under

Montana's occasional sale and family transfer exemptions must still meet survey and state sanitation requirements.

Our study indicates a variety of ways in which the subdivision definition is written and exemptions provided.

Discussion Areas

1. Could Montana's definition of subdivision and its exemptions be simplified? Would adjustments be needed in the review process?

2. Should we lower, raise, retain or eliminate the 20-acre limitation?

3. What exemptions to the subdivision laws are most important to retain? Could any exemptions be withdrawn?

What Kind of Subdivision Review?

The state statutes provide varying detail on the substantive review and procedural treatment that must be given to subdivision applications. Montana, Washington, Oregon, Colorado, New Mexico and Vermont are among the states that provide detailed statutory guidance. States with limited guidance include South Dakota, North Dakota, Wyoming, Utah and Idaho.

Substantive Requirements

States mandate substantive requirements by either stating minimum requirements or providing criteria to determine if the subdivision is in the public interest (or both). All states employ minimum standards to some extent, but few states provide public interest criteria.

1. Minimum Requirements

Areas where states provide explicit minimum requirements include:

- mapping and recordation (all states);
- water supply (Montana, North Dakota,

Washington, Wyoming, Vermont, New Mexico and Colorado);

• sewage treatment (Montana, North Dakota, Washington, Wyoming, Vermont, New Mexico and Colorado);

- park dedication (Montana and Colorado);
- access (Colorado, Montana, Wyoming and New Mexico);
- street requirements (Colorado, Montana, North Dakota, Wyoming and New Mexico);
- bonding or financial capacity requirements (North Dakota, Montana, Washington, Wyoming and Colorado);
- safety from natural hazards, including flooding (Montana, North Dakota and Washington);
- environmental studies (Montana);
- drainage (Montana, New Mexico and Colorado);
- traffic congestion (Vermont);
- mitigation of costs of government services (Vermont);
- no undue harm to wildlife or scenic landscapes (Vermont);
- non-interference with future mining of mineral resources (Vermont);
- energy conservation (Vermont); and
- conformance with local government plans and capital programs (Vermont and Washington).

In regard to implementation, local governments must review subdivision applications to ensure that all statutory requirements are fulfilled.

Colorado and Oregon also have land use legislation involving statewide planning efforts. Subdivision developments, along with other land uses, are reviewed for conformity with goals and associated requirements under these laws.

2. Public Interest Criteria

States sometimes provide criteria to help local governments decide if subdivision proposals are in the public interest. Two of the states surveyed — Montana and Washington — have public interest criteria:

- the basis of need for the subdivision (Montana);
- expressed public opinion (Montana);
- effects on agriculture (Montana);
- effects on local services (Montana);
- effects on taxation (Montana);
- effects on the natural environment (Montana);
- effects on wildlife and natural habitat (Montana);
- effects on public health and safety (Montana and Washington);
- adequacy of drainage (Washington);
- adequacy of open space (Washington);
- adequacy of streets (Washington); and
- adequacy of water supply and sewage disposal (Washington).

While Washington relies heavily on the public interest analysis and provides very few requirements, Montana's statutes provide a unique blend of minimum requirements and public interest criteria.

Discussion Areas

1. Do the subdivision laws provide adequate guidance to subdivision developers and local governments? Would Montana provide clearer direction by using only minimum requirements or public interest criteria? Could Montana's public interest criteria be incorporated into minimum requirements?

2. Should Montana provide more specific language regarding either minimum requirements or application of the public interest criteria?

Procedural Requirements

Whether or not state statutes provide explicit direction, the subdivision review process appears generally similar among the states. The process normally begins with a preapplication review of the developer's proposal by local government staff. Based on this review, the developer makes an application, accompanied by a preliminary plat or plan, that is reviewed by the planning commission (and in some cases, by a technical review subcommittee). The planning commission then makes recommendations and, if it has authority, approves or disapproves the preliminary plat. If it does not have authority (as in Montana), the decision is made by the local governing body (e.g., the county commission). The final step is the preparation of the final plat, which is reviewed by the decision-making body for conformity with the conditions attached to the preliminary plat, and then filed with the county recorder.

The review process normally involves a public hearing on the proposal, allowing the public to submit formal comment. The public hearing is often a requirement. The time allowed for review varies, but may be about 60 to 90 days. During this time the developer may revise the application to meet local recommendations.

Abbreviated Reviews

1. Small Divisions

Some states allow an abbreviated process for divisions with a small number of parcels. In Montana, divisions of land into fewer than five parcels (minor subdivisions) need not be accompanied by an environmental assessment or be submitted to public hearing. In addition, the time for review is shortened from 60 days to 35 days.

Washington provides that divisions of land into four or fewer parcels (or nine or fewer parcels upon local government designation), are "short" subdivisions for which local governments may develop "wholly different" regulations.

Nevada requires that a parcel map be prepared for divisions of land into four or fewer parcels. The parcel map requires less information than the tentative map otherwise required, though the local governing body may still require measures to ensure adequate streets and access, water supply and sewage treatment. A shorter review period (30 days) is provided, and local governments may delegate their subdivision approval authority. In addition, governing bodies are allowed to waive the review requirements.

2. Divisions of Land into Large Parcels

Nevada allows special treatment for divisions of land into large parcels (above 40 acres). For these parcels, the tentative map must provide information showing access and easements for public utilities and irrigation or drainage. In addition, adequate access by vehicle to the parcel must be provided, unless the local governing body waives the review requirements.

3. The New Mexico System

New Mexico varies its review requirements according to the following types of land division:

- type-one: any land division containing 500 or more parcels, of which one parcel is less than ten acres;
- type-two: any land division containing 25 to 499 parcels, with at least one less than ten acres;
- type-three: any division containing five to 24 parcels, with at least one parcel less than ten acres;
- type-four: any land division containing 25 or more parcels, all of which are larger than ten acres; and
- type-five: any land division containing five to 24 parcels, all of which are greater than ten acres.

For type-one or type-two land divisions, the statutes describe requirements for environmental safeguards and public improvements, and for the procurement of state agency opinions on the proposals. For type-three and type-four subdivisions, the local governing bodies determine the submissions necessary to ensure compliance with the act. For type-five subdivisions, local governing bodies must adopt a summary procedure, which may require only a proper survey and a plat acknowledgment and affidavit by the landowner.

Discussion Areas

1. Is the public hearing requirement important for all types of subdivision proposals? Could the hearing in some instances be conditioned upon a petition by a concerned citizen?

2. Is the minor subdivision review a good idea? What is the best threshold number? Should local governments be able to vary the threshold?

3. Could varying subdivision reviews be available for local governments? Should a thorough review be required of counties only if they elect it?

State or Local Subdivision Review?

Some states do not require state executive agency involvement in implementing subdivision statutes (North Dakota, South Dakota, Wyoming and Utah). These states rely on local regulation to achieve subdivision objectives.

An intermediate approach entails state approval or opinion concerning water supply or sewage disposal plans. Montana is one of these states; it requires Department of Health and Environmental Sciences approval of subdivision water supply and sewage disposal systems before the subdivision plat or certificate of survey may be recorded. Nevada, New Mexico, Idaho, Wyoming and other states similarly require state environmental or health agency input.

Oregon, Colorado and Vermont provide a broader state role as a result of major land use legislation.

Oregon adopted legislation in 1973 that provides for statewide planning. The program involves 19 planning goals, including the development of a citizen involvement program, the diversification and improvement of the economy, the installation of a land use planning process, the protection of air and water quality, and the preservation of open space and agricultural land. Under the Oregon system, each county and municipality must adopt a comprehensive plan and submit it for approval to the state's Land Conservation and Development Commission. One element of this program is the designation of urban growth boundaries, within which residential development, including subdivisions, is planned. Subdivisions outside these areas are examined under more rigid criteria.

Colorado's Land Use Act of 1974 established the Colorado Land Use Commission to develop state land use planning. This program gave money and direction to local governments to plan for future land uses within their jurisdictions. The Land Use Commission was empowered to oversee and assist in this process, which allows local governments to designate areas and activities of state concern.

Areas of state concern include mineral resource areas, natural hazard areas, historic sites and wildlife habitat. Activities of state concern include domestic water and sewage systems, nuclear facilities and solid waste disposal sites. Permits are required for developments within an area of state interest or for activities of state interest. A subdivision application can be denied, for example, if an extension of a public water system is not in the public interest or if the development would threaten the quality of an underlying aquifer. However, the Colorado Supreme

Court has indicated such authority may not be used by local governments to deny developments that are not within Colorado's definition of "subdivision" (Penobscot v. Bd. of County Comm'rs, 642 P.2d 915 (Colo. 1982)).

Vermont's system involves subdivision review by nine district environmental commissions. This review is in addition to any review provided by local governments. The regional bodies evaluate subdivision applications according to nine criteria: air quality, water quality, water supply, soil and agricultural impacts, traffic considerations, costs to local governments, aesthetic effects, wildlife and wildlife habitat impacts, and conformity with land use plans. The regional approval process is similar to that used by local governments, and generally involves a 60- to 90-day review period. The review is "intended to provide an additional level of review for larger-scale projects which are likely to have greater than local impact, or it is intended to review smaller projects in towns which have adopted minimal local controls."

Discussion Areas

1. Would Montana's subdivision regulations benefit by less state involvement or more state involvement?
2. Is Montana's present system, which provides state administration for water supply and sewage disposal considerations (with potential local government assumption of these duties), fulfilling the objectives of the Sanitation in Subdivisions Act fairly, efficiently and thoroughly?

Work Group Discussions: May 1986

The Environmental Quality Council met on May 13, 1986 with a number of interested people to discuss subdivision regulation. The participants broke into working groups to discuss four questions:

1. What are the purposes of subdivision regulation?
2. What types of local subdivision review should the state require?
3. What should be the role of state executive agencies in reviewing subdivisions?
4. What land divisions should be regulated under subdivision laws?

A principal EQC goal was to include all interest groups in the study to facilitate the development of a consensus bill. The council's May 1986 meeting provided the first opportunity for these interests to discuss and share perspectives on fundamental questions relating to subdivision regulation.

The Purposes for Subdivision Regulation

The working group for this topic consisted of EQC Representative Dennis Iverson and staff **Bob Thompson**, facilitators; **Rick Gustine**, surveyor; **Bill Walker**, realtor; **Jerry Hamlin**, builder/developer; **Jerry Sorensen**, planner; **Allen Jacobson**, county commissioner; **Joe Gutkoski**, wildlife representative; and **Don Mullen**, county sanitarian.

Iverson began the discussion by stating that a necessary first step in determining what to do with the subdivision laws is to define the purposes for subdivision regulation.

Walker urged that strong consideration be given to private property rights and noted that there is competition currently between realtors and government. Thus, he said, subdivision laws must be reasonable and not too burdensome. He said further that it is important to protect the public health and welfare and to ensure water quality, proper septic systems, good drainage and good legal access.

Sorensen added as purposes the avoidance of natural hazards (floodplains, steep slopes, earthquake areas) and the provision of adequate services. Ideally, he felt, subdivision laws should focus on design standards and not locational evaluation. But because Montana does not have strong comprehensive planning, the public interest criteria and minimum standards in Montana's subdivision laws are important to deal with locational issues.

Jacobson emphasized that good progress must be orderly and that Flathead County had adopted a resolution that helps to achieve orderly growth by limiting the use of exemptions. Jacobson stressed water quality and natural drainage as important public purposes and said that county-level subdivision control was the best way to achieve these purposes. The basic state statutory guidelines, particularly those affecting health, guarantee some uniform environmental control.

Mullen felt that the purposes in the present subdivision law are not being accomplished because most of the subdivision development in Ravalli County does not go through the process. The real issue he feels is aesthetics: what is the county going to look like when all of the land dividing is completed?

Hamlin emphasized the assurance of proper mapping and recordation as a public purpose.

Gutkoski emphasized the preservation of wildlife winter range as a public purpose. Subdivision development is occurring in these areas, as well as on floodplains and in areas vulnerable to slope failure. He urged strict regulation of subdivision development by local governments, with reasonable emphasis given to wildlife protection.

Gustine stated that the existing purposes in the Subdivision and Platting Act are acceptable. He stressed that investments in land are the most costly investments made by most people. The reason exemptions are used is usually a matter of economics: people use exemptions rather than go through a time-consuming and costly review process. Gustine also affirmed that a purpose of the Subdivision and Platting Act is to protect the value of property.

Hamlin emphasized the need to limit the time taken by governments to review subdivision applications, and noted that it took him nine months to process a major subdivision proposal. Hamlin also felt that the purposes for subdivision regulation may vary with the size of subdivision.

Walker noted that the original intent for the 20-acre exemption was to save agricultural land, but that the exemption has failed to achieve this intent. In some places he feels a five-acre exemption may be more effective in preserving agricultural land. The problems with the 20-acre exemption were acknowledged by other participants in subsequent discussion.

Jacobson stated that Flathead County restricts land divisions by forwarding all second subdivisions of a parcel to the county commissioners for review to determine whether the subdivider is attempting to evade the requirements of the act.

Gustine stated that a common problem for surveyors is the lack of uniformity among the 56 counties in administering the subdivision laws. Sorensen noted that county use of evasion criteria does close exemption loopholes, but that the evasion criteria aren't uniform from county to county.

Sorensen added that legal and physical access are important, but that that does not always mean that county-road standards are necessary. Jacobson stated that providing legal access is also important for property divided by occasional sale or family transfer.

Walker expressed a concern that the subdivision laws should have enough flexibility to account for private property-owner needs.

Gutkoski stated that the developer should pay the full costs of a subdivision development. Hamlin noted, however, that subdivision developments provide benefits to the public, including a contribution to the tax base. He acknowledged that payment by the developer for on-site costs of the development is legitimate, but questioned whether developers should be charged for off-site costs because the general public also benefits from the development. It was acknowledged generally by the working group that payment for local government planning should come from general tax money.

Hamlin also questioned whether a state minimum requirements/local control approach would work for all of Montana's 56 counties, since some counties may not have adequate staff to administer local subdivision review efficiently.

Tom France, an EQC member, asked whether it is worth looking at streamlining the subdivision process in exchange for more sophisticated, comprehensive planning. Mullen mentioned that it is difficult for Ravalli County to provide the developer with advance guidelines concerning how or where to develop. On the other hand, Hamlin stated that Jefferson County has not used its comprehensive plan. In addition, he noted that the comprehensive plan steps on the toes of private property owners. Thus, while time may be saved in the subdivision review process, substantial time would have to be spent in preparing a comprehensive plan.

France thought the public has two principal concerns: a public health/sewage treatment concern and a concern for aesthetics or open space. He felt the

second concern is not being achieved by the existing laws.

Jacobson felt the subdivision law becomes more applicable where larger populations exist. Land use planning is important in counties where rapid growth is occurring. Another participant added that perhaps a threshold level is needed in the law to provide for comprehensive planning in these areas.

Senator Dorothy Eck, EQC vice-chairman, asked about agricultural land preservation. Sorensen felt this purpose is something that should be determined by the legislature, and that good planning could direct growth toward areas with poorer soils. Hamlin mentioned the possible economic burden such measures could place on farmers, unless development rights or some other compensation could be incorporated into the laws.

Local Review Requirements

Addressing this topic were EQC Senator Dorothy Eck and staff **Bob Thompson**, facilitators; **Mike Foley**, surveyor; **Sandy McPherson**, realtor; **Dave Rasmussen**, developer; **Mike Money**, planner; **Carlo Sieri**, county commissioner; **A.P. Hollinger**, realtor; **Pat Trusler**, county sanitarian; and **Judy Mathre**, mayor.

Substantive Provisions

Money mentioned that land use controls are built into the current subdivision regulations. A better alternative for achieving land use goals would be by using the master planning or comprehensive planning process.

Trusler felt that providing uniform standards for all counties would be a difficult approach because of the varying levels of subdivision activity. The public interest criteria currently provide guidelines for each individual county to determine whether a subdivision proposal is in the public interest. To have only minimum standards would hamper the planning process.

Eck inquired about providing two or more levels of standards for developing counties and rural counties. Money mentioned that certain standards (road and sanitation) are already in place. He added that the public interest criteria are essentially land use decisions, and sometimes can be arbitrary. For example, "need" and "impact" are sometimes very difficult to explain because of their subjectivity.

Foley commented on the subjectivity of the laws, and remarked that the guidelines used by local

governments should be more specific. An example he used was the changing evasion criteria used by counties. Sieri noted, however, that new problems are occurring all the time and that change is needed to adjust to these problems. Sieri also remarked that some criteria, e.g., need, are hard to define.

Hollinger expressed concern about local governing bodies basing decisions on the “applause meter”. State review does not cause difficulty, on the other hand, because the state review authority exists outside of applause meter influence.

Foley said that the exemptions are not working and encouraged some review of all subdivisions according to a tiered approach. The tier system could be designed according to population density. Foley supported stronger, concrete rules over subjective ones; the rules should be uniform across the state. Hollinger added his general agreement.

Money noted that local governments may need more tangible public interest criteria if they are to avoid possible liability. On the other hand, if an area is master planned and zoned, public interest criteria are — at least philosophically — not necessary. There is also a liability question in regard to whether local governments are shunning service obligations in subdivided areas where fire, ambulance, or police access is difficult or impossible. Sieri provided an example of a such a situation this winter in Park County. Money mentioned that in some areas a homeowner’s association provides its own road maintenance and fire protection.

Hollinger added that there are several homeowner’s associations that work quite well. Another participant expressed concern about whether counties should provide guidelines for these associations.

Eck inquired about the amount of flexibility that should be given to local governments in evaluating subdivisions. Foley stated that off-site conditions on subdivisions are what cause legal problems. Money stated that local governing bodies should be allowed to require specific conditions for subdivisions, since they are the ones elected to guide the quality of life for their constituents.

Procedural Requirements

Public hearing requirements were discussed first. Foley mentioned that where an area is master planned or zoned, the public hearing requirement may not be necessary. He noted that county processes generally require a hearing before the planning board and then another hearing before the county commission.

Money noted that philosophical considerations that go beyond water, sewer and street requirements probably do not belong in the subdivision review process. The changes needed are not as much with the Subdivision and Platting Act but with the need for counties to adopt comprehensive land use plans and

regulations. Sieri noted, however, that implementation of these plans is a problem.

Money added that a land use plan may give the developer notice of potential difficulties before money is spent to prepare a subdivision proposal. Money also stated that the subdivision laws could be reduced drastically if land use planning and zoning are implemented.

Hollinger noted that condominiums in areas zoned for duplex buildings are treated as subdivisions and subjected to public hearings and the general review process. This type of review, he stated, is what aggravates people.

Trusler stated that a need exists for the current level of subdivision review in areas where comprehensive planning has not been established.

In regard to minor subdivisions, Sieri stated that the parkland requirement could be removed and that perhaps a graduated subdivision review system could be studied. Foley thought the minor subdivision review process was excellent and that tiered review was worth investigating.

Rasmussen stated that he had developed three major subdivisions. While the first two reviews had been acceptable, the last subdivision process had resulted in unreasonable recommended requirements. This treatment could force him to redesign his subdivision into 20-acre parcels to avoid the subdivision regulations. Rasmussen felt that the subdivision regulations themselves are acceptable, but that the people evaluating the proposals often create difficulties.

Mathre mentioned that there appears to be a double standard among Montana local governments. As opposed to most counties, cities get substantial guidance by way of master planning and zoning. As a result, a commission decision on a subdivision application is usually clear because of the guidance. Thus, greater certainty is probably available in most urban areas.

Money mentioned that the counties experiencing development are the ones raising the subdivision issues. These counties need to address the subdivision problem. Thus, there may be justification in providing varying review possibilities for counties according to their level of development.

Steve Powell, a land surveyor from Ravalli County, recommended removing the exemptions from the Subdivision and Platting Act. He stated that people often take the route of least resistance, which means using the exemptions to avoid the act. He also suggested considering removal of the park requirement for minor subdivisions. Bob Custer, a surveyor, stated that if comprehensive planning is undertaken throughout the state, one subdivision regulation for everyone might work.

Gordon Morris, executive director of the Montana Association of Counties, agreed that comprehensive planning is the preferred route, and that the implementation of planning and zoning does account

for the differential between cities and counties. However, Linda Stoll-Anderson, a county commissioner, stated that her county's comprehensive plan is not adequate because of the political problems associated with regulating property rights. Epple mentioned a new comprehensive planning approach that would emphasize guiding development with policy statements, but Stoll-Anderson cautioned that enforcement of this type of plan could be subject to a successful legal challenge.

The Role of the State

The working group that addressed this topic consisted of EQC Representative **Bob Gilbert** and staff **Hugh Zackheim**, facilitators; **Robb McCracken**, Department of Commerce planner; **Jim McCauley**, Department of Health and Environmental Sciences Water Quality Bureau; **Dan Schulte**, realtor; **Rick Gustine**, surveyor; **Bob Mullen**, county commissioner; **Don Mullen**, county sanitarian; and **Joan Toole**, Environmental Information Center.

McCracken provided a historical perspective on the role of the Department of Commerce and its predecessor agencies in subdivision review and technical assistance. In the late 1960s, the state began to provide technical assistance for community development. In 1973, federal funds made it possible for the state to take a more active role in subdivision review, and at one time the Department of Community Affairs (the precursor to the Department of Commerce) had eight planners on staff. Major efforts included development of model subdivision regulations and coordination of state review of subdivision plans.

In 1981, overall subdivision review authority was transferred from state to local governments, but the state (through the renamed Department of Commerce) retained rulemaking authority for surveying standards and for model subdivision standards, along with a technical assistance program for planning boards. In recent years, the community technical assistance functions have been reorganized. The staff now helps local governments, boards, developers and citizens interpret laws and administrative procedures under the Subdivision and Platting Act.

McCracken said the law is complex; about 75 opinions on the law have been issued from courts and the attorney general's office. He indicated that there is a demand from local government officials and the private sector for this technical assistance. There are 183 local governments in Montana with approximately 70 planning boards, 700 planning board members and 350 zoning commission members. He said the role of his office is to provide local officials and private parties with the tools to solve their own subdivision problems;

his office does not have a regulatory role and does not review individual subdivision plans.

McCauley said his bureau's subdivision review responsibilities fall into four main categories: water (including domestic and irrigation water quality, quantity and dependability); sewage disposal; storm drainage; and solid waste disposal. The bureau operates under the Sanitation in Subdivisions Act and reviews all parcels under 20 acres, including occasional sale and family conveyance lots.

Gilbert asked how the water quality bureau views its role in relation to enforcing rules and conducting inspections.

McCauley said his staff of four must limit its role to inspecting large subdivisions and to investigating complaints and problems. The bureau works closely with local sanitarians, he added.

Don Mullen said he has no problems with the health department's role. However, he doesn't think the state provides enough guidance for the local review process. He said there's no place to get help in enforcing what the county wants to accomplish on the local level. He indicated that the loopholes and vagueness in the law provide very little incentive for local government officials to control subdivision activity.

Schulte said that the working relationship between real estate agents and the health department has been excellent in recent years as the department has streamlined its subdivision rules. The problem is with the law's vagueness, particularly with dependence on terms like "adequate." He noted that each county interprets the law differently and said that the legislature needs to define the law to set minimum requirements.

Gustine agreed that every county is different, and that the high number of attorney general opinions on the subdivision law indicates problems with the law. He said there is a need for definite criteria for land development. He also questioned whether one-acre and two-acre splits should have to go through state review, and said review authority for these splits should be delegated to qualified local sanitarians.

McCauley said rules are currently being promulgated to give local governments the option to review minor subdivisions.

Toole posed a question as to whether planning goals should go beyond health and safety considerations. She said she doesn't believe importance of aesthetics has been addressed.

Schulte said he supported House Bill 791 for adequate access, but expressed dismay about the interpretation that has been given to that law. He said this is an example of what can happen with a word like "adequate."

Zackheim asked what local governments thought about the need for flexibility versus the need for more defined technical standards.

Bob Mullen said that defined standards are all right, but he has a problem with minimums. He does believe

the state should have a role in subdivision review. As a county commissioner, he doesn't want to have to deal with approval of sewage and water systems.

Gilbert asked whether it is a state or local government job to see that standards are observed. He indicated that the state has set the rules, but has not specified who is responsible for enforcement. He said if the state can't fill the role, perhaps it should be given to local governments. There is a need to determine what is going to work best. The ultimate loser when inspection and enforcement fail is the person who purchases the lot.

Don Mullen noted real problems when the state sets minimum requirements that it can't enforce. When a state rule is violated, local officials have to take the matter to their county attorney.

Bob Mullen said the problem with local review is that some counties don't have the resources to hire a sanitarian.

McCracken mentioned that the state could promote increased funding to ensure a trained local or regional staff for inspection and enforcement. He said there might be some consideration of training or licensing programs for county officials and developers.

McCauley said that the state role, especially for large central systems, is to oversee the work of the design consultants. For on-site sewage systems, the state's role is to approve a site, while local officials are responsible for seeing that actual installation is done properly. He said that enforcement and inspection take money and people, and added that it takes months or years for a state enforcement action to proceed given the department's small legal staff.

Gilbert asked if more definition in the law is needed on how enforcement and inspections will be handled and whether county governments or state government is responsible. He also questioned the role of consulting engineers doing their own site studies. Should the law require developers to pay for state or local officials to do necessary testing to ensure the quality of the information?

McCauley said the current law sets up dual responsibility but both state and local government officials are reluctant to take legal action because of the time and expense of the proceedings. He said he supports the current system of having private engineers doing on-site testing for engineering purposes.

Schulte said having government employees doing inspections would increase the time and costs of development. He said by streamlining the review process, people would be better able to comply.

Bob Mullen commented that guidelines are needed to designate who is responsible for enforcing sanitation provisions. If local governments are responsible, then they want to be able to inspect the development.

Toole said the legislature has not specified how developers should mitigate costs to local governments.

McCracken added that many studies have indicated that costs of services to residential developments exceed

the local tax benefits. He said that better legislative guidance is needed in regard to the public interest criteria under the Subdivision and Platting Act.

Don Mullen noted that the public interest criteria represent technical issues that should be handled on a statewide basis. He also said that, although the health department has defined public water supply and sewage rules, there is no guidance to say what local governments should do if a site is developed and these rules have not been met.

Gilbert said that concern may indicate a need to extend the law to say what should be done if on-site conditions are not met. He added that there is a need to protect the consumer in cases of developer bankruptcy and that a bonding requirement might be possible.

McCauley said one must balance the benefits of spending more time and money before development with the increasing costs of development.

Don Mullen commented that it is better in the long run to spend the money upfront.

McCracken said that poorly planned developments often get paid for by federal or state money in a backdoor fashion after problems are discovered. He said there may be a need for some state subsidy to prevent problems upfront. He added that the distinction between the platting act and the sanitation act makes subdivision regulation difficult for the public to understand and makes coordinated review difficult on the local level.

Schulte said he would like to see consideration of a streamlined review process that only looks at four issues for all subdivisions: water, sanitation, drainage and access. All divisions of land would be subject to this review. All subdivisions below 20 acres would go through the planning board.

Don Mullen said that approach would get around the current problems caused by exemptions.

Schulte and Gustine complained that there was too much emphasis on the public hearing, but Don Mullen said that testimony at the public hearing must be directed at the public interest criteria.

In response to a question, McCauley said the current subdivision review fee does cover the health department's costs. He said, however, that enforcement of subdivision laws has been a major problem for the department over the years and added that a comprehensive way to fund the resolution of enforcement issues would be helpful. He suggested that the focus be on dealing with violators, rather than over-regulating everyone.

Schulte said that today's discussion hadn't indicated that we need more review. He said more refined review may be needed along with a streamlined process.

Don Mullen said simply addressing the exemptions is not the answer. He believes something also needs to be done about the cash-in-lieu-of-park provision and about minor subdivision review.

Gilbert agreed that the law could be streamlined and said that subdivision requirements could be better

defined. Improved enforcement, including methods to check soil data, could help reduce the problems.

McCracken said that public interest criteria beyond just water supply, sewage, drainage and access are important to some people. He said the public interest issues may be addressed in a comprehensive plan rather than in a subdivision law, but they can't just be ignored. He believes there would be a lot of support for streamlined review if currently exempted subdivisions were subject to an appropriate level of review. He said, however, that one can't avoid the question about whether to make the subdivision act a purely platting and design act or whether to include some locational, planning-related concepts in the law. This needs to be pinned down clearly so that local governments and planners know exactly what's required.

Defining Subdivisions

The working group that addressed subdivision definitions consisted of EQC Representative **Dennis Iverson** and staff **Bob Thompson**, facilitators; **Joy Bruck**, League of Women Voters; **Andy Epple**, planner; **A.P. Hollinger**, realtor; **Bill Spilker**, realtor/developer; **Bob Custer**, surveyor; **Linda Stoll-Anderson**, county commissioner; **Rick Duncan**, county sanitarian; and **Jim Jensen**, Environmental Information Center.

Custer stated that the exemptions probably don't belong in the law, and that the review process should reflect the impact of the parcels created. A stepped or tiered review process could handle the problem, particularly if the process is simple enough to enable a surveyor to use a checklist to determine the requirements. Necessary exemptions might include a narrowly tailored mortgage exemption and an exemption for agricultural property exchanges.

Epple thought the definition of subdivision could be revised to place all subdivisions of land, except for the agricultural subdivisions, under some level of review. He proposed a rough draft of a four-tiered review. The first level, which would cover divisions of one or two lots, would address technical considerations: suitable access, availability of utilities, on-site sewer and water, and absence of geologic hazards. For step two, the three- to five-lot subdivision, the technical considerations and limited public interest criteria (health and safety, effects on taxation and effects on local services, but not basis of need or effects on agriculture) would be applied. The parkland requirement would be removed for these two steps.

For six- to ten-lot subdivisions, an environmental assessment would be added. For eleven or more lots, parkland dedication plus all of the preceding requirements would be required, and the basis of need

criterion might be considered. Mr. Epple added that exemptions in general undermine the work of *bona fide* developers.

Spilker stated that a form of review is given currently to virtually all parcels, particularly with the passage of House Bill 791 (note: HB 791 was repealed by the 1987 legislature). Perhaps more important is not what land should be reviewed but what type of review should be given to subdivided parcels. With the idea that a review take place for housing, Spilker suggested that the review be largely administrative, rather than being totally undertaken by the governing body, and that the criteria be very definite.

He noted the quality effort of the Department of Health and Environmental Sciences and the straightforward rules it uses to apply the Sanitation in Subdivisions law. The public interest criteria could be placed into a comprehensive planning process, he offered, although this might be postponing the controversy until the comprehensive plans are prepared. Because of the arbitrary interpretations of the public interest criteria, Spilker suggested a judicial-type review by the county commissioners to remove the emotionalism often associated with decisions on subdivisions. In regard to Epple's proposal, Spilker expressed concern about possible arbitrary review factors for five-parcel divisions, which can drive up costs rapidly.

Duncan suggested going back to the purpose of the subdivision laws, and that the need for the laws should generate the definition. A site created for a dwelling, with resultant generation of wastewater, does need some review. Duncan also noted that, while there is a need for the agricultural exemption, the use and nature of this exemption must be made clear.

Stoll-Anderson stated that, as in Ravalli County, over 80 percent of the development in the Helena valley occurs through the use of exemptions. The lack of review for these parcels, particularly when the exemptions over time result in major subdivisions, causes problems with streets and utilities. Ms. Stoll-Anderson added that the definition of subdivision should include any division of land, though perhaps not all subdivisions need to go through the review process.

Custer suggested that the subdivision process must somehow identify how to handle major impacts associated with 20 owners who have individual parcels, as well as one owner who creates 20 parcels.

Hollinger thought a tier system could work, but voiced concern about the park dedication requirement for one-acre or larger tracts.

Jensen mentioned the historical interest of the Environmental Information Center in subdivision regulation. Jensen's general concern was that significant environmental deterioration will occur if a comprehensive approach is not used to evaluate changing land use. He added that the availability of exemptions negate a comprehensive approach, and that Kalispell and Flathead Lake exemplify the effects of

“nickel-and-dime” development.

Bruck expressed her organization’s concern about the availability and use of exemptions, particularly the occasional sale and the family conveyance, and the 20-acre limit. The subdivision laws would be simplified without them, she said.

Epple stated that the occasional sale was designed to recognize the legitimate right of the agricultural landowner to occasionally parcel off a small tract without having to go through the county commission. The evasion criteria are not designed to eliminate these legitimate divisions, but to cut down on the abuse of this exemption. Epple also noted that in Park County the overwhelming number of unreviewed tracts are those 20 acres or larger.

Spilker stated that many of the problems with the subdivision laws are a result of the legislature’s failure to give more specific guidance concerning its intent, and mentioned House Bill 791 as an example. As a result, authority has been delegated to the executive branch, the attorney general and the courts to redefine the laws. Definitive statewide standards are needed.

Bruck asked about limiting the occasional sale to, for example, one sale every five years. Duncan mentioned that the exemptions provided in the Subdivision and Platting Act often are not carried over to the Sanitation in Subdivisions Act.

Epple stressed the need to evaluate all subdivisions, but to vary the review and requirements according to the size of the subdivision. Custer encouraged consideration of a stepped (tiered) review process.

Spilker saw nothing wrong with the tiered approach, but stated that an administrative procedure is important. The real conflict, he believes, is in the subjective and arbitrary nature of local government review; perhaps this subjective review belongs in the comprehensive planning process instead. If the subdivision laws are to be amended, he urged repealing them and starting anew. Spilker thought New Mexico’s tiered approach was interesting and felt that the public interest criteria should be removed. Custer stated that removal of the public interest criteria and the public hearing requirement would enhance the potential for a new subdivision law.

Epple stated that the public interest criteria are important for the more intensive subdivision developments. Even critical wildlife habitat at some point must be considered. Mr. Epple agreed that the most subjective public interest criteria should be re-examined. He also felt that the public interest criteria in general could be further defined.

Spilker reiterated that local governing bodies should deal in fact, and that judicial-type review would help accomplish this objective.

Hollinger urged examining other states, such as California, for specific details. He noted that in California’s rural areas a Rural Special Improvement District may be formed after a percentage of the property has been sold. The owners agree in advance to

contribute money to, for example, finance paving at a certain time. This mechanism would encourage developers to go through a full subdivision review.

Jensen asked Epple whether the tiered approach addresses the cumulative impacts of a number of small land divisions. Epple said the concept needs further development in this area.

Iverson summarized the session by stating that the discussion indicates that the public interest criteria should be made more usable, with some criteria possibly eliminated; that good, uniform local control must be facilitated by firm state guidelines; and that the exemption problem might be solved if a better-working system can be designed.

Sen. Dorothy Eck inquired whether a comprehensive land use plan could result in subdivision review only for improvements. Epple said yes, provided that the proposed subdivision is located in an area planned for that type of development.

Public Comment

Jo Brunner, executive director of the Montana Water Development Association, stated concerns about the liability of irrigation districts associated with subdivision development in agricultural areas. Billings, for example, has over 50 miles of irrigation laterals and feeder ditches within its city limits. Subdivisions have been built along irrigation ditch banks, and the landowners do not accept liability. Brunner urged that legislation be enacted to direct owners in new subdivisions to accept responsibility for damages they incur as a result of their location next to an existing ditch. Brunner noted that the irrigation districts do not expect to be removed from liability associated with improper maintenance.

Kathy Macefield, planner for the Lewis and Clark County Areawide Planning Organization, noted that counties have authority to adopt stricter standards than the minimum standards provided in the law, and that perhaps concurrent review by county and state health and planning officials should be required.

Innovative Approaches to Subdivision Regulation: September 1986

As the next step in EQC's subdivision study, EQC invited a number of national and state resource persons to discuss Montana's subdivision regulation at a public forum. The well-attended conference took place September 18-19, 1986 in Great Falls.

EQC CHAIRMAN REPRESENTATIVE DENNIS IVERSON opened the conference on "Innovative Approaches to Subdivision Regulation," noting that the EQC interest grew out of a history of legislative frustration with the polarization of various interest groups on subdivision issues. He expressed hope that the EQC study would provide a fresh approach in drafting a new Montana subdivision law. The elements of that approach include defining the purposes of subdivision regulation, determining how to achieve the necessary public protections, and building a regulatory system to allow proper development with the least amount of delay and cost.

Panel: Perspectives on Subdivision Regulation in Montana

Rick Gustine, Mont. Assoc. of Registered Land Surveyors

Linda Stoll-Anderson, Mont. Assoc. of Counties

Senator Pete Story, landowner

Robb McCracken, **Chris Rockey** and **Lee Tuott**,
Mont. Assoc. of Planners

Bill Spilker, Mont. Assoc. of Realtors

Jim Jensen, Mont. Environmental Information
Center

Representative Tom Hannah, developer

The opening panel featured a variety of viewpoints on the purposes and operation of subdivision regulations in Montana.

RICK GUSTINE stated that the existing law has failed because it relies on subjective and inconsistently applied criteria. He said the law's vagueness has led to varying interpretations at the local level and has created uncertainty for developers. Gustine noted that the Sanitation in Subdivisions Act has worked well by providing definite standards administered on a statewide basis. He also expressed his view that the many exemptions from subdivision regulation should be eliminated and nearly all parcels reviewed.

SENATOR PETE STORY said that subdivision regulations reduce private land values and that hindrances to a landowner's ability to sell or borrow against land can be devastating to agricultural operations. He said the existing public interest criteria are contradictory and do not serve many segments of the public. Story also said that the Subdivision and Platting Act is intended to regulate divisions of land and that other concerns, such as air and water quality, are best handled by laws specifically addressing those issues. He concluded that government should not frustrate citizens' desires to own land.

ROBB MCCRACKEN, **CHRIS ROCKEY** and **LEE TUOTT** stated that subdivision regulations are intended to protect public health, safety and welfare, and that regulation must balance public values with private property rights. The planners commented that 75 percent-85 percent of the subdivisions in some high-growth areas of the state have been exempt from regulation under the platting act. They showed slides of environmental problems and impacts on public services caused by inadequately reviewed subdivisions.

BILL SPILKER said realtors are not satisfied with the present law, and that the objective of subdivision laws should be to provide for development at reasonable cost. He said a consensus on a new subdivision law for Montana is possible. According to Spilker, four concepts should be included in the development of such a law: repeal of the Subdivision and Platting Act; adoption of defined criteria for evaluating divisions of land; a tiered review related to

the size of the subdivision; and strong state guidance concerning the review criteria.

JIM JENSEN noted that subdivision law should allow for the regulation of land development to reflect societal values of a clean and healthful environment. He said the local level is the place to define these values, and he cited a numerical rating system used in a Colorado community to determine acceptable developments. Jensen commented that subdivision law also needs to address cumulative impacts of development.

LINDA STOLL-ANDERSON said there is a tremendous need for money to properly analyze the effects of subdivision proposals so that informed decisions can be made. She cited a lack of information about groundwater as an example. Stoll-Anderson said that private agricultural lands have important public values, including scenery, wildlife, watershed and cultural resources; public purchase of development rights is one way to protect these values. She agreed with previous speakers who had suggested that comprehensive plans are the most appropriate place for consideration of public interest aspects of subdivision development, but she added that a lot of money is necessary for preparing such plans. She believes that developers should pay for the costs of their development, but said that the review process could be streamlined. She said she is not convinced a new subdivision law would necessarily be an improvement over current law.

REPRESENTATIVE TOM HANNAH noted estimates that 70 percent to 90 percent of Montana subdivisions are developed through exemptions to the platting act. He said this is occurring because it is too difficult for developers to comply with the rules and regulations governing development. Hannah called for specific criteria in the law to replace the subjectivity and vagueness of such terms as “need” and “impact.” He said a developer should face the same requirements in whichever county the development is proposed. Hannah concluded that: there is a need to eliminate subjectivity; there must be uniform standards and enforcement; and it must be easier to develop within the law than under the exemptions. He said the key issue is finding the proper balance between planning and private property rights.

Shultz is a professor of law at the University of Missouri at Kansas City.

MICHAEL SHULTZ stated that it is a well-established legal principle that the ownership of land is subject to reasonable governmental regulation. He said politicians must draw the line between public interest and private rights; the goal of subdivision regulation should be the highest quality development at the least cost with proper allocation of responsibilities between public and private sectors. Shultz noted four major purposes of subdivision regulation: consumer protection, environmental protection (including regulation of density, location, and manner of development), community aesthetics and financial accountability. He said consideration of the cumulative effects of a number of small subdivisions is important.

He suggested several necessary components of a subdivision law: minimal exemptions (that are not based on the size of the parcel); formal written findings of fact for all exemptions from specific regulations; and state-mandated criteria in the approval process (as exemplified by Colorado laws specifying county subdivision review procedures). He said that not all requirements can be quantified, and that the abundance of premature subdivisions (land splits approved long before development is contemplated) argues for retaining the “need” criteria in the subdivision review process. Shultz supported requiring secure (liquid) financial guarantees that can be used to complete development if the developer bails out. He suggested that infrastructure costs be imposed on the developer if there is a rational “nexus” (connection) between the subdivision development and the new costs incurred by the local government.

As an alternative to a tiered review system, Shultz proposed that all developments should be liable for all costs (under the rational-nexus test) unless the local government adopts written findings of fact to reduce these exactions. There should be standards to define how the exactions will be determined. Shultz said there should only be one public hearing, which should be at the preliminary plat stage. Local government decisions could be based on this record, he added.

Shultz said there is a need for mandatory zoning to indicate how property can be used. A comprehensive plan, supported by a capital facilities plan and building permit system, should also be in place. He noted that the building permit process provides the legal check to insure that infrastructure development has been properly carried out before housing construction starts. The building permit can also allow an updated review when developers finally propose to begin housing construction on prematurely subdivided land.

He said an important issue is the tradeoff between the need for developers to be certain of the regulations and costs and the need for local government flexibility to respond to changing conditions.

Michael Shultz: A Primer on Subdivision Regulation

Robert Freilich: Applying Comprehensive Subdivision Regulations to the Montana Situation

Freilich is an attorney with Herrick, Feinstein in Kansas City and the Hulen professor of law at the University of Missouri at Kansas City.

ROBERT FREILICH began by stating that development interests have traditionally supported a rational system of land-use regulations because such regulations greatly increase land values. The critical issues he discussed involved the degree to which the regulatory system interferes with development, restricts private property rights, and is rational. Freilich does not favor regulation unless it can be shown that the regulatory system is producing public benefits.

Freilich said that despite comprehensive Montana laws governing zoning, planning and subdivision, the existing state regulatory system is ineffective. This is because the laws provide no incentives for developers to participate. The result is a history of Montana litigation based on whether or not developers attempted to evade the law. Little consideration has been given to how development-related infrastructure should be provided.

He added that the system is failing also because it provides no tools to determine or allocate the costs of development. Montana law does not even address the questions of what off-site infrastructure needs are generated by development or who should pay for infrastructure. Moreover, the law provides no systematic method for local governments to plan for or to construct needed improvements.

A developer's share of infrastructure costs cannot fairly be determined on an *ad hoc*, subdivision-by-subdivision basis, Freilich warned. In order to use subdivision regulation to finance infrastructure development, the local government needs a capital improvement program. That program should assess the effects of population growth and the need for capital facilities caused by subdivision development. Once a plan is developed and infrastructure costs are determined, a fee system could be established. Subsequently, developments of all sizes would be assessed the same per-lot fee to meet the anticipated community needs. In the absence of a capital

improvement program, most small developments are assessed no fees, while larger developers bear most of the infrastructure costs. Development of a rational system for assessing costs relieves this inequity and guarantees that infrastructure will be provided. These factors are incentives for bringing developers into the subdivision regulation system.

Freilich commented that Montana, with its large land base, can accommodate agricultural land development. At the same time, subdivision law can recognize critical values of specific rural areas through requirements for clustering developments and leaving open space. A developer could then be given some financial incentives. Freilich cited King County (Seattle) as having a very workable system for preserving key open-space areas.

He noted that American subdivision laws have gone through four phases since the early 20th century: recordation and mapping; the advent of planning commissions and subdivision regulations to ensure that developments pay for on-site costs; acknowledgment of off-site impacts with the ability to deny development based on inadequacy of off-site facilities; and joint public-private development. In this last and most recent role, local governments participate in development and help assemble capital resources to provide infrastructure. The local government serves as an equity partner and benefits from the ability of private developers to take advantage of depreciation, tax and investment laws. The developer benefits from the leverage that government can provide in project approval.

Freilich listed six steps for a successful subdivision law:

- 1) Broadly define the purposes of subdivision regulation, including fiscal, environmental, infrastructure, and "rational development" considerations. All purposes will not be applicable to all developments but stating broad purposes in the law can avoid future litigation.
- 2) Define any division of land as a subdivision. Montana's whole system is being skewed by exemptions.
- 3) Set processing and review standards that distinguish between rural and urban areas; do not develop a tiered review system based on the number of parcels. For urban areas, develop a standard of review that assesses subdivision impacts and sets fees within the context of a long-term capital improvement program; an elemental environmental review could be added. Allow for development agreements between the developer and county and provide assurances of what facilities the county will provide under its capital improvement program. Accelerate processing with a single hearing at the preliminary plat stage to address zoning considerations, environmental assessment and sanitation review.
- 4) Take out the public interest criteria. Add specific standards for sewers and other improvements. Require

mandatory findings of fact by planning commissions, subject to judicial review.

5) The state does not have to be involved in the review process if standards are set. The state could be involved in reviewing developments in areas of critical state concern.

6) Do not subject developments in rural areas to assessment under a capital improvement program. The review process for rural subdivisions should be minor, covering access, sewer and water. Developers could be required to cluster developments in areas with important agricultural or other values; incentives should be provided for such cluster developments.

Freilich concluded by stating that Montana should consider developing a new subdivision law based on limited objectives, and not attempt a major revision of zoning or comprehensive planning statutes. Although planning and zoning are rational ways to make land-use decisions, the majority of Montana land is neither zoned nor planned. Given this situation along with public resistance to planning, subdivision regulation becomes the basic tool to achieve planning goals. If the administrative and procedural aspects can be revised to make the review process simple and certain, a consensus among the different Montana interests may be achieved.

Stanley Abrams: Procedural Innovations in the Subdivision Review Process

Abrams is an attorney with Abrams, West & Storm in Bethesda, Maryland.

STANLEY ABRAMS discussed the subdivision review process from the perspective of a developer's attorney. Abrams noted that although the Maryland subdivision law is only six pages long, subdivision regulation is highly effective in that state. The key, Abrams said, is people. He emphasized the importance of governments making the financial investment to train the staff and elected officials who administer subdivision regulations and make land-use decisions.

Abrams said that regulation increases and stabilizes the value of property. The quality of local school systems has proven important in the decisions of major corporations to relocate; communities with adequate

capital programs and plans in place are also favored.

In Maryland, state agencies have a very minor role in the review process, except where development occurs in areas of critical concern (e.g., wetlands, beaches and around interstate highways). Local officials are certified to review developments according to defined standards. The Maryland law contains few exemptions.

Maryland planning commissions are semi-autonomous bodies with decision authority and professional staffs. They depend on a hearing examiner system to provide a rational and uniform basis to make decisions, improve speed and efficiency, and ensure professional quality analysis. Some hearings are handled similarly to court trials, while others are less formal. Maryland law also includes a fast-track procedure for qualifying developments, and opportunities for public improvement agreements (contracts) between the government and the developer.

Abrams noted that strict financial guarantee requirements have effectively stopped land speculation and premature subdivision. Developers are required to pay for infrastructure in their developments, and fees for off-site improvements are assessed, based on the number of houses. Abrams noted that ultimately the land purchaser pays for the improvements.

He said that determinations of adequacy can be based on standards. For example, detailed methodologies have been developed to compute traffic impacts to determine what a development is going to do to public facilities.

Abrams said transferable development rights will work to conserve open space or agricultural land, but consideration must be given to the "receiving" area where the transferred development rights may be exercised. Cluster developments conserve open-space, and can provide for higher development density than would normally be allowed. Clusters also reduce road and sewer costs.

Abrams concluded by suggesting that Montana develop separate model subdivision regulations for rural and urban areas.

Cliff Spirock: A Development Consultant in the West

Spirock is president of Community Sciences Corporation in Corrales, New Mexico.

CLIFF SPIROCK provided a developer's perspective on subdivision regulation, with suggestions for Montana. Spirock cautioned against confusing subdivision regulations with zoning, and noted that zoning is intended to regulate the location and density of development. Spirock commented that public interest issues should be resolved long before the land becomes involved in a subdivision development proposal. He added that a subdivision law should not be so restrictive as to preclude effective zoning options.

Spirock said that land-use statutes should provide the developer with access to a variety of development techniques, including transferable development rights and conservation easements. Local jurisdictions should have the flexibility to offer developers incentives (e.g., increased density limits) in exchange for provision of off-site services. Spirock said that exacting excess funds for off-site impacts can multiply costs greatly through the layers between the developer and the homebuyer. He encouraged a look at alternate bonding procedures to keep developers' costs down.

Spirock called for an expedient process for arbitrating technical disputes and interpreting local requirements. He said subdivision manuals should be provided in layman's language, in addition to the more common technical format. Spirock explained New Mexico's system involving five tiers of subdivision review, based on the number and size of parcels.

He said public interest criteria should be removed from Montana's subdivision law, and he discussed the use of the LESA (Land Evaluation and Site Assessment) point system, which has had some success in conserving agricultural land.

Panel:

Processing Subdivision Proposals

Joining Abrams, Gustine, Shultz and Tuott on the proposal processing panel were:

Dan Schulte, Mont. Assoc. of Realtors

Bob Mullen, Mont. Assoc. of Counties

Jim McCauley, Dept. of Health & Env. Sciences

MICHAEL SHULTZ said "one-stop shopping" is a must for the subdivision review process, meaning that under most circumstances a developer should only have to present his proposal once to the reviewing bodies. He said that most state agencies do not have the

resources to participate effectively in subdivision review, but suggested that agencies involved with critical state interests could promulgate precise guidelines for local officials in their review process. He said public interest criteria are needed, but they cannot be subject to *ad hoc* decisionmaking. Rather, local governments could be required to adopt reasonable methods of evaluating the public interest issues. Shultz concurred with previous speakers on the importance of adequate training and technical assistance for subdivision reviewers.

STANLEY ABRAMS supported streamlining the review process, and said the state should delegate review authority to local governments. He said the state must narrow its exemptions, commenting that Montana has virtually no subdivision review now because of the exemptions. Abrams opposed a tiered review system based on the size of a development, noting that the impacts of a single developer creating five two-acre units are the same as the impacts caused by five landowners each splitting off a two-acre unit. Abrams said comprehensive plans define what local residents want for their quality of life, and subdivision regulations should be used to carry out the plans.

DAN SCHULTE said developers want to know costs up front, and said there would be support for doing away with exemptions if the review process is streamlined for small pieces of land.

BOB MULLEN questioned whether local governments have the resources to take the lead role on all aspects of subdivision regulation.

JIM MCCAULEY said it is important to determine what level of government is most qualified to conduct the review, noting that state agencies may have greater resources than some local governments.

ABRAMS concluded the panel by noting that a fee structure for processing subdivision applications should directly reflect the costs incurred by local government in reviewing the application.

Panel:

Substantive Review of Subdivision Proposals

Joining Abrams, Freilich, Hannah, Jensen, Spirock and Stoll-Anderson on the panel discussing substantive review of subdivision proposals were:

Jerry Sorensen, Mont. Assoc. of Planners

A.P. Hollinger, Mont. Assoc. of Realtors

REPRESENTATIVE TOM HANNAH opened the panel by saying that subdivision regulations must be uniform and must not be subjective.

ROBERT FREILICH said differentiating between rural and urban review processes will not encourage locating large developments just outside of urban areas. Developers who build on the margins of urban areas would still be covered by the capital improvement plan. He briefly reviewed methods of conserving agricultural and open space values, and reiterated that incentives should be provided for developers using these methods. Freilich outlined a number of fundamental tests to determine whether capital improvement fees assessed upon a developer are appropriate to the impacts of a development. Having local governments adopt detailed ordinances on how such fees are to be calculated would give the developer certainty in figuring development costs.

CLIFF SPIROCK said exemptions can be eliminated, but a stratified review process is still necessary to differentiate among types of development. He said a one-stop review process is appropriate if desired by the developer.

A.P. HOLLINGER said planning commissions should have the authority to approve the final plat. He said the three-step approval process and associated delays are very costly to developers.

LINDA STOLL-ANDERSON said "need" is one of the most important criteria in the subdivision review process, given the abundance of unsold lots on the market.

FREILICH said public agencies are not in a position to regulate the market or anticipate need for land development. Development of "in-fill" land (land closer to the urban service area) can be encouraged by economic incentives.

STOLL-ANDERSON said there are public costs of a market flooded with unsold lots when developers default on taxes and improvement agreements, leaving county governments with land and unpaid debts.

HANNAH said that the public should have the opportunity to select among the range of available lots, and an artificial limitation on the number of lots that may be marketed means that subdivision proposals could be rejected on a subjective basis.

JERRY SORENSEN said interests need to work together to promote quality development, as opposed to fighting over land divisions. There are too many platted land divisions and very little good development. He said Montana's law is a mix of design law and locational law, and concluded that Montana needs either stronger planning or more clarification of the public interest criteria, recognizing that there will be some subjectivity. Legislative support would be needed to get a stronger role for planning in Montana.

FREILICH said he would like to see the public interest criteria broken down into a set of determinants that could be used by communities in a realistic and rational way. Environmental issues and capital

improvements could be covered. Freilich also said that developers are willing to face the risk of failed subdivisions, but that a system in which the local government develops a long-term financing system would be an improvement over the special improvement district process.

JOE GUTKOWSKI said subdivisions have devastating effects on wildlife and developers should have to pay for their impacts. He cited an Oregon law that limits development to urban areas.

FREILICH said rural cluster development is a way to keep important wildlife areas free of development. He added that urban services should not be provided outside the urban area.

SPIROCK said the LESA system does consider wildlife within its point tabulation.

Panel: The Scope of Subdivision Regulation

Joining Freilich, Shultz, Spilker, Spirock and Story on the panel on the scope of subdivision regulations were:

Pat Trusler, Mont. Environmental Health Assoc.
Mike Foley, Mont. Assoc. of Registered Land Surveyors
Chris Ebeling, Mont. League of Women Voters
Andy Epple, Mont. Assoc. of Planners

MIKE FOLEY said there is a need for countywide planning and zoning. He asked why government is reluctant to enact statewide zoning.

SENATOR PETE STORY said Montana's low population density makes it pointless to ask many rural counties to enact planning and zoning. He added that statutes specific to air and water quality are the most appropriate tool for many problems, while the most highly developed areas do need zoning.

ROBERT FREILICH said that this underlines the logic of distinguishing between urban and rural areas.

CHRIS EBERLING said she is concerned about the expressed opposition to retaining public interest criteria and the concept of government becoming partners with development interests.

PAT TRUSLER said any redraft of the Montana law should keep its strong focus on public health. He said that Montana is diverse, and that legislators should remember that some areas of the state do have

subdivision-related problems.

ANDY EPPLÉ said any division of land should be subject to some level of review, since a problem has been that subdivision review has been considered a planning tool. He said discussions at this conference have indicated that counties need to do a better job of comprehensive planning and need to exercise self-determination to decide their quality of life goals. He said that with comprehensive plans in place, including capital improvements, economic development and land-use considerations, subdivision review would become a simple, technical process. Epplé said discussions have highlighted a need to draw distinctions between urban growth areas and rural areas. In rural areas, developments with low density populations and private roads and sewer systems can create some cumulative problems for wildlife and aesthetics. A tiered review system might be appropriate

under these circumstances.

MICHAEL SHULTZ concluded that the overwhelming use of exemptions in Montana does not mean that the regulatory process is bad, it means the exemptions should be eliminated. Uniform regulations will result in higher quality developments that benefit the state. He also said public need criteria are important, because the market system by itself cannot allocate the use of land and satisfy social goals. He said much land division is speculative and not beneficial.

CLIFF SPIROCK noted that, given the existing 20-acre exemption, Montana has de facto zoning of one unit per 20 acres.

FREILICH said that by having proper controls on subdivisions, the problem of premature urban subdivision is avoided. He said the challenge facing Montana is to specify how public interest concerns are to be applied.

Toward a Better Subdivision Law: An Options Paper

Montana interest groups have debated subdivision regulation for years, expressing general dissatisfaction with existing laws. Various parties have offered viewpoints during the EQC study on what the purposes should be for subdivision regulation, the problems that should be solved by an effective subdivision law, and the legal provisions that might receive consensus support and resolve principal subdivision regulatory issues.

The decision points provided in this paper are designed to express a broad array of regulatory and policy issues that the legislature must face in developing a new subdivision law. Although this paper reviews some facets of existing Montana subdivision law, it does not assume that the current law is a necessary starting point for future legislative decisions. Rather, the approach is to encourage reviewers to “start from scratch” in determining what concepts should be included in formulating a new subdivision law for Montana.

Why Regulate Subdivisions?

Interest group representatives at the EQC meeting on May 13, 1986, expressed general agreement on the following purposes:

- parcels should be properly mapped and recorded to prevent legal difficulties;
- properties should have a quality water supply to ensure public health;
- sewage treatment should be provided to conserve groundwater and surface water quality;
- lots should have good drainage to protect consumers; and
- legal access to properties should be guaranteed.

The challenge facing persons interested in revising state subdivision laws is to reach accord on what other

purposes should be achieved by subdivision regulation. Some of the most commonly noted purposes include controlling fiscal impacts on taxpayers and local governments, preserving critical wildlife habitat, assuring orderly growth, protecting the rights of private property owners, and providing for quick and uniform government review of proposed developments.

The 11 broad categories below contain purposes that might be included:

- (1) assure accurate, uniform and expeditious processing of subdivision proposals;
- (2) ensure that property rights are protected and that affordable housing is provided;
- (3) “ensure adequate access to land parcels;”
- (4) protect water quality through proper sewage and solid waste disposal;
- (5) ensure protection from natural hazards;
- (6) ensure a good water supply;
- (7) protect environmental and/or cultural resources from undue degradation;
- (8) protect agricultural land and landowners;
- (9) provide for orderly growth;
- (10) reduce government infrastructure costs associated with serving subdivisions; and
- (11) provide for quality subdivision development.

Decision Points

1. The legislature must decide whether the five consensus objectives should be in Montana law.
2. The legislature must select any additional purposes it wishes to accomplish through subdivision regulation.

What Substantive Review Should Be Required?

Governmental entities apply substantive requirements to determine whether proposed subdivisions should be approved. The requirements follow directly from the purposes that have been established for subdivision regulation. In other words, the substantive requirements help governments ensure that the purposes of subdivision regulation are met. Most study participants have indicated that subdivision requirements should be as clear and certain as possible. Several persons expressed concern about the vagueness in the review criteria in the Subdivision and Platting Act. These criteria, they feel, are the basis for inconsistent statutory interpretations by local

governments and often unpredictable decisions on subdivision proposals.

There are two types of substantive review criteria. The first determines if certain *requirements* are fulfilled to ensure a good subdivision.

The second type determines generally if it is in the *public interest* to approve the subdivision. Because the latter type has become controversial, the legislature may wish to replace certain public interest criteria with requirements, or to require local governments to adopt more specific interpretations of these criteria.

Discussions at the May 13 EQC meeting and the September subdivision conference indicated that effective policy guidance is especially important in counties that have not completed a comprehensive plan. The discussions further indicated that a quality comprehensive plan may alleviate the need for application of public interest criteria. Thus, one suggestion is to develop specific criteria in the subdivision law that accomplish essential purposes, and address other purposes by comprehensive planning or by identifying critical areas.

Decision Points

1. The legislature must decide which substantive requirements should be adopted to implement the purposes selected from section I.
2. If substantive requirements are not developed for some of the purposes selected, the legislature must decide how those purposes should be considered in subdivision review.
3. The legislature must decide whether each substantive requirement should be specified in the law, in state agency rules or model rules, in local government ordinances, or in a combination of these approaches. The legislature may wish to put bounds on how broadly both state and local governments can construe their authority to set standards on specific requirements.

How Should Proposals Be Processed?

Local subdivision review generally involves separate review by two formal bodies — the planning board and the city or county commission — in addition to review by local government staff. This two-stage process is currently undertaken within a statutory timeframe of 35 or 60 days, depending on the size of the subdivision.

In actuality, local government review practices and/or deficiencies in the developer's application may result in a longer review period. But perhaps more importantly, developers often feel the local review process promotes uncertainty, resulting in added expense or even unanticipated denial of a subdivision proposal.

The Decision-making Authority

In Montana, the planning board provides recommendations to the county (or city) commission, which makes the final decision to approve or deny a subdivision proposal. In some states, however, planning boards have that final authority. For developers, the advantage of this approach is that it removes a tier of review, along with the potential that the county or city commission will disagree with the planning board. For local governments, this modification would reduce the workload for the city or county commission, but it would entail delegating authority to the planning board and lessening the overall review given each subdivision proposal. Additional questions are raised by having appointed officials (the planning board members) rather than elected officials (the commissioners) responsible for subdivision decisions.

The Public Hearing

The public hearing requirement has attracted specific questions about the reliability, accuracy and relevance of much of the public testimony. Some observers advocate a quasi-judicial hearing (with a hearing examiner, evidentiary rules and opportunity for cross-examination) to help remove the emotionalism often associated with a subdivision decision.

Others favor the informal public hearing process because it allows any person to present views on a proposed subdivision. Interested persons may also be less intimidated by the hearing and feel encouraged to participate.

Expedited Procedural Review

For certain subdivisions, such as a small one, it may make sense to speed up the review process. There are a variety of ways to achieve this, including removing the public hearing requirement where the subdivision proposal is uncontested; providing review authority to the planning administrator for small subdivision proposals; and providing shorter periods for reviewing these proposals. The latter example is currently available to local governments in Montana where divisions of land result in five or fewer parcels (the "minor" subdivision).

Decision Points

1. The legislature must determine the appropriate local government bodies to make decisions on subdivision proposals.
2. The legislature may specify local review processes, including public hearing requirements, review deadlines, information requirements and verification procedures.
3. The legislature may wish to assess the resources available to local governments to evaluate subdivision proposals and to monitor development.

What Should Be the State's Role?

Both state and local governments review subdivision proposals in Montana. The state Department of Health and Environmental Sciences must evaluate a proposal's water supply, sewage and solid waste disposal systems. If a subdivision proposal meets the specified requirements, the state approves the application, leaving local approval as the final step for the project go-ahead.

The division of authority between local and state officials has led to some difficulty in monitoring and enforcing subdivision requirements. For example, homes in a Richland County subdivision experienced foundation problems because of unstable soils and inadequate drainage. Although both state and local officials had "signed off" on the subdivision, the potential for problems went undetected, partially because of confusion over who was responsible for ensuring the accuracy of information provided by the developer.

Decision Points

1. The legislature must decide which review functions should be state responsibility and which should be local responsibility.

A Tiered Approach to Review?

Discussions at the May 13 EQC meeting indicated that a "tiered" approach to reviewing subdivisions might be workable. While the proposal received both negative and positive comment at the September subdivision conference, its uniqueness is valuable for comparison with other models for subdivision regulation.

Tiered review would involve applying varying substantive and/or procedural review to subdivision proposals. A large subdivision might receive extensive review, whereas a small subdivision would receive only limited review. Thus, the criteria applied to a particular subdivision would vary according to the tier in which it falls.

The tiers could be based on a variety of criteria that distinguish subdivisions according to anticipated impacts. As an example, New Mexico uses a formula based on the number of divided parcels and the acreage of the parcels in establishing five types of subdivisions.

A four-tier approach was proposed at the May 13 meeting. The limits tentatively proposed for differentiating among the four tiers were one or two parcels, three to five parcels, six to 10 parcels and 11 or more parcels.

The proposal would allow local government review of small subdivisions (one or two parcels) for access, sewage disposal, water supply, utility availability and natural hazards. Large (11 or more parcels) subdivisions would be reviewed for the entire range of requirements provided under the subdivision laws. Possible distinctions suggested for the intermediate types include whether an environmental assessment is required and whether park lands should be provided.

The tiered approach could also involve procedural variances. For example, review procedures for small subdivisions could include evaluation only by a local government administrator.

Decision Points

1. The legislature must decide whether tiered review is desirable. If it is, the legislature must determine: a) the number of tiers; b) how the tiers should be distinguished; and c) what review procedures and requirements should apply to each tier.

2. The legislature must determine whether or not "subdivision" can be defined to include all types of land divisions.

1987 Session Activity

Two public hearings and three meetings of a working group were held in fall 1986 to obtain additional input and to begin developing a consensus subdivision bill. Beginning in December, with a meeting involving the working group, the EQC met to make policy decisions concerning the bill. Final decisions were made by January 24, 1987. After public comment and final technical changes, House Bill 809 was introduced.

HB 809: The Subdivision and Development Act

House Bill 809 represents the cumulative efforts of the working group, public participants, and the EQC to develop a consensus subdivision bill. While consensus was achieved in many areas, the council made policy decisions in other areas based on a weighing of the testimony of interested persons. The bill, as submitted to the House Local Government Committee on February 20, 1987, is summarized below.

Except for an agricultural exemption, the bill provided some review for virtually all land divisions. The technical exemptions that remained were listed within the definition of subdivision. The 20-acre limit, occasional sale, family conveyance, and mortgage exemptions were removed.

While regulating more subdivisions, the bill attempted to ensure tailored and more uniform review for subdivision proposals. The statement of purpose reflected this objective by stating concern for the rights of property owners as well as the protection of public health, safety, and welfare.

House Bill 809 recognized major, minor, and special subdivision types. Detailed review was provided for major subdivisions. Minor subdivisions, defined generally as divisions resulting in five or fewer parcels, would receive less extensive substantive review through an abbreviated review process (except in multiple minor subdivision situations). Special subdivisions, which are subdivisions that comply with a qualified master plan, a capital improvements program, and zoning laws or local subdivision regulations, would also receive abbreviated review.

Review Procedures

Procedures for local government review were provided for each subdivision type. The process for all subdivisions, however, involved a preliminary conference between the subdivider and a local government officer.

For a major subdivision, a single public hearing was required. The governing body, the planning board, or both could conduct the hearing. In addition, the subdivider or an affected citizen could petition, or the governing body could elect, to have an informal contested case hearing (costs of the hearing could be assessed to the petitioner, however). For any major subdivision, the governing body would determine whether to approve or disapprove the application during executive proceedings.

The process was significantly different for a minor or special subdivision. A subdivision review officer would decide on these applications, unless the subdivision proposal deviated from established standards or involved a request for a variance. The officer would then notify the governing body of his decision on the application.

A public hearing would not be available for a special subdivision (these subdivisions indirectly receive public comment through hearings at the master plan, zoning, and capital improvements program phases). However, a minor subdivision located in a critical resource or fiscal impact area could receive a public hearing upon request of the subdivider or an affected citizen. In this instance, an informal contested case hearing was an option, though the petitioner could be assessed costs for the hearing.

Local Substantive Review

The bill provided primary and secondary review criteria for local governments. The primary criteria applied to all subdivisions, and included the following:

- review for accurate mapping and proper recordation;
- review for water supply and sewage disposal under the Sanitation in Subdivisions Act;
- review to ensure easements are provided for any planned utilities;
- review for access (legal access was required for primitive tracts and physical access was required for all other subdivided parcels);
- review for flooding;
- review for certain specified hazards, including unstable slopes unsuitable soils, and drainage. In general, hazards would be analyzed with existing data, and mitigation measures could only be required pursuant to clear and specific standards adopted by the local government. Other hazards could be identified by the review authority and made known to the subdivider.

The identification of critical resource or fiscal impact areas served as an avenue for local governments to address specific secondary review criteria, including costs to local government and wildlife habitat. These areas would be determined according to local government rulemaking procedures and would apply to subdivision applications filed after the area or areas have been adopted. Special guidelines were provided for the designation of critical areas for wildlife habitat.

A major subdivision was subject to a capital improvement fee and a park dedication fee (the park fee was eliminated if the capital improvement fee included a fee for parks or the subdivision met waiver criteria). In addition, a major subdivision had to either conform to a qualified master plan or be reviewed for:

- effects on agricultural and water user interests;
- effects on critical wildlife habitat if site-specific information documents critical habitat or the subdivision is within an area formally designated as critical wildlife habitat under strict criteria; and
- possibly other critical resources if the subdivision is within an area formally designated as a critical area for that resource.

A minor subdivision was subject to a capital improvement fee only if it was located in a fiscal impact area designated in a capital improvement program. Also, if a minor subdivision was located in a critical resource area, the subdivision would be reviewed for the designated critical resource.

Because of prior master planning, capital improvements planning, and zoning, the bill only attached the capital improvement fee and the park dedication requirement for special subdivisions (the park dedication requirement would be eliminated if capital improvement fee included a fee for parks or the subdivision met waiver criteria).

Recording and Surveying

These sections were very similar to the sections contained in the existing Subdivision and Platting Act. Working group and EQC discussions indicated that, except for minor changes, the existing laws are working effectively.

Sanitation in Subdivisions Act

The study proposed initially to develop one comprehensive subdivision regulation law and to repeal both the Subdivision and Platting Act and Sanitation in Subdivisions Act. Because of general satisfaction with the Sanitation in Subdivisions Act, however, the EQC decided that the act should be retained separately from the bill. The only significant change concerned the definition of “subdivision”, which was modified in accordance with the new definition and a specific

requirement that DHES shall address cumulative effects of subdivision development on water quality.

Planning Statutes

The bill encouraged effective master planning and capital improvements program development as a way to guide subdivision growth. Because subdivisions must conform to master plans, the EQC and the working group emphasized the need to ensure qualified plans. The bill, therefore, outlined criteria for a qualified master plan.

Amendments

House Bill 809 was heard in the House Local Government Committee on Friday, February 20. A subcommittee met on Sunday, February 22, to review the bill and proposed amendments. The subcommittee's amendments were adopted by the full committee on Monday, February 23. On Tuesday, February 24, the committee adopted additional amendments submitted by Rep. Brandewie addressing the natural hazards and access sections, but then decided to table the bill. A major committee concern was the limited time to examine the bill comprehensively.

The House Bill 809 gray bill, which contained the amendments adopted by the House Local Government Committee, included the following changes to the original bill:

- the effective date was delayed until July 1, 1988 to allow local governments more time to develop regulations implementing the new law;
- a civil penalties section was added to allow a governing body to enjoin any activity in violation of the subdivision law or to compel actions to remedy any damage caused by the violation;
- a public hearing on a minor subdivision located in a critical resource area was limited to consideration of factors relating to the critical resource, or to fiscal impacts if the subdivision is located in a fiscal impact area;
- clarifying language was added stating that a governing body may delegate decision-making authority on subdivision applications to the planning board;
- the access requirement was modified by a) defining primitive tracts to include low human impact activities more than one mile (rather than two miles) from a state, federal, or maintained county road; b) allowing for fixed dwellings within these tracts; and c) removing the requirement that legal access be noted on plats and instruments of transfer involving primitive tracts.

- the review for natural hazards was modified to require only that notice of the hazard, and recommended mitigation if not agreed to by the subdivider, be placed on the final plat;
- the review for critical wildlife habitat as applied to major subdivisions was limited to instances where the subdivision is located in a critical resource area;
- mitigation for critical resources was limited to mitigation of substantial (as opposed to significant) adverse effects; and
- the park dedication fee requirement was modified to allow developers to elect to donate land instead of cash.

Future Work

The EQC will decide later this year whether to continue the subdivision study during the 1987-89 interim. If the study is continued, the bill will be reexamined to determine if it is suitable for developing consensus legislation. Testimony on the bill indicated that areas of disagreement include what type of review, if any, should occur for natural hazards, access, or effects on wildlife habitat. The adequacy of the subdivision review process and the capital improvements program sections are other areas where the bill might need reexamination.

The EQC study indicates several viewpoints that must be addressed and incorporated to develop a consensus subdivision law. The viewpoints include:

- A new subdivision law should have a comprehensive definition of "subdivision" and provide some level of review for virtually all subdivisions.
- Subdivision laws should not discourage development, but should encourage development in a manner that is in the public interest.
- Subdivision developments should pay their fair share of costs otherwise borne by local governments.
- A new law should provide flexibility to local governments to address unique situations within their jurisdictions.
- Subdivision review should be predictable, without opportunity for "applause meter" decisionmaking.
- Subjective review criteria should be addressed at the planning level rather than during site-specific subdivision review.

HAZARDOUS SUBSTANCES

Montana's Regulation of Hazardous Substances

During the past decade, the American public has grown increasingly concerned about chemicals in the environment. Many recent studies have linked certain chemicals with potential health risks, while the daily news brings stories of environmental contamination caused by industrial, agricultural or household chemicals. At sites across the country, citizens have become aware of the consequences of living with the uncertain effects of chemical exposure.

Congress has responded to public concern by enacting an array of laws regulating the use and management of hazardous chemicals. Since the first comprehensive hazardous waste management law in 1976, major congressional initiatives have focused on dump-site cleanup, chemical information for workers and communities, emergency response programs, leaking underground storage tanks and nuclear waste disposal. Ongoing reform efforts center on laws and regulations for hazardous materials transportation, drinking water contamination, pesticide application and toxic air emissions.

The Montana legislature took its first major step into the "toxics" arena with passage of the Montana Hazardous Waste Act in 1981. During the following two sessions, Montana kept pace with congressional initiatives by enacting complementary legislation and setting up new programs to administer state and federal requirements.

This chapter highlights some of the key policy issues in hazardous substance management facing the 1987 Legislature. The issues are grouped into five major topics: hazardous waste management, regulation of underground storage tanks, Superfund program, state mini-Superfund, and chemical right-to-know. For each topic, the text provides background information, a pre-session overview of legislative issues, and a summary of actions taken by the 1987 Legislature. (The legislative actions are reported through April 10, 1987 (the 80th day of a 90-day session) and, although apparently final, some actions could be subject to change during the final days of the session.)

Management of Hazardous Waste

Congressional approval of the Resource Conservation and Recovery Act of 1976 (RCRA) established the first comprehensive federal approach to managing hazardous wastes. The federal Environmental Protection Agency (EPA) administers RCRA. The program focuses on preventing problems caused by improper management of waste industrial chemicals. Its enactment completed a "triangle" of federal regulation, adding land disposal regulations to existing laws governing air and water pollution.

RCRA defines hazardous waste; sets technical standards for disposal; establishes a permit system for generators, transporters and disposers of hazardous wastes; and allows EPA to authorize states with equivalent regulations to run their own program. RCRA is predicated on "cradle-to-grave" management, where hazardous wastes are regulated from generation to ultimate disposal.

The 1981 Legislature formally authorized Montana's hazardous waste management program with the passage of Senate Bill 212, the Montana Hazardous Waste Act (MHW A). MHW A is the state counterpart of RCRA, and Montana's hazardous waste program mirrors federal law and regulations. This is because RCRA requires state programs to be at least as tough as federal law, while MHW A specifies that state law may not (with minor exceptions) be more stringent than federal regulations.

With the passage of the MHW A and adoption of associated regulations, Montana satisfied the program requirements of the federal RCRA. In 1984, EPA authorized the Montana Department of Health and Environmental Sciences (DHES) to administer virtually all program elements.

To retain EPA authorization, DHES must keep current with regulatory changes on the federal level. The most significant changes occurred in 1984 when Congress passed major RCRA amendments. These amendments:

- tightened regulations for "small-quantity generators" (i.e., businesses producing between 220 and 2,200 pounds of hazardous waste per month);
- established a new program regulating underground storage tanks; and
- severely restricted land disposal of untreated hazardous wastes.

DHES has proposed some revisions of its laws and rules as necessary to bring them into conformance with the federal small-quantity generator regulations and other new RCRA provisions; additional state rule changes may be required after EPA develops federal regulations on land disposal over the next two years.

The department anticipates regaining full EPA authorization for all hazardous waste management program elements sometime in 1988.

Program Issues

Montana is facing three primary issues in hazardous waste management: regulation of small-quantity generators; evaluation of the need for a hazardous waste collection and transfer station; and management of used oil.

Small-quantity Generators

The inclusion of small-quantity generators under RCRA regulations has greatly increased the number of regulated businesses in Montana. Hazardous waste management regulations will now cover an estimated 100-200 generators on a regular monthly basis, along with several hundred other generators who may accumulate reportable quantities over several months. This compares with the approximately 50 generators who had been regulated under the previous monthly limit of 2,200 pounds of hazardous waste.

Service stations, dry cleaners and many small manufacturing firms that previously disposed of hazardous wastes at local landfills must now use licensed facilities and maintain detailed records. In response to this broader coverage, DHES has worked to educate small-quantity generators on their new responsibilities for proper disposal of hazardous wastes. The department, in conjunction with the Montana Chamber of Commerce, conducted workshops in ten cities in September 1986 to inform businesses of their responsibilities and waste disposal options under the new law. DHES also has two staffers who work with Montana small businesses on hazardous waste disposal issues.

Collection and Transfer Station

The rapid increase in the regulated community — coupled with the fact Montana has no licensed commercial disposal facilities for hazardous wastes — spurred both state and private interest in helping small businesses to dispose properly of their wastes. State officials worried that without accessible and affordable disposal, Montana might experience a rash of "midnight dumping" to evade the new regulations.

In response, DHES requested money from the 1985 Legislature to study and, if necessary, to construct a hazardous waste collection and transfer station. As envisioned, the station would serve as a central collection point for hazardous waste generated by

Montana businesses. The wastes would then be consolidated into shipping loads and transported to out-of-state disposal facilities. Although the department would charge a user-fee, some state subsidy might be necessary to operate the station and to keep fees at affordable levels.

The 1985 Legislature approved the funding, appropriating \$800,000 for the hazardous waste collection and transfer station. But the appropriation was contained in House Bill 922, which funded a series of natural resource projects with interest money from the Resource Indemnity Trust Fund. A budget shortfall convinced the legislature to delay funds for HB 922 projects until fiscal 1987.

As a result, the feasibility study for the collection and transfer station did not begin until the summer of 1986. This study, funded by \$115,000 of the \$800,000 appropriation (plus \$50,000 from DHES for information on used oil and waste solvents), is being conducted by two consulting firms: Environmental Resources Management from West Chester, Pennsylvania, and Damschen and Associates from Helena.

In January 1987, the consultants issued a preliminary report, recommending that the state proceed with development of a hazardous waste collection and transfer facility. Under that option, trucks with a 20-drum capacity would pick up waste containers at businesses and deliver them to a central station. These wastes would be tested, consolidated when possible, and loaded onto semi-trailers for out-of-state disposal.

Estimated per-drum costs of transportation and disposal would range from \$280 to \$350, comparing favorably with the range of \$250 to \$800 per drum for similar service currently available to small generators. As envisioned, generators would pay the disposal costs and thus cover operational expenses of the facility, but the state would invest about \$600,000 to construct the facility.

The report also recommended that the facility be a joint state-private venture. The state would develop the project and retain ownership, but private contractors would conduct day-to-day operations. As explained in the report:

"Public sector siting and permitting of the facility is viewed as reducing greatly the perceived business risk associated with facility development. Commercial hazardous waste management firms generally state that such business risk is the major barrier to private sector development of hazardous waste management facilities. Public ownership will also guarantee, through bid documents, that service to all generators, even in distant parts of Montana, will be provided. Private operation of the facility ensures that the efficiency of the operation benefits from free market factors."

The report also presents the results of a survey intended to determine how much hazardous waste is produced in Montana. Small-quantity generators, together with very-small-quantity generators (producers

of less than 220 pounds of waste per month), are estimated to produce about 280,000 gallons of hazardous waste annually in Montana. Slightly more than half the total is organic solvents, and nearly all the hazardous waste from the small and very small generators is treated off-site.

To transport this waste to out-of-state disposal facilities would require about 65 semi-truckloads, carrying 80 barrels each. A growing interest in solvent recovery operations, however, could reduce the volume that must be shipped from the state. The survey also indicated that used oil from small businesses totals an estimated 2.2 million gallons, much of which is recycled or burned for fuel.

While DHES was studying a hazardous waste collection and transfer station, a private firm announced plans to construct such a facility in Montana. In November 1986, Special Resources Management, Inc., said it would construct a hazardous waste collection and transfer station in the Yellowstone Trade Center in southwest Billings. SRM, a Billings-based subsidiary of the Montana Power Company, would contract with regional waste generators to pick up hazardous wastes and transport them in sealed drums from the client businesses to Billings. SRM would then ship the drums to licensed hazardous waste facilities in other states. SRM expects its Billings station to be operational by the spring of 1987. The facility will initially store the wastes fewer than ten days, and thus will not be subject to state or federal permitting. This strategy will allow SRM to avoid waiting for completion of a potentially lengthy permitting process. Company representatives have said that their intention is to construct the facility to meet state regulations for a hazardous waste storage facility; ultimately SRM may apply for a permit under the Montana Hazardous Waste Act.

According to company officials, the Billings facility is part of their long-range plan for the commercial management of hazardous materials in a five-state region: Montana, Idaho, Wyoming, North Dakota and South Dakota. This plan includes a waste disposal facility in the region, although the site selection process has not yet begun.

Some southwest Billings residents have expressed concern that the hazardous waste collection and transfer station would threaten public health in the event of a fire or other accidental release of hazardous waste. These residents are worried about the kinds of wastes the facility will handle and the proximity of the site to residences. SRM has participated in a series of recent meetings with local residents in an effort to respond to the concerns. The company also hosted a public meeting in Rocker, west of Butte, where the company is planning to establish a second waste transfer station.

Waste Oil

Regulation of waste motor oil disposal is another major federal initiative with potential effects on Montanans. Under RCRA amendments of 1984, Congress directed EPA to study if used motor oil should be regulated as a hazardous waste and thus be subject to stringent requirements for tracking and disposal. In late 1985, EPA tentatively proposed to subject most used oil to the hazardous waste regulations.

That proposed regulation raised a number of concerns from oil users and state officials. Regulation of used oil as a hazardous waste would sharply increase the cost of handling the material; this would dampen a re-refining market already depressed by low oil prices. Regulation might also make it more difficult to burn used oil for heating purposes. Service stations and other generators of used oil would have to find other, more expensive outlets for disposal, prompting concern that waste oil would be illegally dumped into sewers, storm drains or the environment.

In November 1986, EPA announced that waste oil destined for re-refining or use as heating fuel would not be classified as a hazardous waste. Rules remain in effect governing the blending and burning of hazardous substances with used oil, and future rules may be proposed to regulate used oil that will be disposed of by methods other than re-refining or burning. At present, however, most used oil may continue to be handled under established practices.

Legislative Issues

Hazardous Waste Management

The Department of Health and Environmental Sciences is requesting legislation to incorporate into state law the changes made to the federal hazardous waste law (RCRA). The bill would allow the department to establish requirements for financial assurance and corrective action in the event that a permitted facility spills or otherwise releases a hazardous waste. To retain EPA authorization to conduct a hazardous waste program, Montana must keep its laws and rules at least as stringent as federal regulations.

Collection and Transfer Station

The 1987 Legislature will have the opportunity to review its 1985 appropriation for state construction of a hazardous waste collection and transfer station. The feasibility study recommends proceeding with the facility, and the money remaining from the appropriation (about \$632,000) would approximately cover design, siting and construction costs. DHES could commit these funds for future use by contracting

with the Department of Natural Resources and Conservation (the agency that issued the RIT grants in 1985), but has not yet done so.

In the opening weeks of the 1987 Legislature, DHES presented the collection and transfer station issue to the Environmental Quality Council and to the Human Services Subcommittee of the House Appropriations and Senate Finance and Claims committees. The legislature faces several policy issues in regard to the proposed DHES facility, including evaluating the public benefits and costs of having the state control a hazardous waste collection system; how the independent development of a private facility will affect the economic feasibility of a state-owned system; and if a private operation will adequately serve all small-quantity hazardous waste generators.

Against the backdrop of uncertain state plans, Special Resources Management is proceeding with its commercial venture to construct collection and transfer stations in Billings and Butte. SRM hopes to have these facilities operational by March 1987. The legislature may, however, be considering legislation aimed at more closely regulating the SRM facilities, in response to public concern over state regulations that have allowed SRM to avoid a permit process.

1987 Legislature

* Passed HB 467, incorporating changes from the federal Resource Conservation and Recovery Act into the Montana Hazardous Waste Act.

* Reappropriated (in HB 6) \$212,000 to DHES out of the remaining \$632,000 from the 1985 appropriation for state construction of a hazardous waste collection and transfer station. The reappropriated funds will not be used to construct a collection and transfer station. Instead, the funds are provided for a two-year effort that will include:

(a) hiring of a Billings-based staff person to work with small-quantity generators to increase compliance with hazardous waste laws; to inspect the SRM collection and transfer facility in Billings; and to report to the next Legislature on the effectiveness of private waste handling operations in Montana; and

(b) promoting techniques to minimize the generation of hazardous wastes, through public information and technical assistance to generators.

The remaining \$420,000 of the 1985 appropriation reverted to the Resource Indemnity Trust interest account.

* Passed HB 789, which establishes regulations for hazardous waste transfer facilities. Under this act, DHES must adopt rules governing emergency preparedness, contingency plans, personnel training, security, and provisions for waste handling, storage and spill containment. The SRM stations set to open in Butte and Billings will have to comply with these new operating regulations, but no permit or siting requirements will be developed for transfer facilities.

Underground Storage Tank Regulation

In recent years, leaks from underground storage tanks have become recognized as a national crisis. Hundreds of aquifers have been polluted by gasoline, diesel fuel and other hazardous chemicals, threatening public health and making a tremendous volume of groundwater virtually unusable. Thousands of additional tanks are at risk of leaking during the next decade.

Congress reacted to the crisis by including in the 1984 RCRA amendments a federal program to regulate underground storage tanks (UST). The primary objective was to prevent future groundwater contamination by improving the quality of underground tank systems and by increasing the responsibility of tank owners to prevent, detect and correct leaks.

Following the federal lead, the 1985 Montana Legislature passed House Bill 676, authorizing DHES to set up a state UST program under the Montana Hazardous Waste Act. At hearings on HB 676, Montana health officials said they were aware of more than 40 incidents of leaking underground storage tanks in the state.

HB 676 authorized the health department to regulate petroleum products and other hazardous substances stored in underground tanks. DHES may adopt requirements for leak detection and prevention; financial responsibility of tank owners and operators; corrective actions in the event of leaks; reporting requirements; and performance standards for new tanks.

The statement of legislative intent for HB 676 declared: "...in view of the growing number and severity of environmental problems related to underground storage tanks in Montana, the legislature intends to grant DHES the authority to establish a regulatory program for underground tanks that may include elements more stringent than any federal requirement." HB 676 itself went beyond the federal law by extending coverage to heating oil tanks and farm tanks smaller than 1,100 gallons, and by directly regulating underground pipelines that are part of storage facilities.

Montana UST Program

The Montana underground storage tank program is administered by the DHES Solid and Hazardous Waste Bureau. The program currently has three staff positions, and receives technical and enforcement support from

the Water Quality Bureau.

As required by EPA, Montana's initial activity under the UST program has been an inventory of underground storage tanks. All tank owners must submit a notification form describing the size, location, contents, material of construction and corrosion prevention characteristics of their tanks. Montana began processing notification returns in mid-1986; by the end of the year about 9,000 notifications, representing about 18,000 tanks, had been received.

Based on preliminary inventory results, about 90 percent of Montana's underground tanks have no effective corrosion protection. The average tank has been in use for about 14 years, and nearly 20 percent of the tanks are more than 20 years old — an age at which leaking caused by the corrosion of steel tanks becomes likely.

The next phase for both state and federal UST programs will focus on setting technical regulations. By March 1987, EPA is expected to issue draft standards on tank installation and construction; leak detection requirements for existing and new tanks; and corrective actions and cleanup measures. These proposed regulations will be carefully evaluated by DHES officials; they may set the tone for Montana UST rules expected to be proposed during 1987. DHES has already adopted EPA's interim prohibition on the installation of bare steel tanks, and plans to begin a training program for tank installers during the next biennium.

Leaking Tanks in Montana

Investigation and limited cleanup activities are proceeding at a number of Montana sites where leaking tanks have polluted groundwater. The pace of remedial action, however, is characteristically slow.

A situation in Dillon indicates the complexities and resource limitations working against the resolution of tank incidents. In 1979, several residential wells on the north end of town began to show pollution from petroleum products. The pollution was attributed to one or more leaking underground storage tanks from nearby commercial establishments, perhaps compounded by surface spillage and disposal of oil.

State health officials, notified in 1981, worked with three potentially responsible parties to investigate the pollution. Several underground tanks were tested, and some leaking fuel lines were located. Funds for the investigation were not sufficient to check other possible sources, even though officials believe that leaking tanks remain in operation in the area. The investigation was not even able to determine the extent of the contamination; groundwater samples taken far "upstream" of the known and suspected sources continued to show petroleum contamination, leaving officials to believe that much of the groundwater under Dillon has been polluted.

In 1985, insurance companies representing several tank owners jointly reached a settlement with the affected residents, paying for hookups to the city water supply and compensating residents for their inconveniences. But despite years of effort, nothing has been done (or is being contemplated) to address the fact that a previously valuable drinking water aquifer is now unusable due to contamination. Moreover, no one has learned how far the contamination has spread, or whether other residential or agricultural wells in the region may someday be affected.

In this instance, the immediate public health problems have been addressed through replacement of the water supply, but the groundwater resource has not been restored and the long-term implications of the pollution have not been dealt with.

This kind of resolution has been typical of many tank incidents, and testifies to the inadequacy of resources for studies, remedial action and follow-up work. The lack of government resources is compounded by the fact that most owners of small fuel storage systems do not have environmental liability insurance. As a result, they are not in a financial position to sponsor necessary investigations and the state is reluctant to pursue an enforcement action that might cripple a small business. The environmental consequence is that adequate cleanup is seldom achieved.

Not all examples fit this pattern, however. Soon after fuel was discovered in the groundwater near domestic wells in Yellowstone County, area residents called for action. In response, the county engineered a solution to reverse the groundwater flow; it has begun to recover the fuel. Officials continue to monitor the groundwater, but it presently appears that the timely response has prevented irreversible pollution.

A number of Montana sites have been identified where major groundwater contamination is suspected from diesel fuel leaking from underground storage tanks at railroad yards. In Miles City, several hundred thousand of gallons of diesel fuel have been recovered from groundwater beneath the Milwaukee Railroad yard. In Missoula, preliminary test wells have shown a layer several feet deep of diesel fuel on top of the groundwater aquifer, contamination believed associated with Burlington Northern railroad operations.

The DHES has requested that Burlington Northern investigate and report on groundwater contamination at 12 of its Montana rail yards, and BN has begun preliminary work at nine of these.

UST Funding

In January 1987, DHES retained a Helena-based consulting firm to investigate and report on possible long-term funding options for the Montana UST program. This study responds to the diminishing federal contribution to state UST programs. EPA paid

95 percent of state UST program costs in Fiscal Year 86, 85 percent in FY 87, and will cover 75 percent for FY 88. In light of this declining federal share, EPA is requiring states to devise alternate ways to fund their programs.

DHES is also seeking passage of a bill that would authorize tank registration fees. As embodied in the DHES proposal, tank owners are the funding source for the UST program. However, even if the bill passes, DHES officials have no immediate plans to assess an annual registration fee for tank owners. They note the logistical difficulties of collecting fees, given the tremendous number of underground tanks in the state. Moreover, an annual fee might be counterproductive in a program that depends heavily on public cooperation for tank registration. It is possible, however, that a selective fee could be imposed on new tanks, large tanks or some other category of tanks if revenues are needed.

The fee issue may become particularly important if administrative responsibilities for the UST program are eventually transferred from the state to local governments. This transfer has been advocated by some officials who believe local governments would be in the best position to inventory or license tanks, to oversee new tank installation, and to conduct tank testing. Before any responsibilities could be transferred, however, local governments would need predictable funding to cover program administration.

Montana may soon benefit from the recent congressional establishment of a national \$500 million UST trust fund for response to incidents involving leaks of petroleum products from underground tanks. The trust fund, to be built up over five years, will be funded by an earmarked federal fuel tax. Until early 1988, the federal government will pay all the costs of approved response actions; after that time, states must pay 10 percent. The funds may be used to respond to leaks, develop and enforce cleanup orders, recover costs from responsible parties, conduct cleanups, and provide alternate water supplies for affected citizens.

EPA is currently developing procedures for states to gain access to UST trust money. By mid-1987, Montana and other states should be able to receive federal funds for some site-specific responses to leaking underground tanks. However, competition for funds among the states may be considerable, so it is difficult to predict the amount Montana may receive.

Legislative Issues

The 1987 Legislature will be asked by the Department of Health and Environmental Sciences to clarify and expand state authority to regulate underground storage tanks. The law proposed by the department would state clearly that DHES's

considerable enforcement powers under the Montana Hazardous Waste Act also apply to underground tank regulation. DHES considers this necessary to remove any ambiguity over state enforcement capabilities for underground tanks.

Funding

The bill proposed by DHES also requests departmental authority "to develop a schedule of fees to defray state or local costs of establishing and implementing an underground storage tank program." If the legislature agrees, the department would be able to charge fees to tank registrants. As noted above, however, no statewide tank registration fee is contemplated.

The department may also seek legislative authority to spend state money for the required 10 percent match of federal UST Trust money. Montana's proposed state Superfund Trust account (if enacted as described in the Superfund discussion below) would be a logical source to obtain those matching funds. First, the Superfund Trust would have available funds intended to be allocated on an as-needed basis. Second, obtaining federal UST Trust funds is consistent with the goal of the Superfund Trust: to match state money with federal funds for remedial action at sites contaminated by hazardous substances.

Response to Leaking Tanks

A final UST question that may be addressed by the 1987 Legislature is the availability of resources for the state to respond effectively to leaking underground tank incidents. Despite a very strong legal framework (including the regulation of underground tanks under the Montana Hazardous Waste Act, the groundwater provisions of the Water Quality Act and the state "mini-Superfund" for remedial action), state experiences to date indicate the extreme difficulty in successfully resolving leaking tank incidents.

This difficulty can be traced in part to the complexity of the steps necessary to respond effectively to a tank leak. These steps include conducting field work and laboratory analysis to determine the nature and extent of contamination; investigating possible sources; assessing the effects on water users; ensuring the availability of safe alternate water supplies for affected parties; establishing legal responsibility for the leak; negotiating with responsible parties and their insurance companies; and attempting to recover the costs of investigation, cleanup or other remedial actions when the responsible party fails to act. Each step requires either technical or legal expertise, and staff must be able to do the long-term follow-up necessary to stay on top of each tank incident.

State resources for responding to leaking tanks are

limited. The federal money that supports Montana's UST program may not be used for leak investigation or remedial activities, and other hazardous waste bureau staff are similarly restricted from acting outside of authorized programs. The Water Quality Bureau generally undertakes initial activities to assess and respond to potential public health threats, but both manpower and money are lacking for detailed follow-up work.

Montana's leaking tank problem can be expected to grow, given that thousands of underground fuel tanks in the state are reaching the end of their useful life. On-site response needs may increase dramatically as new leaking tanks are discovered.

The next two years also promise to be an active time for UST rules. Following the federal lead, the state plans to set standards for tank testing, inventory record-keeping, groundwater monitoring, financial assurance for clean-up costs, and tank design and installation requirements. State rules may be more stringent than federal rules, although state officials have expressed support of most preliminary rules proposed by EPA.

The Burlington Northern sites further illustrate the level of resources Montana may need to commit during the 1987-89 biennium to successfully administer its UST responsibilities. DHES has requested that BN conduct detailed investigations of 12 fueling stations where petroleum groundwater contamination is known or suspected. For each site, the department must reach an agreement with BN on the study plan, exercise careful technical oversight of the studies, analyze the results and coordinate this technical review with legal backup.

The project is massive, even if full cooperation is provided. The issues can be expected to become more complicated as the monitoring results are translated into potentially expensive cleanup options. Each site may go through protracted negotiation, and legal action may be necessary to achieve containment or cleanup of the groundwater pollution.

Additionally, under the provisions of the 1985 state "mini-Superfund" law, the state is entitled to compensation from a responsible party for natural resources damaged by hazardous substance releases. In the case of underground storage tank leaks, this would initially involve documenting the damage to state groundwater and assessing the value of the lost resource. Pursuing a damage claim in court would also take a major state commitment (see discussion of the Superfund program below).

In response to these program needs, DHES has requested adding to the UST program an additional full-time technical specialist and one-half of a new attorney position. Even with these additional resources, Montana could use additional resources to bolster the effectiveness of the UST program. Specifically, funds could be allocated to retain a private contractor for on-site response; to dedicate UST program staff to

oversee studies and remedial action at sites of major groundwater contamination; to obtain and effectively utilize federal UST Trust money; to support legal efforts to work with potentially responsible parties; and to pursue natural resource damages where applicable. It is worth noting that successful natural resource damage claims could return funds to the state for environmental restoration and to recover program expenses incurred.

1987 Legislature

* Killed HB 416 that would have clarified DHES authority to regulate underground storage tanks and that would have authorized DHES to develop a fee schedule for tank owners.

* Authorized spending of state hazardous waste funds to match federal UST Trust money. The funding source will be the new Superfund Trust established in HB 777.

* Approved the budget for an additional technical position in the state underground storage tank program and a half-time attorney, as provided in HB 2.

* Established through HB 718 a program for investigation and remedial action at non-Superfund sites, which may include sites with major underground tank leaks.

Superfund Program

The 1980 congressional passage of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) established a massive program within the Environmental Protection Agency to address abandoned hazardous waste sites across the nation. The program was supported by a tax on petroleum and chemical feedstocks, and the resulting \$1.6 billion "Superfund" was earmarked for identification, investigation and containment of hazardous waste sites. In 1986, Congress reauthorized the Superfund program, and raised the fund to \$8.5 billion.

Under the Superfund program, known or suspected hazardous waste sites are investigated and ranked according to their potential for impacts on human health and the environment. Sites with the highest rankings are placed on EPA's National Priority List, and all subsequent studies and remedial actions at these sites come under the auspices of the Superfund program.

At each Superfund site, officials first conduct a remedial investigation (RI) to determine the extent and nature of the contamination. This is followed by a feasibility study (FS) to determine the best alternatives for cleanup or containment. Depending on the complexity of the problem and the size of the site, the

RI/FS process may take four years. The RI/FS process is funded entirely by Superfund, unless a potentially responsible party agrees to undertake some of the necessary studies.

After completion of the studies, EPA selects a preferred alternative for remedial action, which may involve waste cleanup, containment or a combination of containment and cleanup. If a party responsible for the hazardous waste site can be identified, that party is liable for the costs of the RI/FS process and the remedial action. If a responsible party cannot be found or does not agree to pay for the remedial action, EPA will use Superfund for 90 percent of the cleanup cost. The state must contribute 10 percent. EPA will subsequently seek to recover cleanup and RI/FS costs, plus the authorized triple damages, from the responsible party.

Superfund in Montana

Montana currently has 9 sites that are on or will soon be added to the Superfund National Priority List (NPL):

- Silver Bow Creek, including contributing elements from Butte Hill (mining wastes)
- Anaconda Smelter Site (smelter emissions)
- Somers Tie Plant (wood preservatives)
- East Helena Smelter Site (smelter emissions)
- Idaho Pole Company, Bozeman (wood preservatives)
- Libby groundwater (wood preservatives)
- Milltown Reservoir (mining wastes)
- Montana Pole, Butte (wood preservatives)
- Mout Industries, Columbus (chromium ore wastes)

The Comet Oil Refinery in Billings may also make the NPL during 1987.

The DHES has the lead in investigating the Silver Bow Creek and Milltown Reservoir sites, while EPA is heading up studies at the remainder of the sites.

Most of the Montana sites are undergoing either remedial investigations or feasibility studies, with remedial action expected to begin at many sites within the next three years. Emergency cleanup operations have been conducted at both the Montana Pole and the Idaho Pole sites, and a replacement water supply was developed for residents of Milltown prior to completion of the RI/FS process.

State Match Requirements

Once studies are completed at a Superfund site, the EPA must begin negotiations with the potential responsible parties. If the parties do not agree to pay for remedial action or if no financially capable responsible party can be located, EPA may spend Superfund money on the cleanup. However, the host state must commit

to pay 10 percent of the cleanup cost before EPA can draw on Superfund at this stage.

Under EPA procedures, a state must be ready with its 10 percent share when federal cleanup funds are made available, or the federal funds may be withdrawn. The issue of state matching funds promises to become increasingly important to Montana during the next three to five years, as feasibility studies reach completion and EPA begins Superfund cleanups.

The high cost of remedial action at Superfund sites underscores the need for substantial state matching funds. For example, at the community of Mill Creek within the Anaconda Smelter site, EPA is considering three alternatives for relocation of residents and soil removal, with price tags ranging from \$1.8 million to \$18 million. If no responsible party agrees to pay, Montana would be faced with providing 10 percent of the cost of the selected alternative. Mill Creek is only one part of the Anaconda site, and there are other major Superfund sites (such as Silver Bow Creek, East Helena and Milltown Reservoir) where remedial action could cost tens of millions of dollars, with a potential state share of several million dollars per site.

It is important to note that if the responsible party agrees to pay for the remedial action, then the state need not commit cleanup funds. Under the Superfund law, parties who do not pay for cleanup and are later judged to be responsible may have to reimburse the state and the Superfund three times the actual response costs. This threat of triple damages provides a considerable incentive for potentially responsible parties to reach financial settlements for site cleanup.

Some settlements between EPA and a responsible party may not cover the entire cost of cleanup. In such cases, EPA would spend some Superfund money; the state would have to cover 10 percent.

Finally, under the Superfund program, the state may bear a continuing expense for maintaining a site after the responsible party has discharged its legal responsibilities for remedial action. Maintenance activities may range from keeping fences in repair to the continued operation of a water treatment system. For ten years after remedial action is completed, EPA will pay 90 percent of the site maintenance cost and the state will pay 10 percent; after ten years, the state will assume the entire maintenance cost.

The many contingencies for funding Superfund cleanup make it difficult to project the funds Montana should be ready to commit for its share of Superfund activities. Given the magnitude of some cleanup efforts, the state may face a tremendous bill if no responsible party agrees to cleanup. Based on EPA figures, the DHES estimates that current Superfund projects could require up to \$6.5 million in state funds during the biennium (to match about \$60 million of federal money).

Alternatively, no state funds may be required in the near term if the responsible parties conduct the required cleanup. Montana will eventually need to

commit some money for maintenance of Superfund sites that have completed remedial action, but those costs cannot be estimated until after the remedial action has been selected.

The Schweinden administration has proposed legislation to generate needed state matching funds and to address the uncertainties of budgeting money for state participation in the Superfund program. The proposal, termed the "Superfund Trust," is described below in the Legislative Issues section.

Although the requirement for Superfund match creates a financial obligation for the state, the Superfund program does offer substantial benefits in return. A Superfund cleanup reduces public health risks, improves the environment, and can restore land and water to productive uses, thus furthering important public policy goals. A Superfund cleanup may also provide a regional economic boost when responsible parties retain contractors for cleanup or when the Superfund is used, bringing nine federal dollars into Montana for each state dollar spent.

Natural Resource Damage Lawsuits

In addition to requiring the cleanup or containment of hazardous waste sites, the federal Superfund law authorizes states to sue responsible parties for compensation for natural resources damaged by the release of hazardous wastes. Such "natural resource damage" (NRD) lawsuits address resources that will not be restored even when the Superfund remedial action is completed. For example, while a Superfund cleanup may cap a hazardous tailings pile, it may not be feasible to remove the tailings that have been deposited in the floodplain downstream. The NRD provisions of Superfund allow a state to recover damages for losses to water quality, fisheries, agriculture and other resources impacted by the tailings.

Money the state recovers through NRD lawsuits must be used to restore, rehabilitate or acquire resources equivalent to those lost and to pay state costs of documenting the resource damage. Legal costs are also fully recoverable. In addition, a state may be able to recover funds above and beyond these direct expenses: compensation for lost tourist revenues or agricultural production, for example. Money recovered in a successful suit could be developed into a trust fund to restore the affected resources.

In 1983, Montana filed the then-maximum \$50 million claim against the Anaconda Minerals Company and its parent company, ARCO, for unspecified natural resource damages to the Clark Fork River Valley, including Silver Bow Creek, the Deer Lodge Valley, and the Clark Fork River. The suit has since been on hold, pending results from the Superfund studies and remedial action recommendations. Surface water,

groundwater, soil, vegetation and fisheries are among the state resources alleged to have been damaged by mining and smelting operations. Rough estimates of losses include 100 miles of fishery and 27,000 acres of agricultural land.

Colorado has been the nation's most aggressive state in pursuing the natural resource damage issue under Superfund. Over the past four years, the Colorado legislature has appropriated more than \$10 million of general funds for a special unit within the state attorney general's office to litigate NRD cases. The unit has filed actions against eight potentially responsible parties to date. State officials believe they will reap many times their investment through court rulings or settlements, and they virtually guaranteed to the Colorado legislature that initial appropriations will be fully recovered. These expectations have been confirmed through the first settlement, as Union Carbide agreed to a combined \$42 million cleanup and NRD settlement at Uruvan, a site contaminated by uranium mill tailings.

In contrast to Colorado, Idaho recently settled a Superfund site cleanup and NRD claim for \$3 million for damage done by a major smelter in Kellogg. Many observers believe Idaho could have received a much more favorable settlement had the state pursued the matter more actively.

At present, Montana has virtually no available resources to pursue the Anaconda NRD lawsuit or to investigate such actions at other hazardous waste sites in the state. Because the Anaconda action has been on hold, the state has not lost much ground in its efforts. However, as Superfund studies in the Clark Fork drainage draw to a close during the next few years, Montana must then be in a position to pursue the lawsuit.

The pursuit of natural resource damage claims promises to be an extremely complex legal adventure, as Montana enters a rapidly evolving field of law. Each NRD lawsuit breaks new legal ground and must be based on a highly technical review and compilation of scientific and economic evidence. Once a sound legal position is established, the state and the defendant may be able to negotiate a settlement. But whether negotiation or litigation is pursued, the proceedings are likely to be complicated and protracted. As reviewed below, the Schwinden administration is proposing to fund a limited effort on behalf of the state's NRD suit during the next biennium.

Legislative Issues

Superfund Trust

To generate Montana's Superfund match, the governor has proposed setting up a "Superfund Trust" and associated bonding authority. The trust would

receive a new 6 percent allocation from the Resource Indemnity Trust (RIT) interest account, plus most of the unexpended portion of the 6 percent of the RIT interest currently earmarked for hazardous waste management. This would raise about \$1.15 million over the biennium, and could be supplemented by up to \$400,000 of carryover Superfund match allocation from fiscal year 87 (if no state share for remedial action is required before July). Montana would then either spend Superfund Trust money directly or would sell bonds as needed to raise its share of Superfund waste site cleanups. As proposed, the bonds would be general obligation, but their issuance would be limited to an amount that could be backed by the earmarked funds going into the Superfund Trust.

The bonding authority within the Superfund Trust is designed to allow the state to raise large sums of money quickly if necessary to participate in an expensive cleanup. This capability is important, both because of the uncertainty in projecting state matching fund requirements for the biennium and because of the magnitude of the potential state need. The proposed bonding authority would give the state the flexibility and resources to address a "worst-case" scenario, without having to commit massive cash reserves for a need that might not materialize.

NRD Lawsuit

The Schwinden administration is proposing to draw \$200,000 from the Superfund Trust during the upcoming biennium to pursue Montana's lawsuit against Anaconda Minerals for damaging state natural resources. The proposal is intended to give the state some legal, technical and clerical resources to begin documenting damages, and to keep current with legal proceedings in the lawsuit and with developments in the rapidly evolving field of NRD lawsuits. The Montana lawsuit would be handled jointly by the Department of Health and Environmental Sciences and the Department of Fish, Wildlife and Parks. Officials also hope to use some of the money to investigate the possibility of filing NRD actions on other Superfund sites.

A number of circumstances raise the question if the proposed state commitment of \$200,000 to the natural resource damage lawsuit is adequate. In Colorado, for example, the legislature funded a battery of 14 lawyers and more than a dozen resource specialists to work full-time on NRD issues. Officials in Colorado recommend having at least three to five attorneys full time on the larger cases, in addition to scientific specialists to develop recovery options and qualified economists to assess the value of the damaged resources. According to Colorado officials, their success to date would not have been possible without the exceptional commitment of state resources to pursue the NRD action.

Montana hosts the largest Superfund complex in the nation (Silver Bow Creek - Butte Hill - Clark Fork River - Anaconda Smelter - Milltown Reservoir). Given the size and number of sites involved and the complexity of the issues, the state might need technical staff beyond the 1.5 proposed positions for this issue. Additionally, given the importance of the assessment of economic damages in the NRD suit, a substantial appropriation for an economic valuation seems in order, especially if the state wants to retain one of the few economists with experience in NRD actions.

The legal aspects of recovering money for natural resource damages will not be easy. Montana is contending with a major corporation that can bring significant financial and legal resources to bear on this issue. The magnitude of the potential stakes — a \$50 million lawsuit that could be increased now that the 1986 Superfund amendments have removed the monetary cap for NRD suits — will mandate an active legal posture by the defendant. Montana may find itself unable to keep up with the pace of legal demands if the case becomes active and the state allocates only 1.5 attorneys to it.

Finally, there are a number of other hazardous waste sites — both Superfund and non-Superfund — where it might be appropriate for the state to pursue actions for natural resource damages. Even the preliminary development of cases at these sites will take some state staff resources, and it appears unlikely that the proposed \$200,000 biennial effort will support efforts beyond the Anaconda-ARCO case.

In sum, the legal and technical complexities of NRD actions, coupled with the amount of money at stake, argue strongly for an increased state commitment. The state will need to develop clear and convincing evidence of natural resource damages, and will have to actively pursue all the legal channels available for recovery.

Although the administration envisions a “stepped up” effort during the 1989-91 biennium, Montana’s interests could suffer in the next two years if competent damage assessments are not completed, if natural resource damages are not addressed in concert with development of a cleanup alternative, and if the legal effort is not staffed adequately to handle the demands of the highly complex field of Superfund litigation. An adequate commitment of state funds and staff in the beginning could pay off in successful resolution of the lawsuit or negotiations. Without such a commitment, Montana could lose its opportunity to recover damages and restore significant natural resources.

1987 Legislature

* Passed HB 777 and HB 760, which establish the state Superfund Trust and provide for a \$10 million bonding capability for the state to raise funds as necessary to match EPA funds for site cleanup.

* Passed, within HB 777, the Administration’s requested appropriation of \$200,000 from the Superfund Trust for pursuit of the natural resource damage lawsuit against Anaconda Minerals Company and for preliminary investigation into the possibility of damage suits at other sites.

Montana’s Mini-Superfund

The 1985 Montana Legislature passed House Bill 766, which gives the Department of Health and Environmental Sciences explicit authority to take remedial action for the prevention or cleanup of releases of hazardous substances. The bill established an Environmental Quality Protection Fund (EQPF), termed the “mini-Superfund” because of similarities with the federal Superfund.

Like the federal Superfund, the EQPF authorizes definitive government action to respond to the actual or potential release of a hazardous substance to the environment. The action could be an emergency response or a long-term remedial action for hazardous waste sites. The EQPF also includes cost-recovery, through which the state can spend funds on response or studies and then seek to recover these expenses from the parties responsible for the contamination. The EQPF allows the state to recover double damages when a responsible party refuses to act, a provision modeled after the federal Superfund’s triple-damage cost recovery.

Unlike the federal Superfund, the EQPF was provided with no independent source of funding, but was simply authorized to receive funds from other sources. The 1985 Legislature did, however, make some money available through a rather complicated chain of legislation during the 1985 session.

The key bill was HB 922, an appropriation measure that provided RIT interest money to a list of natural resource projects. During Senate action, HB 922 was amended to include program language from HB 913, an unsuccessful bill that had proposed setting up a permanent program of RIT grants. (SB 272, the RIT grants bill proposed by the Schwinden Administration in 1985, also provided for a contingency account.) The language incorporated from HB 913 into HB 922 established a permanent Governor’s Environmental Contingency Account (ECA), provided the account with 5 percent of the RIT interest, and set four objectives for fund use. These objectives included funding the EQPF from HB 766; taking emergency action to provide public water supplies or to prevent water project failures; taking emergency action to preserve renewable resources; and taking emergency action related to environmental or health threats from

mineral development. The governor was authorized to withdraw funds "to meet unanticipated public needs" in pursuit of the objectives.

Through the end of 1986, no money had been transferred from the ECA to the EQPF, or to meet any other public need. Only two formal requests had been received by the governor, and neither was considered an emergency nor funded. During the June 1986 special legislative session, the initial 5 percent allocation of the RIT interest (amounting to about \$350,000 a year) was reduced to a total of \$175,000, with the remainder transferred to the general fund.

The status of the state mini-Superfund (EQPF) was on the agenda at the December 11, 1986, meeting of the Environmental Quality Council. The session was called to review the status of the fund and to learn how it could be made more active, in light of existing needs for funds for emergency response and waste-site cleanup. The findings of the meeting and related research are summarized in the following sections.

Non-Superfund Hazardous Waste Sites

In addition to the nine Superfund sites, Montana hosts about 100 other uncontrolled hazardous waste sites that have been or will be reviewed for possible inclusion on the EPA Superfund National Priority List. The state health department anticipates receiving about \$360,000 from EPA to assess, investigate and rank these waste sites through the next two years. The department's proposed budget includes an additional \$60,000 in state hazardous waste funds for this purpose; unlike the EPA money, the state funds can be used to search for potentially responsible parties after the initial site studies are done.

Most of the 100 sites are not expected to rank high enough to make the NPL. For these sites, EPA will commit no additional Superfund money for cleanup or detailed investigation. Montana will then have the option of taking further action at these sites, either by initiating cleanup activities or by convincing a responsible party to do so.

Emergency Response

The emergency response provisions of the mini-Superfund law were intended to allow DHES funds to respond quickly to leaking underground storage tanks and other hazardous material spills. However, although numerous incidents have occurred during the biennium, no funds have yet been requested by the department from the EQPF for emergency response. Rather, DHES has responded with existing resources.

Department officials say they would have requested mini-Superfund money in a couple of instances had they been aware of its potential availability. These officials knew that the mini-Superfund had been enacted without funding; they did not know that the Environmental Contingency Account was funded and

could be channeled by the governor into the EQPF.

The DHES Water Quality Bureau has successfully used the threat of double damages from the mini-Superfund law to convince responsible parties to undertake remedial action in several spills and leaking tank incidents.

A separate emergency response issue arose in late 1986, when Broadwater County requested use of the state mini-Superfund to reimburse the county for costs incurred in responding to a highway acid spill. The county, unable to recover its full costs from the trucker's insurance company, saw the state mini-Superfund as a possible funding source.

When the claim for mini-Superfund was rejected by the state, the county subsequently sought an attorney general's opinion on the subject. The opinion noted that the state could use the mini-Superfund, but did not say the state was required to do so. Nevertheless, Broadwater County officials are reportedly interpreting this to mean the state is responsible for first-line response.

State health officials fear this interpretation could lead other counties to opt out of hazardous material response, even though DHES is not staffed or funded for statewide response.

Legislative Issues

Mini-Superfund Funding

One reason for the inactivity of Montana's mini-Superfund during the past biennium has been the chain of funding. Money first goes into the Governor's Environmental Contingency Account and then may be transferred by the Governor to the mini-Superfund. The administration has consistently viewed the ECA as an emergency account, even though the statutes do not require an emergency for transfer of ECA funds into the mini-Superfund. This viewpoint will probably prevent the use of ECA funds for waste-site cleanup under the present fund structure.

If the legislature desires to use the mini-Superfund for waste-site cleanup, or to make the fund more available for non-emergency incidents (such as underground storage tank response), statutory funding procedures should be modified. One option would be to direct a percentage of the ECA allocation into the mini-Superfund; another would be to eliminate the ECA entirely and channel its funds into the mini-Superfund. This latter option would, however, make ECA funds unavailable for some of the other emergency purposes specified in the ECA statute. The governor does have access to separate emergency funds outside of the ECA; these funds have in the past been used for fire suppression and against grasshopper infestations.

The funds provided to the ECA will also have important implications on the state capability to fund and use the mini-Superfund. Current law specifies that 5 percent (about \$650,000 biennially) of the RIT interest should go into the ECA; the administration proposes to reduce this to \$175,000 for the biennium.

Non-Superfund Hazardous Waste Sites

The Department of Health and Environmental Sciences has requested an RIT grant for investigations and remedial action at four abandoned refineries in Montana. This proposal has received a high ranking from the administration, and will be presented to the legislature in the package of projects proposed for RIT funding.

DHES has not requested funds from the mini-Superfund to address any other non-NPL (non-Superfund) sites during the next biennium. The department is, however, seeking budget authority to use \$60,000 of its hazardous waste account for site investigation and perhaps searches for responsible parties. If the legislature wishes the department to begin a major program to rank and address non-NPL sites, specific direction would need to be given and funding provided through the mini-Superfund.

Instituting such a program of waste-site cleanup through the mini-Superfund would raise at least two other legislative considerations: how much money to leave in the fund for emergency response and how to create a priority list of sites. These considerations are important because site investigations and development of remedial action could cost hundreds of thousands of dollars for a large site, thus depleting the Environmental Contingency Account (until response costs are recovered from responsible parties). As one option, the state may wish to begin with sites where a responsible party can be expected to fund the costs of studies and remedial action.

Emergency Response

The legislature may wish to clarify the respective state and local roles in emergency response to hazardous substance releases. If the legislature indicates that counties are generally responsible for first-line response, it may also wish to provide additional technical and legal resources for counties to use in response actions. Technical resources could be provided by appropriating funds for the DHES to contract with a private response firm for first-line response to emergency incidents. For legal resources, the state mini-Superfund law could be amended to provide counties with the authority to sue responsible parties for double damages, as is now available to the

state. This could give the counties leverage for better settlements with parties responsible for hazardous material spills.

1987 Legislature

* Passed HB 718, establishing a hazardous waste site remedial action program for sites not covered under the federal Superfund program. During the 1987-89 biennium, a program manager will be hired by the Department of Health and Environmental Sciences. This person will be responsible for overseeing reclamation (funded by HB 6) at several abandoned oil refineries and at the Apex Mill mine site in southwestern Montana; for prioritizing future remedial action at other abandoned hazardous waste sites; and for identifying and working with responsible parties to begin investigations and cleanup activities at non-Superfund sites.

Beginning in fiscal year 1990, this program will be funded through a 4% allocation of the interest income from the resource indemnity trust fund. This funding source is intended to provide program continuity, thus allowing the state to pursue or oversee long-term cleanup activities, to negotiate with responsible parties, and to draw on a predictable source of funds for cleanup in emergency situations or if the responsible party refuses to act.

* Revised the allocation to the Governor's Environmental Contingency Account from 5% of the RIT interest to a biennial appropriation of \$175,000. This allocation is part of SB 373, which established a new statutory allocation of RIT interest funds.

Right-to-know

The 1985 Montana Legislature passed the "Employee and Community Hazardous Chemical Information Act," otherwise known as the "right-to-know law." The law was intended to enhance worker and community safety by requiring employers to make information available on the potential hazards and safe handling of chemicals in the workplace.

Many of the information requirements under Montana's right-to-know (RTK) law mirror the federal requirements of the Hazard Communication Standard, administered by the Occupational Safety and Health Administration. Both laws require that employers maintain a file of chemical information that is readily accessible to workers; compile a workplace chemical list; ensure that hazardous chemicals are properly labeled; and provide education and training for workers who use hazardous chemicals.

The heart of the information system under state and federal RTK laws is the material safety data sheet

(MSDS). The MSDS is a 2- to 4-page form, prepared by the chemical manufacturer, that provides information on the properties, hazards and safe handling of a specific chemical. The chemical manufacturer must distribute the MSDS to each employer purchasing the hazardous chemical. The employer, in turn, must maintain all MSDS's in a central file in the workplace and allow employees to examine them.

Although Montana and federal requirements for chemical information in the workplace are very similar, the Montana RTK law differs significantly from the federal in two areas. First, the Montana law extends to all workplaces where employees are potentially exposed to hazardous chemicals; the federal RTK standard is currently applicable only to manufacturing industries. Second, the Montana law includes "community" right-to-know — the provision of chemical information to safety officials and the public.

The community aspect of the Montana law requires employers to record their workplace chemical list with the county clerk and recorder. The list thus becomes public information, accessible to interested persons and to safety officials. (Prior to the June 1986 special legislative session, employers had to record each material safety data sheet, along with the chemical list. This requirement was potentially very costly, given the statewide \$5-per-page recording fee and the hundreds of pages of MSDS's accumulated by some employers. The legislature amended the law to reduce employers' expenses and to increase compliance with the new law.)

The 1985 Legislature did not appropriate funds to carry out the Montana right-to-know act, nor did it place administrative responsibility with any state agency. Rather, administration was placed at the county level, and no funds were provided. Management of public information under the RTK law is primarily the responsibility of the county clerk and recorder; local fire officials are given authority and responsibility for inspecting chemical information; and county attorneys are charged with investigating complaints and taking enforcement action.

Two recent developments on the federal level may have significant effects on the administration of the Montana right-to-know law. First, a federal court has ordered the Occupational Safety and Health Administration to apply its Hazard Communication Standard to more than just manufacturing industries. OSHA standards have been ruled to preempt state laws, so expansion of the OSHA program means that more Montana businesses will fall under the scope of OSHA and fewer will be the state's responsibility. If the OSHA standard is expanded to all workplaces, Montana's right-to-know law may become unnecessary. However, the scope of the OSHA expansion is not yet known.

A second major development affecting right-to-know in Montana is the October 1986 passage of the federal "Emergency Planning and Community Right-to-Know Act." Under this law, the governor must appoint a statewide emergency planning

commission by April 17, 1987, and must subsequently appoint local emergency planning committees. The state commission and the local committees are responsible for working with industries to develop emergency response plans for hazardous chemical incidents and to provide public information on potentially hazardous chemicals in the workplace.

The law also places a number of reporting requirements on employers. They must submit lists of their workplace hazardous chemicals, emission inventory forms and information on hazardous chemical releases to the state commission, local committee and local fire department. These requirements are phased in through early 1988.

Congress did not provide funds to states or EPA for administration of the federal right-to-know program. The law does authorize citizens to sue governments for not carrying out their prescribed duties, and this provision is intended to spur state compliance with the act.

Legislative Issues

Administration

The absence of state administrative or financial resources has resulted in general confusion among employers and local officials faced with right-to-know responsibilities. The community right-to-know portions of the law have been widely ignored, even after the action by the 1986 special legislative session significantly reduced the costs of compliance. Establishment of workplace RTK programs has been pursued in good faith by many private and governmental employers, largely because information about right-to-know responsibilities has been distributed by federal OSHA and various trade organizations. There still are undoubtedly, however, hundreds of Montana workplaces where the right-to-know law has not been implemented.

The Environmental Quality Council and the state health department have attempted to field questions about this complex law, but in many cases affected parties are left to their own interpretations. Local governments, technically responsible for administering and enforcing the state law, are generally without adequate staff resources or information to assist with public compliance.

One solution to the administrative dilemma would be to authorize and fund a state agency to administer the right-to-know law. Such an approach could provide a central, consistent source of public information about rights and responsibilities under the law and could relieve the burden on local governments.

During the executive budgeting process for the 1987-89 biennium, the DHES did request a \$40,000

appropriation to oversee the right-to-know law. The request was not incorporated into the executive budget, however, and the Schwinden administration has not proposed any appropriation or legislation for administering the right-to-know law. Given existing budget constraints, funding for such a program appears unlikely during the 1987 session.

Another approach that might ease some confusion would be to make virtually all workplace requirements of the Montana law the same as the federal OSHA requirements. This would allow employers or local government officials to seek guidance from OSHA on technical requirements and interpretations. Placing the Montana law in more substantial compliance with OSHA would also ease the transition for employers if the OSHA standard is ultimately expanded beyond the manufacturing sector. The minor differences between the state and federal laws could be resolved without decreasing worker protection, especially if the section addressing worker rights is retained in the Montana law.

Clarification may also be desirable in specifying how the Montana law affects distributors of chemicals and chemical products. The law exempts retailers and also exempts sealed containers of hazardous chemicals during transportation or in storage at transport terminals. These exemptions do not specifically address distributors, who may have hundreds of chemicals at their workplaces. A number of distributors have expressed concern about their potential record-keeping responsibilities under the act, even though there is little opportunity for worker exposure.

Community Right-to-know

The enactment of the federal community right-to-know law has established new requirements for Montana businesses to compile and submit public reports on their chemical inventories. This federal requirement is very similar to Montana's; other federal provisions go far beyond Montana law by mandating emergency planning and requiring employers to report on emissions and other chemical releases. The result will be a tremendous increase in the volume and specificity of chemical information available to the public.

At the same time, the overlay of the federal law on the state law is bound to exacerbate an already difficult situation for state employers. Few Montana employers or public officials have an understanding of what Montana law requires and, with the advent of the new federal law, it would seem advisable to reduce duplication as much as possible. The legislature may wish to review state community right-to-know reporting requirements and see if the new federal program will adequately meet public needs.

Finally, the legislature may be asked to address the funding of state responsibilities under the federal

Emergency Planning and Community Right-to-Know Act. Because the law was only recently enacted, the Schwinden administration did not include it in its proposed budget. Administration officials have been reviewing potential implementation plans, but have not yet indicated whether they will request funding from the legislature.

1987 Legislature

* Passed HB 750, which (a) replaces Montana's community right-to-know provisions with the new federal provisions; (b) specifies that compliance with the federal OSHA Hazard Communication Standard satisfies Montana's RTK law for in-workplace issues; and (c) indicates that sealed containers of hazardous chemicals at the facilities of a distributor are exempt from RTK provisions.

Employee and Community Hazardous Chemical Information Act

The 1985 Montana Legislature passed the "Employee and Community Hazardous Chemical Information Act," otherwise known as the "right-to-know law." The law (50-78-101 et seq., Montana Code Annotated) is intended to enhance worker and community safety by requiring employers to make information available on the potential hazards and safe handling of chemicals in the workplace.

Many provisions of the Montana law mesh closely with the Hazard Communication Standard adopted by the federal Occupational Safety and Health Administration (OSHA). The Montana law, however, broadens the scope of the federal standard by covering all employees and by including community right-to-know.

This chapter summarizes Montana's right-to-know law, as it stands after amendments enacted during the 1987 legislative session. Eleven common right-to-know concerns are addressed in a question-and-answer format. It also indicates how to obtain pertinent documents or more information on specific issues.

While this chapter will help Montanans understand and comply with the right-to-know law, it is not a definitive legal interpretation. Many states have recently enacted right-to-know laws, and some specific issues are the subject of ongoing litigation in state and federal courts. Also, the extent to which the federal Hazard Communication Standard may preempt state laws is unresolved. Persons seeking specific legal guidance should first refer to the text of the Montana law. Further interpretation may be obtained from county attorney offices, OSHA or, if necessary, private legal counsel.

Right-to-know Provisions

Although the Montana right-to-know law is eight pages long, its effect can be summed up in one sentence: it establishes a method for employers to

provide information on hazardous chemicals used in the workplace.

The law details the employers covered, the definition of a hazardous chemical, employer responsibilities, worker rights, trade secret confidentiality, community access to chemical information and administration of the law by public agencies. Explanation of each of these specific issues provides a guide for how Montanans can comply with and benefit from their right-to-know law.

Employers Covered

Montana's right-to-know law applies to any "person, firm, corporation, partnership, association, governmental agency, or other entity engaged in business or providing services that employs workers." This broad definition of employer means that almost everyone who utilizes hazardous chemicals in his workplace and employs workers must comply with right-to-know provisions.

The right-to-know law does, however, specifically exempt food sale establishments and other retail trade establishments from compliance, except in portions of the store where chemicals are actually used or processed. Thus, for example, a hardware store owner need not comply with the law's provisions for pre-packaged chemical goods being sold. However, if the hardware store also contains a work area where employees routinely mix hazardous chemicals (for example, solvents), the employees must be provided with information on the hazards of these chemicals. The law tempers some information and recordkeeping requirements for medical facilities and research, testing and educational laboratories. These modified requirements are discussed below under "Employer Responsibilities."

Employers in the manufacturing sector * are subject directly to OSHA's Hazard Communication Standard, which specifies in-plant right-to-know requirements. Although this federal standard was the model for much of Montana's law, there are some differences. Manufacturing employers should consult the OSHA standard to learn their specific right-to-know responsibilities. All employers, including manufacturing employers, must also comply with provisions of the Montana and federal laws described below under "Community Right-to-Know."

Hazardous Chemical Determination

Only those chemicals determined to be "hazardous" are subject to the information provisions of the Montana law. In accordance with the federal OSHA standard, the Montana law recognizes two major classes of hazardous chemicals: health hazards and physical hazards. Health hazards are chemicals for which there is statistically significant evidence that acute or chronic health effects may occur in exposed employees. Health hazards include carcinogens (cancer-causing agents), nerve and reproductive poisons, chemicals that damage tissues on contact and other short-term or long-term toxins. Physical hazards include explosives, compressed gases, combustible liquids, flammable compounds, reactive substances and oxidizers.

Although the terms "physical hazard" and "health hazard" seem straightforward, hazard determination is probably the most difficult aspect of the right-to-know law. Only a small percentage of the hundreds of thousands of chemicals used in our society have been thoroughly tested for health effects, while thousands of new chemicals are being developed annually.

Even the identification of a chemical may be a difficult exercise for employers. An individual chemical may be known by a variety of common names or trade names. Additionally, commonly used chemical substances may be mixtures of a number of chemical constituents, thus complicating chemical identification and the determination of potential health effects.

Because of the difficulty of determining whether a

*"Manufacturing employer" is an employer with a workplace classified in standard industrial code classifications 20 through 39, as defined in the federal Standard Industrial Classification Manual. These industries include food products; apparel; lumber; furniture; paper; printing and publishing; chemicals; petroleum and coal products; rubber and plastics; leather; stone, clay and glass; primary metals; fabricated metal; non-electrical machinery; electrical equipment; transportation equipment; instruments; and miscellaneous manufacturing.

chemical is hazardous, the Montana right-to-know law specifies that hazardous chemicals include those physical or health hazards that have been so identified by OSHA or by the chemical manufacturer. Thus Montana employers generally are not responsible for making the hazard determination. This approach reflects the legislature's belief that the federal government and chemical manufacturers have the resources and expertise to make hazard determinations, while most Montana businesses and state government do not.

Under the federal OSHA standard, a chemical manufacturer must include a material safety data sheet (MSDS) with the first shipment to an employer of any hazardous chemicals shipped after November 25, 1985. An MSDS is generally a single-page, two-sided form with information on the properties, hazards and safe handling of the chemical.

For Montana employers, receipt of an MSDS with a chemical shipment indicates that the chemical manufacturer has done the evaluation required by the federal OSHA standard and has determined that the chemical is hazardous. Thus, it is recommended that any chemical for which an MSDS is received should be considered hazardous. *

Some employers routinely purchase products containing hazardous chemicals from retail stores, which are not obligated to provide an MSDS. Examples of such products include cleansers, paints, inks and solvents. If the purchasing employer subsequently requires his employees to work with the chemical product, the employer must learn if it meets the OSHA hazardous chemical definition; if so, the employer must obtain the appropriate MSDS from the manufacturer of the chemical product. Note that the warning labels often printed on consumer products do not provide enough detail to satisfy the legal requirements for an MSDS.

Employers may not receive an MSDS for certain materials that are not hazardous until subject to an industrial process. Welding compounds, for example, may not be hazardous at room temperature, but they do release hazardous metal fumes when heated. These fumes and other workplace-produced hazardous chemicals must be covered under an employer's right-to-know program.

Employers have questioned whether they need to comply with hazard communication requirements for

* Some chemical manufacturers may include MSDSs as a precaution even for chemicals not meeting the definition of hazardous. An employer who suspects this to be the case could check with the manufacturer to learn if the chemical is actually hazardous under the legal definition. This could, however, be a time-consuming or inconclusive process; as a rule, it is probably easiest for an employer simply to treat as hazardous any chemical for which an MSDS is received.

common consumer products used in the workplace. Although no definitive legal interpretation has been issued on this point, OSHA offers the following guideline:

“A common sense approach should be utilized when consumer products are used in a manner similar to which they could be used by a consumer, thus resulting in levels of exposure comparable to consumer exposure. For example, it may not be necessary to have a data sheet for a can of cleanser used to clean the sink in an employee restroom. However, if such cleanser is used in large quantities to clean process equipment, it should be addressed in the Hazard Communication Program.”

Many Montana workplaces will have chemicals they received prior to the requirement that material safety data sheets be provided. Most of these chemicals probably arrived without an MSDS. Nevertheless, they may be physical or health hazards meeting the definition of a hazardous chemical in the right-to-know law. For such chemicals, employers should contact the chemical manufacturer (or, if that name or address is unavailable, contact the distributor who supplied the chemical) and request an MSDS.

Although definitive answers may not be available for all questions on chemical hazards, a good faith effort to obtain this information is expected of an employer. The law requires employers to keep copies of all correspondence requesting an MSDS.

Montana followed the federal standard in specifying that chemicals included on two specific lists are automatically to be considered hazardous. These lists are the *American Conference of Governmental and Industrial Hygienists Threshold Limit Values* for toxic substances and the *OSHA sub-part Z* list. The two lists together contain the names of about 600 industrial chemicals known to pose health threats to workers exposed to threshold concentrations. Additionally, based on the federal standard, chemical manufacturers must consider the carcinogens or potential carcinogens listed in the *National Toxicology Program Annual Report on Carcinogens* and the *International Agency for Research on Cancer Monographs* as health hazards.

Most pesticides and herbicides are subject to the packaging and labelling requirements of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) and are exempt from coverage under Montana's right-to-know law.

Food, drugs and cosmetics are exempt from the right-to-know law.

Also exempt are sealed containers of hazardous chemicals while in transportation, at transport terminals, or at distributorships. Employers must retain existing labels and comply with state and federal regulations on hazardous material transportation. Distributors must send MSDSs to their customers.

The Montana right-to-know law requires hazard communication for some radioactive materials that are not regulated by the Nuclear Regulatory Commission. Workplaces where such radioactive compounds may be

found include medical facilities and laboratories, hard-rock mines and mills, and geophysical exploration operations. Very low hazard radioactive materials (as found, for example, in lamps, watches, smoke detectors, industrial or medical analytic devices and other common products) either are exempt or are generally licensed under other Montana regulations and thus are not subject to right-to-know provisions.

Employer Responsibilities

The specific responsibilities placed on the employer — what information is to be collected in what form, how it is to be provided and to whom — are the core of Montana's right-to-know law. An employer's responsibility to provide chemical information in the workplace can be divided into four areas: material safety data sheets, workplace chemical lists, labels, and education and training. The OSHA standard was used as the model for these portions of the Montana law so that employers would not face conflicting state and federal requirements.

Each employer must maintain the most current material safety data sheet for each hazardous chemical in the workplace. The employer must provide an MSDS to any employee (or to the employee's designated representative) upon request for review or copying. A readily accessible and indexed central file or notebook containing all MSDSs is an appropriate way to satisfy this requirement.

Chemical manufacturers and distributors are required to supply MSDSs to Montana employers upon delivery of a hazardous chemical shipment. If an MSDS is not supplied with a hazardous chemical shipment, the employer must request one in writing from the supplier within five working days after receiving the chemical. The employer must maintain a copy of any correspondence sent or received in an effort to obtain an MSDS.

Employers must compile a workplace chemical list that contains the name of each hazardous chemical in the workplace. The chemical name on the list must correspond to the name on the appropriate MSDS.

The list must indicate the work area in which each hazardous chemical is normally stored or used. The workplace chemical list must be updated as necessary, but not less than once a year.

An employer may not remove or deface any existing label on a container of a hazardous chemical.

Each employer must provide an education and training program for all employees using or handling hazardous chemicals. The program must be given at least once a year. New employees and employees newly subject to an exposure risk must also be trained before working with hazardous chemicals. Employers are required to keep a record of the dates of training sessions given to employees and the names of the employees attending.

The training program must include instruction on:

- interpreting labels and material safety data sheets;
- the acute and chronic health effects of the

hazardous chemicals in the workplace; and

- the location, safe handling, protective equipment, first-aid treatment, and cleanup and disposal procedures for these chemicals.

Employers must post a notice at locations where notices are normally posted informing workers about their rights under the law. A sample notice is available at the county office housing right-to-know information.

Finally, employers must record their workplace chemical lists with the county clerk and recorder. The details of this requirement are reviewed below under the heading "Community Right-to-Know."

Medical facilities and research, testing and educational laboratories are subject to reduced recordkeeping requirements under the Montana right-to-know law. Employers operating medical facilities and labs must make available all MSDSs received from chemical suppliers, retain labels on chemical containers and provide worker education and training. These employers do not have to: (1) obtain MSDSs for all chemicals, (2) compile a workplace chemical list, or (3) record information with the county clerk. Laboratories that produce and distribute hazardous chemicals do qualify as chemical manufacturers, and thus must comply with applicable right-to-know provisions.

Manufacturing employers are covered by the federal OSHA standard and thus are subject to slightly different state provisions. For example, OSHA requires these employers to have a written description of their hazard communication program. Manufacturing employers are advised to review the specific provisions of the OSHA Hazard Communication Standard because in-plant compliance will be judged by OSHA inspectors.

Worker Rights

The right-to-know law specifies a number of rights of Montana workers in relation to hazardous chemicals. Foremost is the worker's right of access to the workplace chemical list and the material safety data sheets. A worker may not be forced to work with a hazardous chemical if the employer does not provide an MSDS within five working days of the worker's request for this information. Workers should note that the OSHA standard does not contain this provision.

A worker also has the right to effective training on the potential hazards and safe handling of workplace chemicals. An employer must provide workers with personal protective equipment appropriate to any potential chemical hazard.

A worker may file a complaint with the local health officer or the county attorney if he or she believes the employer is not complying with the provisions of the Montana right-to-know law. The employer is barred

from discharging, disciplining or discriminating against a worker who exercises these rights under the act.

Trade Secrets

The Montana right-to-know law allows employers to keep chemical "trade secrets" confidential. A trade secret is defined as "a confidential formula, pattern, process, device, or information, including chemical name or other unique chemical identifier, which is used in an employer's business and which gives the employer an opportunity to obtain an advantage over competitors."

An employer who believes that the name of a hazardous chemical is a trade secret may withhold the chemical name from the material safety data sheet only if:

- an MSDS, coded to an identifying notation on each container of the hazardous chemical, is available in the work area;
- the MSDS discloses the properties and effects of the chemical; and
- the trade secret determination is judged valid by the Montana Department of Health and Environmental Sciences.

To obtain trade secret protection, the employer must submit a formal claim to the Legal Unit, Montana Department of Health and Environmental Sciences, Helena, MT 59620. The department will then request substantiation from the employer to determine if the chemical meets the definition of a trade secret and thus merits confidentiality. After the department notifies the employer of its decision, the employer has 30 days to appeal to the district court of Lewis and Clark County.

The employer must provide the specific chemical identity of trade secret chemicals to medical personnel in case of an emergency. In non-emergency situations, occupational health professionals may have access to the chemical identity if necessary to document health effects on exposed workers. The employer may require medical personnel and other health professionals to sign a confidentiality agreement as a condition of access to the trade secret information.

Community Right-to-know

The Montana law, like many other state right-to-know statutes, distinguishes between worker right-to-know (providing chemical information to employees) and community right-to-know (providing the information to safety officials and the public). Montana's community right-to-know provisions originally required employers to record chemical information with the county clerk and recorder. However, passage of the federal Emergency Planning and Community Right-to-Know Act in October 1986 established new procedures both for states and for

employers to increase community information on hazardous chemicals.

Under the new federal act, each state governor must appoint a statewide Emergency Response Commission by April 17, 1987. The commission is intended to serve as a repository for RTK information and to coordinate emergency response to chemical incidents. The commission must, in turn, appoint local emergency planning committees encompassing the entire area of the state. Local committee membership must include public safety officials, industry representatives, citizen groups, elected officials, and others with an interest in hazardous chemical information and response. These committees will work with industry to promote chemical safety and to develop site-specific emergency response plans.

Employers also have new responsibilities under the federal act. They must submit hazardous chemical lists to the state commission and local committees, develop emergency response plans if they have threshold quantities of any of 600 listed "extremely hazardous substances", and report chemical releases and emissions. All information under the program is public.

In response to the comprehensive planning and information requirements of the federal act, the 1987 Montana Legislature removed its requirement that hazardous chemical information be recorded with the county clerk and recorder. The remaining Montana community RTK provisions instruct employers to comply with the federal law, and authorize inspections of workplaces with hazardous chemicals by local fire officials. Fire officials must consult with laboratory operators at least annually on safety and emergency considerations and must also consult with any private fire safety personnel employed at a workplace with hazardous chemicals.

Administration and Enforcement

Investigations and enforcement actions under the Montana right-to-know law will be initiated by local government officials following receipt of a complaint. A worker who believes an employer is not complying with the law may submit a written complaint to the local health officer or county attorney. If the investigating official finds that a violation has occurred, the employer must be notified of the violation and be given 10 days to take corrective action. Continued noncompliance can lead to prosecution by the county attorney. A person found to be knowingly in violation of the law is guilty of a misdemeanor, with each day of violation considered a separate offense.

Manufacturing workplaces are covered by the Hazard Communication Standard of the federal Occupational Safety and Health Administration. As part of its inspection program, OSHA will assess compliance with the standard. Suspected violations by manufacturing employers should be reported to the

OSHA office in Billings, rather than to local government officials.

The statewide Emergency Planning Commission and the local emergency planning committees (both to be established by Montana under the provisions of the federal Emergency Planning and Community Right-to-Know Act) will be responsible for managing community RTK information. Because these bodies will not be completely in place until August 1987, the procedures for providing public information have not yet been established. The U.S. Environmental Protection Agency has primary enforcement responsibility for the federal act.

Questions and Answers

1. My workers use hazardous chemicals to manufacture our product. Will the right-to-know law prevent me from using the chemicals I need?

No. The Montana right-to-know law is not a regulatory standard to control chemical use, production or sale; other state and federal laws accomplish these purposes. Rather, the law is an informational tool so that employees and the public may be aware of potential chemical hazards in the workplace.

2. I'm an employer running a business; I'm not a research chemist. How can I be expected to determine what chemicals in my workplace are hazardous? Is there a master list of all the chemicals considered hazardous under the right-to-know law?

The right-to-know law does not require employers to determine whether or not a chemical is hazardous. This obligation falls upon the chemical manufacturer who, under the federal standard, must evaluate all chemicals produced and send material safety data sheets with shipments of those determined to be hazardous.

Employers are responsible for having a material safety data sheet in the workplace for each hazardous chemical. To ensure compliance with this requirement, employers should inventory existing chemical supplies and request MSDSs from the chemical manufacturers for those chemicals the manufacturer has determined to be hazardous.

Employers are responsible for evaluating the hazards of any chemicals produced in the workplace and securing or preparing material safety data sheets on these chemicals if they are hazardous. Exposed workers have the right to know about these hazardous

chemicals, and the employer has the responsibility to present the required information on an MSDS.

There is no single master list of all hazardous chemicals. Under the OSHA standard, chemicals are hazardous if they pose a physical or health hazard, and these characteristics can only be determined by thorough testing. Neither OSHA nor any other federal agency has the resources to test the hundreds of thousands of existing chemicals and mixtures. The OSHA standard does cite four lists containing a total of more than 2,300 chemicals that must be considered hazardous. These lists are not intended to be comprehensive; they simply indicate some of the commonly used industrial chemicals that are well-documented hazards.

3. We received most of our workplace chemicals from suppliers. We were required to send the material safety data sheet. We also have chemical containers that haven't been used for years and some of them aren't even labelled. What should I do about these chemicals to comply with the right-to-know law?

For workplace chemicals that arrived before the MSDS requirement, employers should write to the chemical manufacturer: (a) specifying the chemical in question; (b) asking if the chemical has been determined to be hazardous under the evaluation required by OSHA; and (c) requesting an MSDS if one has been prepared. The employer must keep on file a copy of each letter requesting an MSDS.

All hazardous chemicals present in the workplace are subject to right-to-know provisions, even if these chemicals are not regularly used. An employer who desires to keep a chemical on-site should contact the manufacturer for the appropriate MSDS. Chemicals that are not used and cannot be identified should be removed from the workplace if they can be disposed of properly. The employer is advised to contact the Solid and Hazardous Waste Management Bureau of the Montana Department of Health and Environmental Sciences in Helena for information on how to dispose of potentially hazardous chemicals.

4. Are agricultural operations covered by the Montana right-to-know law?

Yes. However, many individual farmers and ranchers may not have right-to-know responsibilities. To determine their legal obligations, farmers and ranchers (and all other Montanans) must determine: (1) if they have employees; and (2) if these employees are exposed to hazardous chemicals.

The law defines an employee as "a person who may be exposed to hazardous chemicals in his workplace under normal operating conditions or possible emergencies." A workplace is "an establishment at one

geographical location containing one or more work areas." A work area, in turn, must be "a room or defined space...where hazardous chemicals are produced, used, or stored." Thus, to be covered by right-to-know provisions, an employee must work in a room or building containing hazardous chemicals. An agricultural employer whose workers are exclusively outdoors would therefore not have to comply with that law.

Farmers and ranchers with employees working indoors must assess whether the work area contains any hazardous chemicals. Procedures for determining whether a chemical is hazardous are discussed thoroughly elsewhere in this chapter. However, it is important to emphasize that pesticides and herbicides are not considered hazardous chemicals under the right-to-know law because hazard communication for these chemicals is adequately addressed by other state and federal laws.

5. The right-to-know law says I have to train my workers about chemical hazards. What kind of training program do I need and who can help me set one up?

The training program required by the Montana right-to-know law must inform workers about the chemical hazards in the workplace, precautions for working with these chemicals and the chemical information sources available to them. Training can be accomplished in many ways (e.g., audiovisuals, classroom instruction and interactive videos); ideally it should include opportunities for employees to ask questions to ensure that they understand the information presented to them. The training requirement provides considerable flexibility for employers as long as the objectives are met. However, simply giving an employee a data sheet to read does not satisfy the intent of the law with regard to training. The federal OSHA office in Billings can provide information on acceptable training approaches. Additionally, there are a number of private consulting firms specializing in industrial safety and hazard communication programs.

6. What is the relationship of the right-to-know law to hazardous waste laws?

Hazardous waste laws protect public health and the environment by requiring the proper treatment, storage, transportation and disposal of industrial chemical wastes. The right-to-know law, on the other hand, promotes worker and public safety by increasing knowledge about the potential hazards of chemicals used in the workplace. Thus, in general, these laws are complementary efforts to insure safe handling of potentially hazardous materials in our society. In some

instances hazardous waste laws and right-to-know laws may cover the same chemicals. For example, employers who create hazardous wastes in the workplace must manage these chemicals according to hazardous waste laws and also must inform exposed workers about the potential hazards under right-to-know provisions.

7. As an employer, I get nervous about making my chemical supplies a matter of public record through "community" right-to-know. Isn't this procedure just going to encourage lawsuits?

The community provisions of the Montana and federal right-to-know laws are intended to benefit the community by: (1) ensuring that fire officials will respond properly to chemical emergencies; and (2) informing the public about potentially hazardous chemicals in neighboring workplaces. Although the information may engender some citizen concern, the laws provides no specific grounds for legal action based on the presence of hazardous chemicals in the workplace. The laws may, as a side effect, heighten an employer's consciousness about public safety and public image, and thus lead to improved chemical management in the workplace.

8. No state agency is responsible for enforcing Montana's right-to-know law. As a worker, how can I be sure that I have access to chemical information and that my rights will be protected?

Enforcement of Montana's right-to-know law is vested within county governments. A worker alleging noncompliance by an employer may submit a written complaint to the county health officer or county attorney. These officials must investigate the complaint and, if necessary, seek corrective action from the employer. Employers have 10 days to respond to written notices of violation issued by the county. A worker who is not satisfied with the resolution of an issue by these county officials may initiate court proceedings against the employer.

Workers in manufacturing industries should contact the OSHA office in Billings for investigation of violations of the OSHA standard. OSHA has staff working with labor and industry to ensure compliance with occupational safety and health laws.

9. My workers use a variety of cleaning compounds, paints and other retail goods that might be hazardous. Although some of these goods have hazard warnings on their labels, they generally do not come with material safety data sheets. What should I do to comply with right-to-know provisions for these over-the-counter products?

Over-the-counter products are covered by the law. However, because retailers are exempt from compliance, employers purchasing over-the-counter products may have to contact the product manufacturer directly to obtain an MSDS. Hazard warnings on product labels do not satisfy the MSDS requirement.

Some potentially hazardous consumer products are used in the workplace much as they would be used in the home, thus resulting in levels of workplace exposure comparable to consumer exposure. In these situations, OSHA has advised employers to use "a common sense approach." For example, an MSDS may not be necessary for a can of cleanser used for an office sink; an MSDS would be required if that cleanser is used in large quantities to clean industrial equipment.

10. Some of the compounds used in my workplace are mixtures of chemicals. Do I have to get an MSDS for each chemical in the mixture? What about chemicals I use in only small quantities?

Evaluating the hazards of mixtures, just as with other chemicals, is the responsibility of the chemical manufacturer. If a chemical manufacturer has tested a mixture and found it to be hazardous, an MSDS would be prepared on that mixture. If the mixture has not been tested, the chemical manufacturer must consider it hazardous if it contains at least 1 percent (by weight or volume) of a hazardous chemical or 0.1 percent of a carcinogen.

The right-to-know law makes no distinction related to the quantity of hazardous chemicals in the workplace. If a chemical is hazardous, even if it is present in only small amounts, it must be included within an employer's hazard communication program.

11. Montana has its right-to-know law, while the federal Occupational Safety and Health Administration has its Hazard Communication Standard. Can you explain the relation between these laws and how they affect Montana employers?

The Montana law and the federal standard are both intended to enhance workplace safety by increasing workers' knowledge about hazardous chemicals. The Montana law was closely patterned after its federal counterpart, which was adopted after extensive research, public hearings and testimony from representatives of labor and industry. However, while the federal OSHA standard only applies to workers in manufacturing industries, the Montana law extends to all workers who may be exposed to hazardous chemicals in their workplace.

Manufacturing employers will be subject to enforcement by OSHA for all right-to-know provisions

in the workplace. As a result, manufacturing employers should consult the OSHA Hazard Communication Standard for specific provisions that may differ from the Montana law. The OSHA standard does, for example, require a written description of an employer's hazard communication program, while the Montana law does not.

Non-manufacturing employers are not covered by OSHA and must comply with all aspects of the Montana right-to-know law. Enforcement is vested with county government.

For the Montana right-to-know law, obtain a copy of the Montana Code Annotated, 1985, Title 50, chapter 78, part 1. Copies of the codes may be reviewed or obtained for a fee at any clerk and recorder's office and may also be available at law offices, libraries, universities and other public institutions.

For a copy of the federal OSHA Hazard Communication Standard, contact OSHA at 19 North 25th, Billings, MT 59101; 1-800-332-7087.

For More Information

This chapter provides a working understanding of Montana's right-to-know law. However, you may have additional questions. Because the law does not establish or fund any state agency to serve as a clearinghouse for right-to-know information, you can contact the following sources for information on specific right-to-know provisions:

To determine if a certain chemical is hazardous, first see if a material safety data sheet was shipped with it. If so, it is recommended that the chemical be treated as hazardous. If the chemical was received prior to MSDS requirements, contact the chemical manufacturer directly. Ask the chemical manufacturer if the company has determined if the chemical is hazardous under the OSHA Hazard Communication Standard; at the same time request any available MSDS on that chemical.

For questions about community right-to-know, contact the Governor's Office and request to be placed in contact with the Emergency Response Commission (The commission is proposed to be established in April 1987.)

For questions about agricultural chemicals, contact the Environmental Management Division, Department of Agriculture, Helena, MT 59620; 444-2944.

For questions about other right-to-know responsibilities, contact the local health officer or county attorney for all issues related to non-manufacturing workplaces and to community right-to-know. Contact the U.S. Department of Labor's Occupational Safety and Health Administration at 19 North 25th, Billings, MT 59101; 1-800-332-7087 (toll-free) for information on all workplace right-to-know aspects for manufacturing industries.

MONTANA ENVIRON- MENTAL POLICY ACT

During the 1985-86 interim the EQC initiated a major project to examine implementation of the Montana Environmental Policy Act (MEPA), with primary emphasis on the administrative processes and rules state agencies use to carry out their MEPA-related responsibilities. The goals of the project were: 1) to make environmental impact statements and preliminary environmental review documents more useful to decision-makers and the public; 2) to identify ways agencies can fulfill MEPA-related responsibilities while minimizing paperwork; 3) to examine the relationship between MEPA and other permitting authority; 4) to develop criteria, guidelines and administrative tools, as appropriate, to assist agencies in MEPA-related decision-making; and 5) to examine the "expanded preliminary environmental review (PER)" process and the desirability of formalizing this process through executive agency rulemaking. There were several reasons for undertaking this project. The model MEPA rules had not been reviewed since they were initially written and adopted by the executive branch agencies in 1980. Many refinements and innovations have occurred subsequently in agency administrative

practices and environmental analysis techniques that are not currently acknowledged in the model rules or otherwise described in agency guidelines. Both regulated industries and public interest groups frequently have commented that environmental reviews of virtually all types of projects and government actions are much improved when agencies fully explain the criteria they will apply in making decisions and conducting the review. Both the quality of public participation and the efficiency of environmental reviews are enhanced when all interested parties are appraised of the scope and limitations of the process before work begins on any particular project.

EQC's review of agency MEPA implementation was not designed to be a critique of any agency's interpretation of its MEPA duties. Instead the project was conducted through a series of interagency meetings involving representatives from all of the executive branch departments with statutory responsibilities that routinely require environmental review. The project also featured a major conference in April of 1986 that included participants from both the public and private sectors.

As part of the initial project design, the EQC solicited the opinions and concerns of public interest groups and regulated industries in order to plan the conference and subsequent sessions with agency representatives.

Environmental Groups

The major topics and issues of concern identified by representatives of environmental groups were public participation in environmental reviews and agency decision-making, the adequacy of funding for MEPA-related studies, and clarification of how environmental reviews are used by agencies to make decisions. Several representatives commented that the administrative rules that implement MEPA are vague for purposes of identifying the types of state actions that trigger a need to prepare either a PER or an environmental impact statement (EIS). They felt that the rules also fail to provide adequate guidance about what a “significant” environmental impact is and the related implications for agency decision-making. The federal rules implementing the National Environmental Policy Act (NEPA) were cited as containing numerous provisions that clarify many topics the MEPA rules either fail to address or address only vaguely. In many cases the federal rules implement provisions of NEPA that are identical to MEPA.

It was noted that there are considerable differences in interpretation of MEPA responsibilities among agencies, and sometimes within a single agency from one project to another, especially regarding determinations about the scope or level of environmental review that is necessary. Also, MEPA reviews and evaluations required for permit issuance have been treated as two separate processes, resulting in problems with coordinating the timing and content of studies and agency decisions. Some persons said that MEPA and its rules typically address broader issues than the various individual permitting statutes and rules, but some agencies seem to view the permit requirements as an inclusive and sufficient basis for developing an EIS. They pointed out that agency errors in judgement concerning MEPA compliance end up causing both the state and regulated industries costly delays when documents or other parts of the process are inadequate and have to be redone. It was suggested that in addition to rule revisions and clarifications, a series of training workshops should be held to better acquaint agency personnel with MEPA and with what is required to conduct an adequate review of projects.

PERs were a specific area of concern because the environmental groups felt that it is unclear how agencies are using these documents and because there is no formal mechanism for documenting and informing the public about the decisions that result from PERs. The MEPA rules currently specify that PERs are to be prepared when it is unclear whether a particular project

would involve significant environmental impacts that would trigger the need to prepare an EIS. The rules contain no guidance about public distribution of PERs. At a minimum, the environmental representatives felt that there should be a mechanism to inform the public when an agency begins work on a PER.

The current practice of some agencies of preparing “expanded PERs” raised a number of questions related to public involvement. As presently described in the MEPA rules, PER’s are concise documents that are only to be used to determine if there would be significant impacts that therefore warrant the detailed analysis required in an EIS. The environmental representatives said that when PERs are expanded, it probably means the agency should be doing an EIS. If adequate comment periods are provided for the public to examine these documents, it is unclear whether expanded PERs actually have any advantages, such as expediting the environmental review.

The groups identified several problems with funding for agency activities under MEPA. They said that some agencies apparently do not invoke the fee provisions of MEPA to collect sufficient funds to conduct adequate reviews. Also, under the current MEPA fee structure, agencies can assess fees only for EISs. Hence, they must “absorb” from their existing budgets the costs of preparing PERs or programmatic environmental reviews. A related problem is that the typical work load of agency staff responsible for issuing environmental permits may not leave adequate time or attention for MEPA review, especially for preparation of PERs. However, if there is a separate staff that prepares EISs, they are funded only by MEPA fees and the agency may be forced to lay them off and thereby lose their expertise when there are not enough EIS-level projects to provide funding.

Business and Industry

Many of the comments by representatives of business and industry concerned public participation in the environmental review process, including “scoping” and environmental mediation. The role of the PER in MEPA compliance was also discussed.

“Scoping” is a term that describes the process agencies use to identify the issues and topics that need to be addressed in an EIS. The term is not presently included in either MEPA or the rules, although it is included in the federal guidelines that implement NEPA. There are varying interpretations of what scoping means and who should be involved in the process. Some business and industry representatives felt that scoping should not be defined as a public comment process that occurs before an EIS is prepared because it adds a step to the environmental review and because public meetings are required after the draft EIS has been prepared. These representatives felt that scoping should refer to agency meetings with project sponsors to

review permit applications, establish a budget for the EIS that will be funded by fees paid by the sponsor, and generally reach agreement on what needs to be covered in the EIS.

The business and industry representatives pointed out that scoping would almost have to occur before an application is filed for a particular permit in order to be of use because much of the information about environmental conditions that is eventually analyzed in an EIS is actually collected by project sponsors during preparation of the application. It was also noted that issues raised through public scoping can be so broad that there is no meaningful way for an agency to address them within the context of the project that is the subject of an EIS. A further comment was that public scoping can have the effect of raising the public's anxiety level before the facts about a project are known. Some of the representatives said that project sponsors are realizing the benefits of identifying the issues early in the environmental review process by holding their own public information meetings.

Environmental mediation may be either a formal or informal process that is used to resolve conflict and involves the major parties affected by or involved in a proposed project. The process is not defined by either statute or rule in Montana, although the Hard Rock Mining Impact Board is one existing example of how it can work. It is not uncommon for agencies to meet with project sponsors and members of public interest groups to discuss environmental concerns and mitigation options that will resolve potential conflict and allow a project to go forward. The business and industry representatives generally felt that mediation is attractive from the standpoint of resolving problems at the front end of the environmental review process, but

some persons commented that it only works well if a specific entity is designated to represent the public. One model that was mentioned is the Consumer Council that represents ratepayers in Public Service Commission hearings. Other commenters indicated that the individual who serves as the mediator should be attached to an agency other than the agency responsible for issuing an environmental permit and preparing documents under MEPA.

The business and industry representatives said that agencies should issue statements to inform the public when a PER is being prepared and to describe the reasons the PER is required. They also felt that agency decisions to prepare a PER and not to proceed to an EIS should not be made without a public hearing or some mechanism for determining what concerns the public may have. It was noted that due to the site-specific nature of individual projects, agencies have to be flexible in determining whether to prepare a PER or an EIS. The time required to accomplish an adequate environmental review was cited as the biggest issue of concern to companies. Some agencies are publishing PERs at the same time that an application for a permit is formally accepted as complete. Some of the representatives indicated that it would be desirable to formalize this practice.

The group said it would be useful to include discussion of how alternatives to a proposed project should be addressed in the MEPA review process. Some persons said that PERs should address alternatives, especially if the PER is intended to show that a project, as mitigated, will have no significant adverse impacts. A general comment was that agencies should routinely integrate permit reviews with MEPA review.

MEPA Implementation Seminar

Approximately 125 people attended the EQC seminar on "Agency Implementation of the Montana Environmental Policy Act" held in April of 1986. A primary message from the seminar is that MEPA review involves much more than simply producing environmental documents. It requires a thought process that agency personnel need to apply from the point that an application is received for a permit or when any other agency action is initiated that may have the potential to create significant adverse environmental impacts.

The thought process and decisions the agencies have to make under MEPA are complicated, in part because

of the diversity of projects and the degree of subjectivity that necessarily enters into deciding how to conduct the evaluation. Some examples of these decisions are: 1) deciding whether or not a given action triggers MEPA and whether significant adverse impacts may occur; 2) deciding what level of study to give the project; and 3) deciding what goes into an EIS (e.g., whose opinions should be solicited, how large the study area should be, what alternatives should be studied, what types of impacts, including cumulative impacts, are likely, and how to mitigate or reduce the impacts).

Keynote speakers at the seminar, Dinah Bear (General Counsel of the President's Council on

Environmental Quality, Washington, D.C.) and Janet Rhodes (State of Washington, Department of Environmental Quality), commented that federal agencies and State of Washington agencies face the same issues and questions in implementing environmental policy acts. Ms. Bear noted that there are three stages of agency attitudes regarding administration of a law like MEPA: 1) resistance, which usually results when such laws are first passed; 2) reluctant acceptance; and 3) finding environmental review useful in decision-making, especially as more experience with the process is gained. Another speaker noted that the three most important principles of MEPA administration are 1) sensitivity to the environment; 2) full disclosure of impacts; and 3) public involvement.

Speakers said the MEPA process is becoming more integrated into environmental permit reviews in some agencies and the earlier it happens the better. The Montana Tunnels project was cited as exemplary of how the mine sponsors, Hard Rock Mining Bureau staff and EIS staff devised more efficient and environmentally acceptable alternatives in mine design. Some speakers felt that there is a lack of consistency between agencies in terms of MEPA compliance. They said the process works best where applicants and project sponsors fully understand the environmental review process and consider it in their best interests to work with agencies to comply. Most speakers who represented businesses said they have learned to live with the MEPA process, and that consistency and predictability are the important elements.

One speaker said that MEPA could become the basis for suggesting changes in statutes to allow adequate time for EISs to be done. This may have particular implications for cumulative impact studies. One recent case involves the Shelter Bay Estates subdivision on Flathead Lake. The Department of Health and Environmental Sciences said that it is uncertain how to address these cumulative impacts and in any case, the agency does not have adequate funds. This raised questions about how agencies should go about determining the scope of these studies, and whether cumulative impacts are too uncertain to predict beyond the short term. The current MEPA rules limit the scope of cumulative impact studies to actions related by location or generic type to the project being evaluated.

PERs were a major topic of discussion throughout the seminar. Agencies are currently preparing a wide variety of types of PERs, ranging from simple checklists to large documents that contain considerable site specific analyses and mitigation plans. Based on case law, it is acceptable for agencies to include mitigation measures in PERs, although this practice is not mandated. Public involvement and coordination with permit reviews in producing these documents are informal processes at present. Speakers pointed out that for the most part, agencies are not using PERs as described in the MEPA rules because they are rarely

used to decide that an EIS is needed. One speaker said it appears that PERs end up documenting a prior decision not to do an EIS, and therefore current practice appears to be circumventing the EIS process. From a number of speakers' comments, it appears that agencies do use the "threat of an EIS" as an approach to convince applicants to work with the agency to identify ways to reduce the impacts of a project. Several questions were raised about whether mitigation should be recognized as part of the MEPA process, and if so, how it should be integrated with environmental permitting.

The relationship of MEPA to NEPA also emerged as a topic ripe for further discussion and clarification. The two laws have virtually identical language in many areas although federal agencies are obligated to treat NEPA as both substantive and procedural. There is a significant reliance on court cases to interpret both MEPA and NEPA. However, there are an average of 140 cases a year based on NEPA while in the 15 years of MEPA's existence, there have been only about half a dozen cases. NEPA cases can be used to interpret MEPA, but seminar speakers noted that there can be problems if federal cases are based on portions of the NEPA regulations that differ from the MEPA rules.

A major conclusion from the seminar is that the procedures and analytical techniques used by agencies to implement MEPA are continually evolving. While that evolution is both necessary and inevitable, it is also important to describe current MEPA practices in written form so that the public, new staff and all agencies can obtain a clear understanding of the various procedural approaches and options. This premise appeared especially relevant for those agency practices that have evolved beyond the current MEPA rules or other material generally available to the public.

Interagency Follow-up Sessions

The numerous issues and questions raised by the seminar were grouped into the following four subject areas for purposes of organizing subsequent interagency discussion sessions: 1) EIS topics (e.g., scoping, analyses of alternatives, cumulative impact studies, mitigation); 2) PERs (e.g., public comment, descriptions of the various types of PERs); 3) integration of the MEPA process and review of environmental permits; and 4) general issues (e.g., determining whether an action triggers MEPA, funding). The agencies participating in the discussions included the departments of Natural Resources and Conservation (DNRC), State Lands (DSL), Health and Environmental Sciences (DHES), Fish, Wildlife and Parks (DFWP), Commerce (DOC), Highways (DOH), and Agriculture (DOA). Four separate discussion sessions were held, three in late May and early June of 1986 and one in mid-September.

Preliminary Environmental Reviews

Purposes

Participants generally agreed that agencies are using PERs for more than simply determining whether impacts are significant enough to warrant preparation of an EIS. In fact, cases are very rare when agencies have actually used a PER to determine that an EIS is necessary. PERs have been used to describe the affected environment and anticipated impacts, develop mitigating measures, evaluate alternatives to the proposed action, and provide a focus for public participation and comment. The PER also documents why a decision was reached, and thus can be helpful to an agency if that decision is later challenged.

The narrow definition of the PER as a "brief checklist" was developed during preparation of the 1980 model MEPA rules, which have subsequently been adopted by the executive agencies. The federal government and other states formally recognize broader purposes for their first-stage environmental review. Federal agencies evaluate alternatives to a proposed action in an environmental assessment (EA), and this interpretation derives from NEPA language identical to language in MEPA. Thus a case could be made that Montana PERs should evaluate alternatives. Federal EAs are also used for scoping, documentation of decisions and gathering public input.

There was a general consensus that the name

"preliminary environmental review" does not accurately represent Montana's initial review document to the public. The name leaves the impression that this "preliminary" document will necessarily be followed by a more detailed environmental review. At the same time, the word "preliminary" connotes a lack of in-depth analysis upon which to base an informed decision. In actuality, the PER is usually the final review document, and many PERs do contain an in-depth analysis of impacts. Several participants suggested that the term "environmental assessment," as used by federal agencies for similar documents prepared under NEPA, is a more appropriate name for Montana's first-stage review document.

PER Procedures

Another major topic was whether or not the PER process should be more formalized. The focus of this discussion was the "expanded PER," used by some agencies to detail the impacts of proposals judged not to have significant environmental impacts. Some expanded PERs have exceeded 100 pages, and concerns have been expressed that such documents are neither envisioned in MEPA rules nor subject to formal procedures for public participation.

Some participants noted that the expanded PER is in line with a strict interpretation of MEPA: if there is no significant impact, then an EIS should not be prepared. In an expanded PER any potentially significant impacts would be reduced through appropriate mitigation strategies. Also a detailed discussion of impacts and the mitigation would be provided. These participants felt that for projects that are potentially controversial but that would not actually create significant impacts, the expanded PER is a preferred option for providing information to the public.

Others countered that if a project is major enough to require an expanded analysis, an EIS should probably be prepared. They noted that since expanded PERs often contain mitigating measures and revisions of the project proposal, it is often difficult to define the proposed action because of modifications through the PER process. This raises questions about how the public can participate effectively when the proposed action is a "moving target." One participant said that any mitigation proposed in an expanded PER should be readily available, easily applied and very effective.

Another comment was to vary the size of EISs and make them "issue-driven", rather than use expanded PERs. EISs do not have to cover every conceivable impact, as some agency staff believe. The EIS process already has formal procedures for public comment, as

opposed to the PER process.

MEPA rules or administrative guidelines were suggested for deciding whether to do either an EIS or a PER. Guidelines could include consideration of the length of potential impact, mitigation possibilities, cumulative impact, and the number and types of resources affected.

There was also considerable discussion of the concept of preparing guidelines to specify whether or not an environmental impact to a particular resource should be considered "significant." Some advocated a case-by-case approach, noting that it would be difficult to cover all eventualities by guidelines. Others endorsed the federal guidelines for determining significance, but added that Montana would have to define its own scale (e.g., local, regional, statewide) for the significance determination.

Some participants spoke in favor of keeping flexibility in agency PER procedures. It was noted that while the Forest Service has detailed guidelines on how its environmental assessments should be used and distributed, the document itself may be prepared in "any format useful to facilitate planning and decision-making." The Forest Service thus integrates flexibility in document preparation with several well-defined purposes for its first-stage environmental review document.

Costs

Several participants commented that the preparation of expanded PERs is costly to agencies and that MEPA does not allow agencies to charge applicants for these costs. Such documents generally cost from \$10,000-\$15,000, which must be absorbed within existing agency budgets. Costs can be reduced if the applicant is required to gather the necessary data for analysis, and one participant suggested that environmental information requirements be internalized into each agency's permitting function. This could be accomplished by allowing agencies to issue a formal finding of "insufficient information" on the environmental topic in question. Existing permit statutes, however, do not clearly indicate that agencies have the authority to request that applicants supply information to conduct a PER-level analysis.

Public role

Participants noted that PERs are public documents and, when possible, agencies circulate them to potentially affected parties. Some indicated that public comment on proposed actions may improve agency decisions. If the public offers substantive opposition to the analysis of the proposed action, the agency may decide to prepare a follow-up environmental review document. There is, however, no written administrative process for a public appeal of a PER, and there are no guidelines specifying what an agency should do if the public does not agree with the findings of a preliminary environmental review.

A 15-30 day comment period with public notice requirements was suggested for PERs, and this practice is currently used by some bureaus. However, some agency representatives noted that statutory time constraints on permit decisions do not always allow such a formal comment period if no EIS is going to be prepared.

PER checklists, as mentioned in MEPA rules, were also discussed. The brief checklist form was seen as a positive method of directing agencies to consider a range of environmental factors that might not otherwise be addressed. However, it was noted that permit staff generally know little about many of the environmental disciplines outside of their specific expertise. Support was expressed for a checklist that requires staff to go through a "thought process" to assess potential impacts, perhaps modeled after a question-and-answer format used by some other states.

One participant said that PERs should not be prepared for actions if a statutory deadline does not provide enough time for EIS preparation. Such permits should be identified and the laws should be amended to allow sufficient time for an EIS when indicated.

General MEPA Issues

The session on "General Issues" focused on the following topics: 1) MEPA-related funding problems (both for environmental reviews of individual projects and keeping experienced environmental specialists employed over the long term); 2) the desirability of documenting agency decisions; 3) the desirability of creating guidelines and/or identifying criteria to determine the appropriate level of environmental review for any given project; and 4) the desirability of preparing comprehensive lists of state actions that do and do not trigger MEPA review.

Funding

Agency staff indicated that the MEPA fee schedule is often inadequate for small projects with low capital costs that would be located in environmentally sensitive locations. In such cases the environmental impacts may be numerous and may require more study and documentation than the fee monies will cover. The fee schedule is contained in the MEPA rules and allows an agency to collect a maximum of 2% of any estimated cost of the project up to \$1,000,000. Thus for a project costing \$1,000,000 the fee would be \$20,000. Additional fees may be collected for projects that cost more than \$1,000,000. It should be noted that even a relatively minor EIS may easily cost \$60,000-\$70,000 to prepare. Agencies have responded to this situation in a variety of ways, including absorbing the additional costs from their operating budgets or appealing to the project sponsor to voluntarily provide additional funds or

information in order to avoid delays in completing the process and to ensure that an adequate environmental study is produced.

A separate, but related issue is that certain types of projects and MEPA reviews are exempt from the fee schedule. Examples cited by the participants included permit renewals, projects sponsored by another government agency, and preliminary environmental reviews. It is in neither the project sponsor's nor the agency's best interest if MEPA review documents are inadequate or legally indefensible.

The 1985 Legislature addressed a similar problem with the fee schedule in the Major Facility Siting Act (MFSA) by doubling (from 2 percent to 4 percent) the maximum amount the DNRC can collect for a single project costing up to \$1,000,000. Both the MFSA and MEPA rules provide that agencies must account for the actual costs of performing the studies and that any un-used portions of the allowable fee either be returned or not billed to the project sponsor.

Agency managers have had a long-standing problem trying to retain experienced environmental specialists during periods when there are no projects to study and hence no fees to cover salaries. Various creative methods have been used to keep these people available for the time when there are environmental studies to be done. The essence of the problem is that when experienced people leave, the knowledge of how best to prepare environmental reviews is lost to the agency. There is a significant learning curve for new staff or consultants in gaining an understanding of agency procedures and the most effective ways to do the job. The DSL lost its environmental staff in 1985 when the lack of mining projects meant that there were no fees available for salaries. The DNRC has managed to retain most of its staff, in part because they are now preparing mining EISs for DSL.

Actions That Trigger MEPA

The MEPA rules require executive agencies to "adopt a list of those activities or functions that normally require an EIS or do not require either an EIS or PER in accordance with rulemaking procedures provided by the Montana Administrative Procedures Act". To date only one agency, the DHES, has formally adopted such a list, although the DSL and individual divisions within some of the other agencies have informally listed their various functions and indicated those that may trigger an EIS. Virtually all of the agency representatives felt that a list of government functions would not remove the agency's obligation to carefully scrutinize the case-by-case circumstances of each individual project or action to determine if it would significantly affect the environment.

The group felt it would be useful to devote some effort to defining "significance". At present there is no way for a project sponsor to precisely determine whether a proposal will create significant environmental impacts until the agency examines the

application. In some cases an agency can immediately determine that there would be significant impacts, but where the situation is unclear, the agency has to prepare a PER in order to make the determination.

Documenting Decisions

Examples of agency decisions made under MEPA include: 1) deciding whether an action triggers MEPA (It should be noted that the MEPA rules indicate an EIS is not necessary if an action is administrative, non-discretionary, involves repair/maintenance of existing facilities or involves investigation/enforcement responsibilities.); 2) deciding that a PER is necessary; 3) deciding to issue a permit based on a PER; 4) deciding whether an EIS will or will not be prepared; and 5) deciding to issue a permit based on an EIS. Most agencies send letters to project sponsors at each stage of the permitting or licensing process to document their decisions about the level of environmental review that is necessary and to document the final decision on a project. Also, the EIS process requires public review and comment.

Agency decisions not to prepare an EIS and virtually all decisions involving PERs are not commonly documented for public review. Preparation of an expanded or detailed PER on a controversial project would be the exception, because agencies typically issue press releases and hold public meetings on these documents even though they are not required to do so. Citizens interested in one of the hundreds of smaller projects that are evaluated each year under MEPA usually have to contact the agency to find out whether a PER was prepared and what decision was made.

The agency representatives discussed options for providing public notice of projects evaluated through PERs. Some licensing and permitting processes must be completed within such short statutory time frames that there is not sufficient time for an agency to prepare the PER, reach a preliminary decision and also provide a public comment period. The possibility of publishing the PER titles in the bi-monthly Clearinghouse Bulletin was discussed, although that option would not provide an opportunity for an interested citizen to comment on the agency's decision. Another option would be to determine whether notice of an agency's PER findings could be issued under the Administrative Procedure Act and a short comment period provided.

EIS Topics

The working group session on EIS topics focused on how to structure the analysis of alternatives to a proposed action, how to study the cumulative environmental impacts of one or more projects, and how to mitigate significant adverse environmental impacts.

Alternatives

In reviewing alternatives to a proposed action, agencies must consider how to make the analysis most useful and informative for decision-makers and ensure that the analysis is adequate, reasonable and legally defensible. The legal tests and political scrutiny of an EIS are often based on whether the agency made a reasonable attempt to analyze: 1) the "risks" associated with a project, including a "worst case" analysis; 2) the problems created by uncertainty or unavailability of relevant data; and 3) a range of project alternatives, including the "no action" alternative.

Agencies are confronted with a number of perplexing issues in attempting to analyze alternatives. One such issue is whether the agency has sufficient legal authority to act on an alternative, or whether a project sponsor can implement an alternative. Where neither the agency nor the applicant are able to act on an alternative, it may still be important for the agency to address that alternative in the EIS in order to focus public attention on a problem area and thereby encourage its resolution at some future time.

The alternatives analysis embodies a dilemma that is typical of several MEPA-related topics: experienced agency staff may be able to design an acceptable analysis, even for controversial projects, but there are no guidelines for inexperienced staff to consult in deciding what level of study or attention to detail will be adequate. With controversial projects, it becomes expensive and time-consuming for both the agency and the project sponsor if a wrong decision is made.

Mitigation

The term "mitigation" refers to actions that would reduce or eliminate the adverse environmental impacts created by a project or state action. Mitigation is defined in the federal NEPA regulations as avoiding impacts by not taking a certain action; minimizing impacts by limiting the degree or magnitude of an action; repairing, rehabilitating or restoring the affected environment; reducing or eliminating impacts over time by preservation and maintenance operations; or compensating for impacts by replacing or providing substitute resources or environments. Mitigation is considered the main avenue for agencies and applicants to respond to environmental problems that are discovered through the EIS and public review process. At this time mitigation is not referenced in the MEPA rules.

Agency ability to implement or require mitigation is necessarily linked to the agency's statutory authority. Nevertheless, most of the agency representatives felt that it would be reasonable and useful to recognize mitigation as a legitimate part of the MEPA process. Most state agencies that routinely prepare PERs and EISs are already analyzing various types of mitigation measures, especially adjustments or changes in project design that will make a project more environmentally compatible. In the case of expanded PERs, mitigation is

usually the mechanism used to reach a conclusion that the environmental impacts associated with a given project would not be significant and that a full EIS is not necessary. Incorporating mitigation in the MEPA process would make it more consistent with the federal NEPA process, an advantage for both applicants and agencies that are routinely involved with projects involving both federal and state jurisdiction.

There are many technical issues associated with identifying appropriate mitigation strategies for any given project. Mitigation may be site-specific or generic for an entire class of activity. An example of generic mitigation might be certain construction practices that reduce erosion and make eventual reclamation easier. Hence, for most locations, these construction practices would be required as a condition of permit approval.

Site-specific mitigation usually requires more detailed study of a proposed action. Effective strategies to reduce impacts may vary considerably between sites and what will work at one location may not be appropriate elsewhere. Agency staff, industry and the interested public may need to cooperate and exercise a certain amount of creativity to determine what should be done on a case by case basis. Some agency staff felt that it would be useful to compile case histories of projects where mitigation was successfully accomplished, and examine both the process that was used and the types and level of technical information that was needed.

There are a number of interrelated technical and policy issues associated with determining the appropriate role of mitigation. For most projects it is probably not technically possible (and may not be desirable) to completely mitigate every impact. The decision-maker's task is to balance the cost of mitigation, the impact of that cost on the project applicant, the overall benefits of the project, and the benefits of the environmental amenities of the project location and surrounding area.

Cumulative Environmental Impacts

Agencies are required to analyze "primary, secondary and cumulative impacts" of the proposed action in an EIS. An example of cumulative impact would be the combined, long-term effects on wildlife of a major industrial development (i.e., the project being evaluated in an EIS), increased subdivision activity within commuting distance of the development to provide homes for newcomers/employees, increased commercial activity to serve the newcomers and increased recreational activity and pressure on the wildlife resource. Identification and evaluation of cumulative impacts is centrally important to the MEPA process. However, the question of how such impacts can most appropriately be studied poses a variety of technical, funding and procedural dilemmas for agencies. Some examples of technical questions include the following: How should the study area boundaries be determined? What projects or activities should be

included in the analysis? What future time period should be considered?

Existing data are almost never adequate for a proper assessment of cumulative impacts, and the funding available for an EIS is usually only enough to study the primary project. There are also equity issues associated with using substantial portions of fees paid by an individual project sponsor to study the regional implications of a wider variety of impacts that will likely be caused, at least in part, by parties other than the project sponsor. The results of a cumulative impact analysis will usually have implications for a particular geographic area that go well beyond the purview or jurisdiction of any individual government agency, and that are also beyond any individual project sponsor's control or ability to mitigate.

Based on the discussions with agency staff, programmatic EIS's may be the most appropriate tool or mechanism for studying cumulative or regional impacts. As presently defined by the MEPA rules, programmatic reviews are supposed to address a "series of agency-initiated actions, programs or policies which in part or in total will constitute a major state action significantly affecting the quality of the human environment." One idea generated from the interagency discussions sessions would be to ask the legislature to fund one major programmatic review per biennium.

Agency Coordination and Scoping

Coordination of MEPA and Permitting Processes

Some participants noted the difficulty of coordinating environmental review under MEPA with statutory time limits for agency action on specific permits. Permits with short time frames can preclude EIS preparation, and administration officials have concluded that PERs should not be prepared for these activities.

The ability of an agency to formally determine when an application is complete can have important implications for the environmental review process. Permit statutes that include comprehensive information requirements (e.g., hard rock mining, major facility siting) allow the agency to make a completeness determination. Thus, the "clock" for the environmental review process does not start until the agency has the information it needs.

Under less comprehensive statutes with strict deadlines on permit action, agencies may be unable to "hold" the permit decision, even if the information necessary for a thorough PER has not been submitted. Agencies must often decide quickly and without adequate information whether an EIS should be done.

The system thus has the following ironic results for some "small" projects: agencies have little time to acquire the information necessary to decide whether an EIS should be prepared; however, if the decision is made to prepare an EIS, then the agency has plenty of time to prepare the document. Other permit statutes have no provision for extending the review time even if an EIS appears necessary.

Participants did not believe there is a need for setting formal time limits for agencies to complete EISs. They said that delays in the EIS process are most often caused by difficulties in getting information from applicants. As a result, there was resistance to contractually obligating agencies to finish the EIS when the availability of information is not under their control. The agencies do put together schedules for EIS completion in the beginning of the review process and adhere to these schedules as closely as possible, if the necessary information is provided.

Jurisdiction

The group addressed the concept of whether state agencies have authority to require permit applicants to conduct environmental activities on private lands. Pipeline construction is a prime example of an activity that may be subject to limited permitting (e.g., public stream crossings), yet still has the potential to cause impacts on private lands. In some cases, companies can be convinced to accept conditions that will mitigate impacts, but the legality of enforcing such conditions can be questioned.

Some agency staff noted that, although the state may not be able to require all desirable mitigation, a level of accommodation is evolving between agencies and industry over mitigation. The "bottom line" is fairness. Over time, the state is building a record of successfully negotiated mitigation, and companies are being more responsive. Participants noted that it is difficult to institutionalize or cover all eventualities through the formal MEPA process. How the public fits into the negotiation process remains an open question.

Scoping and Public Participation

Public participation in scoping potential environmental impacts was seen as contributing positively to environmental review. The concept of scoping does not appear in MEPA or the rules. Although agency staff said they can generally define the important issues for consideration, occasionally the public raises an important new concern that needs to be addressed. Continuity in environmental staff is also important to ensure that potential impacts are not overlooked.

One public interest group has asked agencies to define acceptable impacts during the scoping process, and then make future decisions on project authorization based on whether the impact threshold will be exceeded. Agency staff, however, do not use the scoping process to set decision standards; rather,

scoping is used to define what issues will be analyzed during the review process. "Participants noted that MEPA does not prohibit adverse environmental impacts; it simply requires agencies to document these impacts."

Further EQC Work on the MEPA Project

At its November 1986 meeting the EQC received a briefing on the interagency discussion sessions and selected the following topics from those sessions for further work:

Preliminary Environmental Reviews

- Develop proposed revisions to the MEPA rules to incorporate the following: a) change the name of the "preliminary environmental review" to "environmental assessment"; b) identify the purposes of the PER; c) identify options for public review, especially for detailed PERs; and d) acknowledge that a PER may be more than a checklist and identify the circumstances that could require detailed documents

- Develop proposed revisions to the MEPA rules or new administrative guidelines to identify criteria for agencies to apply in deciding whether to prepare an EIS or PER

- Identify alternative formats for PER checklists that would better direct the thought process agency staff should follow in assessing the potential environmental impacts of a project/state action

General Issues

- Identify criteria or guidelines for agency use in determining whether an environmental impact is significant

- Plan a special EQC hearing or meeting to examine funding problems associated with the environmental review process, including funding for PERs and other projects currently exempt from the MEPA fee schedule, funding for the review of projects with low capital costs, and agency funding for environmental specialist positions over the long term

- Remove the provision in the MEPA rules requiring agencies to prepare lists of actions that trigger an EIS or that do not require even a PER

EIS Topics

- Prepare guidelines on the issues and questions that should be addressed by the analysis of alternatives in an EIS

- Incorporate the federal Council on Environmental Quality definition of "mitigation" in the MEPA rules, and prepare guidelines identifying

options for discussing mitigation in EISs and expanded PERs

- Evaluate administrative options for mitigating environmental impacts

- Evaluate alternative systems for funding one major programmatic study of cumulative environmental impacts in Montana each biennium

Integration of MEPA Review and Environmental Permitting Procedures

- Evaluate options for ensuring that agencies can obtain adequate information, either from permit applicants or agency-initiated investigations, to conduct an adequate environmental analysis

- Review environmental permitting statutes to identify time constraints on agency actions that may conflict with MEPA compliance

- Evaluate options for incorporating public scoping procedures in the environmental review process, especially for major projects

The EQC approved the work on the aforementioned topics with the understanding that it would not be possible for staff to devote the necessary time to the project during the legislative session. The agenda for the first EQC meeting following the 1987 session will include a discussion of progress on the project, including a summary presentation for new members on work done on the project during 1986, a discussion and review of new draft materials, and a plan for addressing the remainder of the topics during the 1987-88 biennium.

OIL AND GAS

This chapter is a summary of EQC's interim study of environmental regulation of the oil and gas industry, including review of drilling proposals under the Montana Environmental Policy Act (MEPA). Several reports were prepared for this study that provided an overview of oil and gas field operations and the existing regulatory structure in Montana, compared Montana's environmental-related regulations with those of other Rocky Mountain states and Alberta, and evaluated the relationship of MEPA requirements to the issuance of permits to drill oil and gas wells by the Board of Oil and Gas Conservation (BOGC).

Oil and Gas Field Operations

Oil and gas production currently occurs in five areas of Montana: the Sweetgrass Arch-Bearpaw Uplift in Northern Montana, the Big Snowy Uplift in Central Montana, the Big Horn Basin in South Central Montana, the Powder River Basin in Southeastern Montana, and the Williston Basin in Northeast Montana. The most significant recent discoveries have occurred in the Williston Basin. A sixth area, the Overthrust Belt which runs roughly parallel to the east slopes of the Continental Divide throughout western Montana, is considered to have the potential to yield significant oil and gas reserves. Exploration in this area is continuing.

Oil and gas exploration and development normally progresses through five phases of field operations if commercial quantities are discovered: preliminary

geophysical exploration, exploratory drilling, field development, production, and abandonment.

Preliminary geophysical exploration involves ground and aerial surveys, along with aerial photo and geologic interpretation. Seismic surveys are the most common of the geophysical exploration methods; shock waves are artificially created to gather subsurface geologic information. Each formation reflects the shock wave back to a group of vibration detectors arrayed on the surface. Seismic testing is usually described by the methods and equipment used to generate the shock wave, which most commonly include thumpers and vibrators that are operated from trucks on the surface and explosives that may be detonated either on the surface or underground. For subsurface explosions, 2-6 inch diameter holes are drilled 25-600 feet deep. The sensors for recording the shock waves are placed on one to two mile grids. All conventional seismic methods require an assortment of trucks for crew and equipment, although the number and the road requirements vary. In extremely rugged or roadless terrain, testing with explosives can be accomplished by flying or packing in portable drills and other equipment.

If geophysical exploration results look favorable, stratigraphic testing may be the next step, including drilling to shallow depths to collect samples. If these tests are promising, the company may proceed to drill a wildcat well (i.e., a well drilled in unproven territory). Depending on depth, drilling can be completed in anywhere from a few days to a few months. Prior to drilling, a drill pad (well site) from 1-4 acres in size is cleared and leveled for the drill rig and its associated equipment and structures. From 50,000-100,000 gallons of water a day may be needed for mixing drilling mud, cleaning equipment, cooling engines, etc.

The basic concept of rotary drilling involves rotating a bit on the bottom of the hole with a drill pipe through which fluid is circulated to remove cuttings. A string of surface casing (a long length of steel pipe) is set before harder, deeper formations are encountered. This casing is cemented into the hole primarily to protect surface water from mixing, loss or contamination. Also, surface casing provides for attachment of blowout preventers that are necessary in case a zone containing high-pressure gas, water, or oil is encountered. Storage pits known as reserve pits are often located at or near the well site for storage and burial of the drilling mud.

During or at the completion of drilling, the well is electronically logged. Based on study of the well logs and other test data, the geologist decides whether the well has encountered sufficient quantities of oil or gas to warrant completion.

Well completion involves installation of steel casing from the surface to the bottom through the surface casing and the gas or oil zone. The casing is cemented bottom to top to provide stability and to protect specific zones, and then perforated adjacent to the suspected producing formation.

If a wildcat well becomes a "discovery" well (i.e., if it yields commercial quantities of oil and gas), other wells ("development" wells) are drilled to locate the boundaries of the field and establish the best pattern of wells to drain the reservoir.

Oil and gas field size may vary from less than 1,000 acres to several thousand acres, and some cover several townships. The BOGC regulates the spacing of oil and gas wells. In the absence of special field rules, the regulations require oil wells less than 6,000 feet deep to be placed one per 40 acres; oil wells 6,000-11,000 feet, one per 160 acres; wells greater than 11,000 feet deep, one per 320 acres. Gas wells are located one well per 640 acres. In addition to roads, other surface development includes well drill sites, flowlines, on-site processing facilities to separate oil, gas and water, storage tank batteries, and in larger fields, gathering and transmission pipelines. Other facilities that may be present include injection wells for salt water disposal or evaporation pits.

Production often begins concurrently with development operations, although in a gas field, it does not begin until the pipeline to a market has been constructed. If the natural gas contains hydrogen sulfide (H₂S), special handling and worker safety precautions are required. The process of removing high concentrations of H₂S from gas can require gas treatment plants, although facilities consisting of only a few treatment vessels can suffice for removing low concentrations of H₂S from relatively low volumes of gas.

Crude oil is usually transferred from wells to a central storage tank battery before it is transported from the site by truck or by pipeline. If the oil contains gas and water (known as produced water), separation is necessary. Most "produced waters" are brackish to

highly saline. Methods of disposal include storage in earthen pits, discharge to surface waters (which requires a permit under the Montana Pollution Discharge Elimination System) or underground injection. When salt water is disposed of underground, it is usually introduced into a formation containing water of equal or poorer quality.

When a well becomes nonproductive, abandonment procedures are commenced. Abandonment operations primarily involve surface restoration, removal or burial of debris and proper plugging of the hole.

Potential environmental impacts of oil and gas drilling and production are dependent to some degree on the characteristics of the area or site that is being explored or developed. The impacts may be divided into two types. Direct, site-specific impacts are primarily related to surface disturbance such as soil compaction, soil erosion, vegetation disturbance, and some effects on water quality. Most of these impacts are temporary and can be largely mitigated by proper construction practices and judicious placement and construction of disposal pits, roads and other facilities. The other type of impact involves environmental values in the area surrounding a drilling or well site. The magnitude of this type of impact may depend on such factors as the level of human activity that is already occurring or present, the environmental sensitivity of the area, whether there are any existing roads, and the volume of production and methods of waste and water disposal.

Montana Laws and Rules

Montana laws address the entire oil and gas development process, from exploration to production to abandonment. This authority is implemented primarily by the BOGC and the Department of Health and Environmental Sciences (DHES). The BOGC has principal jurisdiction over oil and gas activity, while the DHES becomes involved only when the activity significantly affects water or air quality. The Department of State Lands (DSL) is involved when it enters into lease arrangements for oil and gas activity on lands under its administration. The Department of Fish, Wildlife and Parks (DFWP) is similarly involved in regard to development on its lands.

Requirements for abandonment and reclamation following geophysical exploration activities are specified in law, but agreements between the surface owner and seismic operator are the principal means used to specify restrictions on surface exploration activity. The law does require registration of seismic crews operating in the state and the filing of a notice of intention to explore with county clerk and recorders. A

surety bond of either \$10,000 or \$25,000 depending on the number of crews operated by the explorer in the state, is required in order to indemnify owners of property from physical damages that could occur as a result of seismic operations. Upon the complaint of a property owner that physical damage has occurred from seismic operations, county attorneys are authorized to take actions, which can include revocation of an exploration permit, to ensure compliance with the requirements.

Abandonment requirements for geophysical exploration activity include the plugging of all "shot holes" such that any water within the underlying strata is contained by use of bentonite mud, cement, or other material, and the capping of the hole at a depth sufficiently below the surface to allow cultivation. In addition, the operator must remove all ropes and other debris and restore the surface to its previous grade and productive capability.

A permit to drill and payment of a fee is required before drilling is undertaken. The statutes do not clearly specify what requirements may be attached to a permit. The BOGC approves permit applications upon submission of a form with the fee and an accurate plat and on the condition that all work will be performed in conformity with BOGC rules.

The BOGC's rules specifically provide for the attachment of special conditions after notice and hearing on a permit application to drill or an approval of recompletion operations if any of the applicant's other Montana operations is not in substantial compliance with the rules. This process has, however, been used infrequently. The rules do not address the attachment of special conditions when the applicant's existing operations are in substantial compliance.

The BOGC is granted specific authority to require "measures to be taken to prevent contamination of or damage to surrounding land or underground strata caused by drilling operations ..." (82-11-111, MCA). The rules implementing this statute require well operators to contain and dispose of all solid waste that accumulates during drilling operations. The waste must either be removed from the site or buried to a minimum depth of three feet below the restored surface of the land. Operators must construct reserve pits in a manner adequate to prevent undue harm to the soil or natural water in the area. When a salt base mud system is used as the drilling medium, the reserve pit must be sealed when necessary to prevent seepage. Reserve pit liners may be used as a means of preventing seepage, particularly where the underlying soil is permeable.

The BOGC has authority to require casing and other measures to protect aquifers and oil or gas reservoirs from contamination from salt or brackish water, muds, or oil or gas. Surface casing must be set to a depth below all potable fresh water which is reasonably accessible for agricultural or domestic use. In addition, only freshwater-based drilling fluid may be used when drilling is occurring through freshwater aquifers.

The BOGC has authority to enforce its requirements and in addition, the DHES uses its authority to make reactive responses to oil and gas-related pollution occurrences. Because the BOGC has principal responsibility for oil and gas development, however, reserve pits (along with water injection wells and produced water pits) are specifically exempted from DHES' Groundwater Pollution Control System permit requirements. The DHES may inspect facilities to determine if contamination exists, issue cleanup orders, seek injunctions and collect for costs of cleanup efforts undertaken by the Water Quality Bureau.

A primary aspect of the BOGC's authority for regulating oil and gas production is the prevention of waste of oil and gas. Hence, a significant portion of the BOGC's time is devoted to ensuring that the location, spacing, drilling, equipping, operating, and producing of wells occurs in a manner that will tend to maximize the quantity of oil or gas that is ultimately recoverable from a given pool or reservoir.

The BOGC provides specific guidance by rule on the disposal of salt or brackish water separated on site from crude oil. According to the rules, "(S)alt water may be disposed of by evaporation when impounded in excavated earthen pits which may only be used for such purpose when the pit is underlaid by tight soil such as heavy clay or hardpan." If the soil under the pit is porous and closely underlaid by a gravel or sand stratum, such impoundments are prohibited. If an operator desires to discharge produced waters to surface water drainages, a permit is required from DHES under the Montana Pollution Discharge Elimination System. Thirty-eight permits for this purpose have been issued by the Water Quality Bureau over the last ten years.

In order to prevent waste, BOGC regulations require justification by operators wishing to flare more than 100 thousand cubic feet (MCF) of gas per day. Justification includes establishing that it is not economically feasible to market the gas. In addition, all waste gas vented to the atmosphere at a rate exceeding 20 MCF per day for 72 hours or more must be burned. If the gas contains 20 or more parts per million of H₂S, workable igniter systems must be installed to further ensure that waste gas will be burned.

The BOGC is directed by statute to require the restoration of surface lands to their previous grade and productive capability after a well is plugged or a seismographic shot hole has been utilized, and necessary measures to prevent adverse hydrological effects from such well or hole, unless the surface owner agrees in writing, with the approval of the BOGC or its representatives, to a different plan of restoration. By rule, operators are required to submit a notice of abandonment to the surface owner and to the BOGC or the BOGC's petroleum engineer. The rules also specify requirements for the plugging of the well (except if the well can be used to obtain fresh water), restoration of the surface, measures to prevent adverse hydrologic effects, and a subsequent report to the BOGC on

abandonment. These requirements are supported by a performance bond requirement of \$5,000 if the well owner has only one well in the state or \$10,000 if he has more than one well.

Comparison with Other States

An EQC report comparing environmental regulation of the oil and gas industry included Wyoming, Colorado, Utah, New Mexico, North Dakota, Alberta and Montana and examined categories of regulation relating to seismic exploration, drilling permits, reserve pits, disposal of produced water, safety, air quality, interagency responsibilities for water quality protection, and well abandonment and site reclamation.

The comparison focused on the level and type of contact that agency staff have with oil and gas companies before field operations occur, either through review of written drill plans and site information or through field inspections. The goal of most environmental regulation is protection of water quality and other environmental values, ensuring public safety, and providing guidance to companies concerning the adequacy of proposed field operations. This type of guidance is most effective if it ensures that plans for construction and waste disposal are appropriate for the proposed drilling site, considering the subsoil type, depth to water table, quality and quantity of surface and ground water, and chemical composition of waste materials and fluids.

Some differences emerged in comparing Montana's regulatory patterns with other states and Alberta. Current regulatory practice in Montana includes telephone conversations between oil and gas agency staff and seismic crews when permits for field operations are issued by county clerk and recorders. Wyoming's oil and gas staff meets with seismic crews before they begin initial operations in the state. This provides an opportunity for discussion of regulatory requirements outside the context of any specific operation. In Alberta and Utah inspectors try to be present when the seismic operations occur, while in Montana a sample of seismic shot holes may be inspected after plugging is completed. An option identified in the study would be to have companies report on whether water was discovered in any shot holes, and whether it was saline, fresh, artesian, or non-artesian. This information would allow inspectors to focus field investigations on the holes that would be most likely to affect water quality if improperly plugged.

Several other states and Alberta routinely attach site-specific environmental conditions to drill permits

that address reserve pit siting and construction, safety, surface uses, road placement and reclamation. Montana's BOGC feels it lacks the authority to condition drill permits for some of these purposes. Most state oil and gas laws reflect the concept that landowners should have a decisive role in determining how oil/gas activities are conducted and ensuring that the land and water are protected. Utah's oil and gas agency schedules pre-drill site inspections that are attended by representatives of the oil company, state agency staff and landowners to determine how proposed operations can be most appropriately conducted.

In Montana, companies are not required to submit soil and water data, pit construction plans or waste disposal plans with drill applications. The first site inspection often does not occur until after drilling has begun. The BOGC's rules require that construction of reserve pits must be adequate and that the pits must be sealed when necessary to prevent seepage. Salt water has to be properly impounded, and may only be placed in earth pits when the site is underlaid with heavy clay or hardpan. Site reclamation requirements specify that previous surface grade and productive capability must be restored and that drilling wastes must either be removed or buried.

The other states examined in the study require submission of special applications for constructing produced water disposal pits. For reserve pits, three other states and Alberta either conduct pre-drill site inspections or review construction plans and site data to regulate pit construction. Additionally Utah and New Mexico provide minimum permeability or seepage standards to define how to adequately seal a pit. New Mexico also has written construction guidelines that define acceptable procedures for constructing pits.

In Alberta and Utah companies drilling in areas where H₂S may be encountered are required to submit emergency response plans for protecting workers and the public in the event of an accidental release of H₂S gas. Montana does not have a similar requirement, although gas containing H₂S must be flared if it is not collected and treated.

Water Quality Monitoring

The need for a monitoring program in Montana to clarify the extent of water quality problems that may be caused or exacerbated by improper disposal of oil and gas field wastes and brines has been identified in previous studies. These include an EQC staff report prepared in 1978 and 1985 recommendations of the Governor's Ground Water Advisory Council. A separate but related issue concerns the reclamation of

improperly abandoned well sites that may cause damage to both the land surface and water quality. The recommendations have not been acted upon to date, but they remain valid because there has been very little information collected to verify the extent of these problems in Montana.

Montana has an Abandoned Well Reclamation Fund that was previously appropriated about \$65,000 per year from the Resource Indemnity Trust interest account, but the amount was reduced by the 1985 Legislature in part because only two or three reclamation projects were discovered and funded in the previous several years. Landowner complaints are the primary mechanism in current law for identifying a need for reclamation at abandoned well sites. To date there has not been a comprehensive field inventory of potential problem well sites. The Governor's Ground Water Advisory Council speculated in its 1985 report that the potential extent of ground water contamination problems from older wells and poorly reclaimed sites may be much greater than has been thus far identified.

During the 1987 legislative session, the BOGC submitted applications and received approval for approximately \$120,000 in three separate grants from the RIT interest account to plug three abandoned wells. The BOGC sought the grants because funds in the Abandoned Well Reclamation Fund were insufficient. Additionally, the BOGC requested a separate grant of \$37,000 from the environmental contingency account to plug a leaking well located within the city limits of Cut Bank. Toole and Sheridan counties also received \$250,000 from the RIT grants program for oil and gas reclamation and reserve pit and brine disposal assessment, respectively.

Montana: MEPA Review of Drilling Permits

MEPA embodies a state policy requiring the review of environmental impacts of state actions (see chapter on MEPA implementation). Under MEPA a brief written statement called a preliminary environmental review (PER) is prepared to determine whether a proposed action will significantly affect the quality of the human environment. If the PER indicates that significant effects would occur, an environmental impact statement (EIS) must be prepared.

The BOGC has approved an average of 900-1000 drilling permits in past years, although this amount has been greatly reduced more recently. The BOGC has not historically reviewed permit applications under the provisions of MEPA, except for Sohio's Bridger Canyon project in 1985. The BOGC believes that its approval of

drill permits is not a state action that must be evaluated according to MEPA procedures because it considers the decision non-discretionary or ministerial. Through its rules the Board has defined the drill application content and review process, including the time allowed for review, in a manner that makes permit issuance an essentially non-discretionary action. A major outstanding issue is whether the Board should exercise more discretion to direct oil and gas field operations than it currently assumes.

Sohio's Bridger Canyon Project

In October 1984 Sohio Petroleum Company applied for and received a drill permit from the BOGC for an exploratory, "wildcat" oil or gas well in the Bridger Canyon area north of Bozeman. After a group of residents sued in December 1984 to require the Board to follow MEPA requirements in issuing the permit, Sohio withdrew its application. During the 1985 legislative session a bill was introduced to establish that issuance of drilling permits is not a major state action under MEPA, but it died in committee. Thereafter, Sohio renewed its application and requested the Board to review the permit as though MEPA applied and to prepare a PER. This is the only PER the Board has written.

Residents of Bridger Canyon and other citizens of the Bozeman area expressed considerable opposition to the proposed Sohio well. Concerns included health and safety effects, and the risk of a H₂S blowout. There was also general opposition to the drilling and the possible eventual presence of one or more producing wells in a scenic, rural-residential area.

The public's concerns were registered in several forums, including a public hearing held by the BOGC in April 1985 prior to the draft PER, comments on the PER, and a hearing before the Bridger Canyon Planning and Zoning Commission. The zoning commission was involved because Sohio and the surface owners of the proposed well site had to obtain conditional use permits in accordance with requirements of a Bridger Canyon zoning ordinance which designated the area an "agricultural-exclusive" district.

Experts in blow-out prevention, safety, and control of H₂S-producing wells were brought in by both the citizens and Sohio to testify at the hearings and to otherwise furnish information. In addition, Sohio sponsored preparation of its own environmental impact report and developed a citizen evacuation plan for use in the event of an accidental release of H₂S. Other testimony and information submitted during the hearings concerned the effects of increased traffic in the Bridger Canyon area, access road construction, reserve pit construction, noise impacts, visual impacts, garbage and sewage disposal, and effects on water wells and air quality.

This public interest and opposition was unprecedented for proposed drilling of an oil and gas well on private land in Montana. Although the BOGC's PER was prepared at Sohio's request, the BOGC subsequently elected to take the unprecedented step of attaching a number of site-specific conditions to the drill permit. The conditions addressed volume of surface casing to be placed in the well, sewage disposal, volume of water use, reserve pit lining, removal of pit contents, a citizen evacuation plan and drilling safety. Also, commitments were made to conduct more frequent inspections than are normally done, and to prepare a detailed inspection checklist, with copies of the results of each inspection to be furnished to the zoning commission. The BOGC concluded that the issuance of the drill permit, as conditioned, was not a major action significantly affecting the quality of the human environment and therefore no EIS was required.

The review process led to approval of the Sohio drill permit in October of 1985, a year after the initial application was filed. Sohio began drilling in late January 1986, but in July announced that the well was a "dry hole" and would be abandoned.

The lack of a single, comprehensive environmental review document and a well-defined review process may have worked to the detriment of Sohio. This case raises at least two important points for consideration. First, environmental review of even very complicated drill projects in environmentally sensitive locations could be structured more efficiently, with reductions in the uncertainty and potentially the amount of time required to conduct the Sohio permit review. State agencies that routinely prepare PERs and EISs have learned to streamline the process without sacrificing the quality of environmental analysis. Second, the vast majority of drill permits would not require the level of review involved with the Sohio permit, assuming compliance with all aspects of the Board's regulations, and imposition of conditions/mitigation measures to address site specific environmental concerns.

CENEX's Coal Creek Project

A PER has been prepared by a state agency on only one other proposed oil/gas well on state or private land in Montana to date. The DSL received an "operating plan" from CENEX in early May 1984 for drilling an oil/gas well on the Coal Creek State Forest west of Glacier National Park. The "operating plan" was required as a result of lease stipulations identified by a 1983 PER prepared by DSL that examined the environmental consequences of oil and gas leasing in the forest. The DSL decided to prepare a detailed, site-specific environmental review of the planned drilling, and issued the resulting PER for public review and comment in October 1984.

Coal Creek State Forest is located in the drainage of

the North Fork of the Flathead River. The area has outstanding natural resource values, including a national scenic river, Glacier National Park, Glacier-Waterton Biosphere Reserve, and critical habitat for the grizzly bear and wolf. There is also a group of concerned citizens, the North Fork Coalition, monitoring all types of development in the drainage.

Based on the drill plan PER, the DSL identified a number of mitigation measures addressing water quality, accidents, man-bear incidents, bald eagle nesting, noise and visual impacts, and air quality. These measures, which were attached as conditions to the operating plan, played an important role in DSL's determination that environmental impacts would not be significant and that an EIS would not be necessary.

Public comments on the PER indicated some disagreement with this decision. In a supplement to the PER issued in January 1985, the DSL stated that an EIS would be written to examine the impacts and issues associated with oil and gas production on the Coal Creek Forest if a major hydrocarbon discovery resulted from the drilling. The DSL noted that it is highly unlikely that environmental review of a future production proposal would "identify a potential impact capable of entirely preventing development not identified at the previous exploration evaluation stage". The same discussion added, however, that "it is not possible to entirely rule out a denial for a production stage at the well site." The North Fork Coalition filed suit to require DSL to prepare an EIS on the Coal Creek drilling project. For these reasons as well as the current depressed market conditions, no drilling has occurred on the Coal Creek State Forest to date.

The sequential type of review DSL used on the proposed Coal Creek drilling operation has been described as "tiering" or "staged review". It recognizes that adequate information to predict impacts of potential future actions such as drilling and production may not be known at the time that leasing evaluations and decisions are made. Also, drilling does not ultimately occur on a high percentage of leases, and production does not result from many exploratory drilling operations.

The "tiered" review was possible because the DSL has authority to review all activity on state lands, and approval at one stage of operations is not a guarantee that subsequent approvals will be given. Federal agencies such as the Forest Service and Bureau of Land Management have followed a similar pattern in evaluating leasing and drilling decisions. It is important to note that issuance of permits by the BOGC has historically conveyed implicit approval to proceed with production. If commercial deposits of oil or gas are discovered, compliance with the BOGC's rules is required, but significant environmental review does not occur at the production stage.

Federal: NEPA Review of Drilling Permits

Oil and gas drilling is a category of activity that is normally “categorically excluded” from detailed environmental review under the National Environmental Policy Act (NEPA). A “categorical exclusion” does not mean that drilling is exempt from NEPA. Rather, it involves an evaluation that is roughly equivalent to the checklist type of PER many Montana state agencies currently use to determine whether significant impacts are likely to occur as the result of a proposed action.

Most drill permits qualify as categorical exclusions for at least three reasons. First, federal agencies have developed specific requirements for reserve pit design and other types of surface disturbance associated with oil and gas drilling that reduce most common types of environmental impacts. Second, forest or resource management plans contain information on and standard restrictions for various types of uses on public lands that further limit potential impacts. Third, for some areas, oil and gas leasing programmatic EISs have already assessed many of the impacts of oil and gas exploration and development and identified mitigation measures for these activities. Available background data and the location proposed for drilling are examined to determine whether a proposed drill operation is likely to cause significant adverse environmental impacts.

Mitigation measures submitted by the applicant, another agency or the BLM as part of the original project proposal are acceptable for reducing impacts below the “significance” threshold. Standard stipulations may also be attached to the drill permit to accomplish the mitigation. If these stipulations/mitigation measures are not adequate to reduce impacts to the point that they are no longer considered “significant”, only at that point would the project not qualify for a categorical exclusion. In that event, an environmental assessment (EA) would be prepared to define site-specific mitigation measures to reduce impacts.

If significant impacts remain after an EA is completed and mitigation is identified, an EIS must be prepared to accomplish the more detailed level of review required to address those impacts.

There are approximately a dozen states with environmental policy acts and three of them (Michigan, New York, and California) have significant oil and gas production and drilling activity. In these three states applications for oil and gas drill permits are reviewed for potential environmental impacts.

Programmatic Environmental Impact Statement

The environmental review process can be viewed as a series of screening steps. Projects with only minor environmental impacts may be approved based on very brief review, while very detailed analysis such as is contained in an EIS would be necessary only for drilling proposals in the most environmentally sensitive locations. A first step in complying with environmental review requirements is the compilation of background environmental information and analyses. One method of assembling this information is through preparation of a programmatic environmental impact statement. A programmatic statement is a document that would identify and evaluate the range of adverse impacts that can occur from oil and gas operations in a variety of locations representative of the major producing basins and ecosystems in Montana, and identify potential mitigation measures or environmental stipulations that would reduce the impacts. Examples of standard mitigation include practices such as removing and stockpiling topsoil for replacement during reclamation, constructing roads in a manner that minimizes the potential for erosion, and procedures for crossing streams with heavy equipment that result in only short term impacts. If a proposed drilling plan appropriately addresses these types of considerations, no stipulations may need to be attached to the drill permit.

The environmental review process can be viewed as a series of screening steps. Projects with only minor environmental impacts may be approved based on very brief review, while very detailed analysis such as is contained in an EIS would be necessary only for drilling proposals in the most environmentally sensitive locations. A first step in complying with environmental review requirements is the compilation of background environmental information and analyses. One method of assembling this information is through preparation of a programmatic environmental impact statement. A programmatic statement is a document that identifies and evaluates the range of adverse impacts that can occur from oil and gas operations in a variety of locations representative of the major producing basins and ecosystems in Montana, and that identifies potential mitigation measures or environmental stipulations that would reduce the impacts. Examples of standard mitigation include practices such as removing and stockpiling topsoil for replacement during reclamation, constructing roads in a manner that minimizes the potential for erosion, and procedures for crossing streams with heavy equipment that result in only short term impacts. If a proposed drilling plan

appropriately addresses these types of considerations, no stipulations may need to be attached to the drill permit.

Based on the experience of other states and federal agencies, it appears that the large majority of drilling proposals do not create significant environmental impacts, and that this determination can be made quickly, especially if the potential impacts and appropriate mitigation have already been documented through a programmatic review.

MEPA review would necessarily have to be integrated with the Board's rules and regulatory requirements, especially if mitigating conditions were to be imposed on drill permits. This end result is similar to that of regulatory processes already in place under existing oil and gas statutes in other Rocky Mountain states.

Legislation was initially introduced in the 1987 session that was identical to the bill in 1985 that proposed to exempt issuance of oil and gas drilling permits from MEPA. However, by consensus of the administration, the oil industry and a number of public interest groups, in its final form the legislation exempted issuance of drilling permits from MEPA until a programmatic statement is prepared and adopted by the BOGC, but not later than June 30, 1989. Preparation of the statement will be supervised by the

Governor's office and funded by an appropriation of \$183,800 from the RIT grants program.

Based on EQC's interim study, MEPA review of oil and gas drilling projects will be likely to provide several positive contributions to the regulatory process in Montana, considering the perspectives of landowners, the oil industry and the public. Both industry and government agencies have stressed the importance of clear regulatory requirements for allowing development to proceed in a timely and appropriate manner, and for minimizing the potential for conflicts and litigation. Based on MEPA review, the potential adverse environmental impacts and mitigation measures would be identified before project activities begin. A programmatic EIS will provide the added benefit of allowing a significant portion of the environmental analysis to occur prior to the review of individual oil and gas projects, and establishing up-front requirements and guidelines for industry to follow in designing drilling and production operations.

MEPA review also may minimize conflicts among regulatory agencies, industry, environmental groups, landowners and other concerned citizens by providing a formal, constructive context for information dissemination, public review and input, industry and agency response, and interagency coordination.

NORTHWEST POWER PLANNING COUNCIL

This chapter is an overview of the activities of the Northwest Power Planning Council (NWPPC) and the effects these activities are having on Montana. One purpose for this overview is to identify potential areas of EQC involvement in the council's regional planning activities and related programs in Montana.

The other main purpose relates to the EQC's statutory oversight of the Renewable Energy and Conservation Program (RECP). There are a significant number of other energy conservation programs in western Montana that are funded by the Bonneville Power Administration (BPA) and carried out by the Department of Natural Resources and Conservation (DNRC), utilities and rural electric cooperatives. DNRC also administers several statewide conservation programs that are funded by the U.S. Department of Energy. Also, utilities throughout the state are devoting their own funds to conservation programs. Many of these conservation efforts are a direct result of electric energy planning activities that have occurred in the Northwest over the past several years.

Montana's electric power supply and distribution system is owned and operated by a number of investor-owned utilities, rural electric cooperatives and federal agencies. This system is interconnected and is also part of a much larger, regional system which crosses service areas and state boundaries. Because of the integrated nature of the Northwest regional electric system, the NWPPC's activities and the programs and policies of the BPA have a significant effect on Montana. Montana is also confronted with some unique issues because it is the only one of the four Northwest states represented on the NWPPC that is not wholly included within the BPA service area.

The NWPPC, authorized by Congress and created by the four Northwest states in 1981, was charged with developing a 20-year regional conservation and electric power plan. At the same time the BPA was given responsibility for financing and acquiring new and existing non-federal generating facilities, subject to the guidance provided in the council's plan. BPA is required to give preference to energy conservation and

renewable energy sources, and to gain the council's approval for any acquisitions over 50 megawatts (MW). The NWPPC also provides a mechanism for the four Northwest states to work with BPA.

This chapter looks at some of the effects of the council's activities on Montana, addressing areas where related BPA programs and funding overlap with state programs and issues that are of concern to the EQC.

Utilities have historically tended to plan for additional generating and transmission facilities in order to meet the specific needs and load growth of their individual service areas, and to take advantage of opportunities to market power at favorable rates in other areas. Utilities have cooperated where necessary, such as by forming consortiums to finance new generating sources and by pooling and exchanging power under both long- and short-term contracts. The new elements that the NWPPC brings to electric system planning and decision-making are an intensive public participation process and an independent capability for analyzing and forecasting energy supply and demand for the region as a whole.

Dramatic changes in the past dozen years in energy consumption and pricing patterns and the levels of investment required to build major new generating resources have mandated more sophisticated forecasts of energy demand. While many individual utilities have incorporated these improved methods into planning for their own service areas, the extensive data base and modelling capabilities developed by the NWPPC to produce the regional plan are an important technical resource that both states and utilities draw upon. The extensive public participation process that the council uses to develop the plan also lessens the likelihood that significant information will be overlooked and costly errors made.

Over the years the EQC has taken a significant interest in the Major Facility Siting Act and the state's evaluations of new generation and transmission facilities. Monitoring the regional planning process and the development of policies that will influence the timing of the need for future facilities represents a continuation of the EQC's interest in this topic area.

Issues of Concern to Montana

BPA has provided power to seven Montana rural electric cooperatives, the Montana Power Company (MPC), Pacific Power and Light (PP&L), the Flathead Irrigation Project and the Columbia Falls aluminum plant. The power provided in 1984 is shown in the table below. The availability and cost of this power is very important to these Montana customers, and is directly influenced by the NWPPC through its planning responsibilities.

BPA Sales in Montana (1984)

<u>Customers</u>	<u>Ave MW</u>
Flathead	14.8
Glacier	18.8
Lincoln	7.6
Missoula	13.1
Northern Lights	13.7
Ravalli	8.4
Vigilante	<u>12.0</u>
Total Co-ops	88.4
MT Power	54.4
Pacific Power and Light'	28
Flathead Irr. Project	18.4
Non DSI	192.8
Columbia Falls Aluminum Co.	<u>307.5</u>
Grand Total	496.7

1 Commercial sector load not included; 1983 data

System Operation

MPC and PP&L both exchange power with BPA and their systems are directly affected by the operation of the Northwest hydroelectric system. MPC's hydro system includes dams on both the east (Missouri River Basin) and west sides of the Continental Divide. MPC's operation of its entire system, particularly in meeting peak energy demand, is influenced by the operation of the regional electric system. Also, the availability of power for purchase and/or exchange from BPA presents alternatives for MPC to constructing new dams or adding turbines to existing dams.

There are several transmission "intertie" issues of concern to Montana. Intertie is the term for high voltage transmission lines that serve as critical links in the regional system for moving large volumes of power to major load centers. The main intertie lines are located on the West Coast, owned by BPA and used primarily to transmit bulk power from the Northwest hydroelectric system to California and the desert Southwest. BPA's intertie access policy is structured to benefit Northwest utilities. However, Colstrip Unit 4 is considered to be outside the region and therefore is not eligible to use the West Coast intertie. This severely limits the ability of the MPC to market the power from this unit.

Private, investor-owned utilities are interested in building a new "inland" intertie, in part to have an alternative means of reaching the Southwest markets, and to provide additional capability to exchange power with that region on a seasonal basis. Construction of an inland intertie is also attractive from the standpoint of

strengthening and stabilizing the regional transmission system. Both Montana and Idaho locations have been identified as possible northern end-points for a new inland intertie. The mid- to late 1990's is the potential goal to have an inland intertie constructed and operating.

The NWPPC is conducting its own study of intertie issues because of the significant implications of long-term bulk power sales out of the region for the operation of the Northwest electric system, the demand for additional generating sources and the availability of adequate power supplies for Northwest customers.

It is important to note that if a Montana location for an inland intertie is proposed and eventually selected for construction, this will have significant environmental implications, due to the intertie itself, and also to new generating facilities that may be proposed to take advantage of the new transmission capacity.

Rates

The survival of the Columbia Falls aluminum plant is highly dependent on its expenses for electricity. BPA has adopted variable rates for its "direct service industry" customers, such as the plant, that are linked to the market price of aluminum. Montana's representatives on the NWPPC have played a central role in communicating with BPA management about the importance of these rates. BPA has also initiated a program to modernize aluminum smelters in the Northwest and thereby conserve energy.

Under the Northwest Electric Power Planning and Conservation Act, BPA is obligated to exchange power with Northwest utilities to meet residential and small farm loads at a price equal to its current average system cost. This provision essentially provides rate relief to investor-owned utilities (and their residential and small agricultural customers). MPC has seldom used this provision because its average system costs have typically been lower than BPA's, but this situation may be reversed as MPC's rates increase as Colstrip Unit 3 is phased into the rate base. PP&L serves loads in northwest Montana and has been exchanging power with BPA under this program. PP&L estimates that each residential and small agricultural customer is saving \$80-\$100 per year on utility bills as a result.

Environmental Concerns

Reservoir levels at Hungry Horse and Libby dams are determined by BPA's overall operating plan for the Columbia River hydroelectric system. Northwestern Montana local governments have expressed concern about low water levels in the reservoirs and the resulting adverse effects on recreation and the local economy. Montana's NWPPC representatives have

been working with BPA to determine whether plan modifications could allow more water to be retained in the reservoirs, particularly during the months of heaviest recreational use.

Mitigation of adverse impacts to fish and wildlife due to past construction of the hydroelectric system is an important component of the Power Planning Act. To carry out its responsibilities in this area, BPA has provided millions of dollars to regional wildlife management agencies, including the Montana Department of Fish, Wildlife and Parks. During the past five years, the department has used these funds to investigate the impacts of proposed small-scale hydro development on the Swan River, to develop operation plans for Hungry Horse and Kerr dams to help the Flathead Lake and Flathead River fisheries, to quantify the value of terrestrial wildlife habitats inundated by hydropower reservoirs, to restore bighorn sheep populations along Lake Kootenai, and to conduct numerous other projects to restore fish and wildlife resources in the Columbia drainage. Montana's FY 87 fish and wildlife budget from BPA was about \$1.25 million, and major efforts will continue to focus on the Clark Fork, Kootenai and Flathead drainages.

BPA funded the Northwest Rivers Study under the provisions of the Power Planning Act. Through the study, Montana and the other three Northwest states collected data that can be used for ranking their rivers and streams based on fish, wildlife, recreational, aesthetic and cultural values. The information gained from the rivers study may facilitate future hydropower planning by steering developers away from sites with exceptional natural values.

Conservation and Renewables

Part of EQC's statutory oversight of the RECP involves evaluating the most appropriate disbursement of state funds to encourage implementation of energy conservation and renewable energy technologies. This also includes ensuring that limited resources are directed where the need is greatest, that program duplication is avoided and that coordination occurs between the RECP and various other federally funded programs that address specific energy conservation needs. Because of the specific preference given to energy conservation in the Power Planning Act as a means of addressing future regional power needs, extensive portions of the regional plan are devoted to building the capability to acquire energy conservation and to directing BPA to implement a number of energy conservation programs, including those listed below. The DNRC administers some of these programs in Montana. Others are available directly from BPA on a regionwide basis or through utilities and coops served by BPA.

Residential Weatherization Program
Low Income Weatherization Program
Appliance Efficiency Program
Super Good Cents Program
Irrigated Agriculture Program
New Residential Demonstration Program
Institutional Buildings Program
Technical Assistance to Local Governments/Small Consumers Program
Financial Assistance to Local Governments/Indian Tribes
Energy Smart Design for Commercial Buildings
Biomass Utilization and Cogeneration Program

There are programs funded by the U.S. Department of Energy, including the Institutional Conservation Program, State Energy Conservation Program, Residential Conservation Service, Energy Extension Service, and Low Income Weatherization, that provide services on a statewide basis. However, the level of activity and availability of program funds for energy conservation is greatest in western Montana. Because Montana is not eligible for BPA-funded programs on a statewide basis, it is important to identify additional ways to transfer the information being developed in the Northwest to other areas of Montana.

The NWPPC is also encouraging Northwest utilities to develop a comprehensive approach to energy conservation. In the power plan the NWPPC treats conservation as an energy resource. Decisions about the appropriate amount of investment that conservation should receive hinges on its cost-effectiveness as compared to other resources. Conservation and energy-efficient design is the cost-effective choice for new buildings in all the residential, commercial and industrial sectors, both from the standpoint of reducing energy costs to individual building owners and postponing the date when far more expensive new thermal generating resources have to be added to the regional system. A coordinated approach to conservation planning by all the state's utilities should be encouraged.

Energy conservation for low income households is an area where the NWPPC has specifically directed BPA to depart from requirements commonly included in most existing utility programs. Most weatherization programs require the homeowner to pay a certain percentage of the costs of energy-retrofit. BPA has been directed to pay all the costs Northwest utilities incur to weatherize low income homes. Availability of federal funds for weatherization from the U.S. Department of Energy is generally decreasing, while the demand for weatherization and retrofit of low income homes appears to be increasing.

With regard to renewable energy, the NWPPC is primarily concerned that the public service commissions in the four states should develop a consistent approach to setting the rates at which major utilities purchase power from renewable energy

facilities owned by independent producers. Although state PSC's are required to determine purchase rates based on individual hearings for each utility, the NWPPC believes that rates should be comparable among the states so that development of renewable energy sources occurs evenly throughout the region. For a time Montana's "buy-back" rates were the highest in the region, but over the past year they have decreased.

Northwest Conservation and Electric Power Plan

The NWPPC is charged with developing a 20-year plan to provide for "all the electricity the region would need at the lowest possible cost." The Northwest Electric Power Planning and Conservation Act gives conservation first priority for acquisition as a resource to serve the electric needs of the region, followed by renewable energy sources (solar, wind, hydro, etc.), cogeneration, and coal/nuclear facilities.

The NWPPC adopted a new plan in early 1986 because of major changes in the region since the first plan was adopted in 1983. The changes include: 1) the surplus of expensive electricity generated from coal and nuclear plants; 2) the fact that the highest load growth is occurring in urban areas served by investor-owned utilities that have a smaller surplus than the BPA and that are not presently served by BPA; 3) uncertainties about the amount of load the investor-owned utilities (IOU's) may eventually place on BPA; 4) uncertainties about future electric needs of the aluminum industry; 5) uncertainties about the ability eventually to complete construction of two nuclear plants; and 6) uncertainties about the rate that new buildings are being constructed to be energy efficient in accordance with the Model Conservation Standards (MCS).

The current Northwest Conservation and Electric Power Plan is composed of the following major sections: a forecast of future electricity demand, an assessment of the conservation and generating resources currently and potentially available, a "resource portfolio" which identifies the energy resources that are most cost-effective and that should be acquired by BPA at some point, and an "Action Plan" describing the activities that the NWPPC, BPA, the region's utilities, and the public service commissions in the four Northwest states need to undertake to meet the region's future power needs in a timely and cost-effective manner.

It is important to note that the NWPPC treats conservation as the equivalent of a generating resource because each megawatt of energy saved is a megawatt that need not be produced. Actions that should be taken to conserve energy comprise a significant proportion of the activities called for in the Action Plan. Because the plan is regional in scope the electricity demand forecasts and resources to be acquired are not reported by state. Also, only one-third to one-half of Montana is affected by the plan. The geographic area included in

the plan in Montana is determined by the service area boundaries of the rural electric cooperatives and IOU's that purchase power from BPA.

Model Conservation Standards

The MCS are "model conservation standards" for new building construction that were first proposed by the NWPPC in 1983. The NWPPC determined that since most residential and commercial buildings constructed today are likely to last considerably longer than the current surplus of electricity, all cost-effective conservation should be captured at the time the buildings are constructed. Where such cost-effective measures are not installed at the time of construction, it can be prohibitively expensive and impractical to return to a building structure and add the measures later.

The MCS are expressed in the form of energy efficiency levels for new electric-heated residences and all new commercial buildings. Homebuilders can choose a number of methods to meet the MCS, including incorporating the following design components in a building: insulation in ceilings, walls and floors; type and placement of windows (as a percentage of floor area); infiltration control; and mechanical ventilation with heat recovery systems. In the "Model Conservation Standards Equivalent Code" (February 1986), the NWPPC identifies specific methods for complying with the MCS.

The MCS represent an added incremental cost to the homeowner of about \$5100 over present building practices for the average size home if the costs of mechanical ventilation and heat recovery are included or about \$2,500 without the ventilation measure. The NWPPC uses a life-cycle cost calculation method to characterize the benefits of the MCS to homeowners. These benefits include lower utility bills and the added value energy efficiency measures give to a home at the time of resale. In addition to being cost-effective to the region (as compared to energy generated from other sources), the MCS measures must be economically

feasible for consumers. This means that a consumer must have the same or better cash flow over the life of a mortgage than if a home of similar size and constructed according to current building practices had been purchased.

The NWPPC's 1983 approach to the MCS emphasized the use of building codes as the least expensive way for the regional power system to acquire cost-effective conservation. While the NWPPC still strongly encourages state and local jurisdictions to adopt the MCS for new residential and commercial buildings as building codes, the current version of the plan also focuses on utility conservation programs designed to encourage MCS implementation through marketing and financial assistance. It is felt that building practices will be improved through these programs and the costs of the MCS thereby reduced.

BPA initiated a marketing program known as "Super Good Cents" aimed at achieving 5,000 houses built to the MCS in the region in FY 86. Houses built and marketed through the program are certified as energy efficient by electrical utilities. The goal of certification is to encourage lenders, sellers, and buyers to recognize the added value of an MCS home because it is less expensive overall to own and heat compared to a similar size home built under current construction practices. The Super Good Cents program is implemented by local utilities that purchase power from BPA. Under present policies BPA is providing \$1500 for 1987 and 1988 for each residence built in accordance with the MCS with an additional \$500 available for mechanical ventilation and heat recovery. For utilities such as MPC that exchange power but are not primarily served by BPA, a total of \$500 per house will be available from BPA if the utilities adopt the Super Good Cents program.

An example of BPA's activities in the commercial sector is the "Energy Edge" energy efficient building design program. Under this program BPA awarded approximately \$200,000 to a Kalispell school district to incorporate the MCS plus additional conservation measures into a new elementary school. The school will save an estimated \$18,000 in operational costs the first year due to the energy efficiency measures.

The Surcharge

All utilities that are contracted to purchase BPA power must encourage incorporation of the MCS in new buildings in their service areas. This can be accomplished by: 1) participating in the Super Good Cents program; 2) adopting an acceptable alternative program designed to achieve an equivalent market penetration rate for MCS homes; or 3) having their service area located within state or local jurisdictions that have adopted the MCS as building codes. Where none of these conditions apply, the plan states that BPA should add a surcharge of 10 percent on the power a

utility purchases from BPA. BPA is still in the process of finalizing its surcharge policy. All of the western Montana coops have adopted the Super Good Cents program. It is not possible to apply the surcharge to utilities such as MPC and Pacific Power and Light unless they purchase power from BPA. Power purchased on exchange from BPA can be surcharged. Pacific Power and Light is exchanging at present, but MPC is not. Nevertheless these two utilities consider conservation a desirable investment and they are currently developing conservation programs.

Ventilation/ Heat Recovery

The MCS are regionally cost-effective when evaluated as an entire package of building design features and components (i.e., it is less costly to the region for BPA to purchase energy-efficiency in new buildings than to pay for electricity from new generating sources such as coal plants). However, recent data indicate that specific measures in the package — such as the mechanical ventilation/heat recovery component — are not as cost-effective as originally thought. The "heat exchangers" have some technical and operational problems. Also, existing houses are about twice as tightly constructed as data originally indicated. This information has a number of important implications. Because existing houses are tighter, the MCS do not save as much energy compared to existing building practices. The ventilation measure accounts for about half the total cost of the MCS (about \$2600) but, based on recent data, only accounts for a small percentage of the total energy savings achieved by the MCS.

BPA completed a major assessment of the cost-effectiveness of mechanical ventilation and air tightening/infiltration control in residences in the fall of 1986 that concluded that these measures are not cost-effective. The NWPPC subsequently revised the plan to provide options for complying with the MCS that do not include these measures.

An issue related to ventilation is indoor air quality and the potential for unacceptably high concentrations of pollutants such as formaldehyde and radon in tightly constructed buildings. From an air quality perspective, it is not entirely clear how much fresh air, measured as air changes per hour, is necessary inside a home to protect the occupants' health. Aside from the air quality issue raised by "supertight" building construction, it may be necessary to insure some level of ventilation in homes built according to current practice since they are much more tightly constructed than previously thought. BPA and others are studying indoor air quality, but it is unclear at present how a response to this issue will ultimately be reconciled with BPA's mission of providing cost-effective energy to the region.

Manufactured Homes

A large number of new homes purchased in the Northwest are manufactured houses subject to standards adopted by the U.S. Department of Housing and Urban Development (HUD). Neither the NWPPC nor state and local governments can mandate energy efficiency standards for these types of homes. BPA is already implementing demonstration programs to construct manufactured houses according to the MCS and monitor both the costs and the energy consumption. Based on the directives in the Action Plan, BPA will also provide marketing or financial incentives to producers and consumers of manufactured houses in order to incorporate all regionally cost-effective conservation measures. The plan notes that there is little likelihood of action being taken at the national level on new manufactured housing efficiency standards in the foreseeable future.

Conservation from Existing Uses

Because of the surplus of electric energy in the region and the fact that energy efficiency improvements in existing buildings, industrial processes and irrigated agriculture can be deferred until additional electricity is needed to meet loads, the Action Plan directs BPA not to acquire conservation from these existing sources at this time.

Three of the western Montana coops are implementing a BPA conservation program for irrigators to encourage conservation. Irrigators are offered a free system inspection to identify if systems could be operated more efficiently. If the irrigator agrees to make modifications on pumps, replace fittings, or undertake other changes, BPA will pay 50 percent to 80 percent of the cost, based on a subsequent evaluation of the actual savings achieved. Irrigation system inspections are currently being offered and in one or two cases have led to irrigation system modifications.

Non-firm Strategies

The availability of a significant block of the region's hydroelectric resource is dependent on water conditions that vary from year to year. If alternative energy resources were available when water conditions

are inadequate to use all of the hydro capacity in the system, this would allow the region to count on 714 additional average megawatts of "secondary" hydropower to meet firm power needs. Some alternatives BPA is directed to investigate include combustion turbines, short-term power purchases from Canada or other parts of the U.S., and load-management policies that more closely match the region's power loads with the output of the hydropower system.

New Generation

The region currently has a surplus of electricity, so the key focus of near-term actions called for in the Action Plan is not to acquire more resources, but rather to improve regional cooperation among the NWPPC, BPA, utilities, state siting and regulatory commissions, environmental groups and state energy offices. The orientation is to build the capability to acquire energy resources when needed. The state PSC's and IOU's, such as MPC, are encouraged to capture "lost opportunity" resources first (e.g., conservation in new buildings) and to develop a consistent policy for purchasing new renewable energy resources. BPA is directed to develop a "standard power purchase offer" to encourage development of the higher priority resources (conservation, renewables) to the extent they are cost-effective and environmentally acceptable. BPA's purchase offer is also supposed to be instrumental in identifying decentralized and non-utility energy resources.

Renewable Energy

Electricity from renewable sources other than hydropower is currently more costly than from coal plants. Therefore renewables are not included in the resource portfolio. However, the plan has found that best estimates of geothermal resources in the Cascades may reach the cost-effective level when verified. The plan also calls for continued data collection and efforts by BPA to confirm the availability of other resources such as wind, bioenergy and solar insolation.

Local Authority Action

The Action Plan contains a special section recommending that the region's PSC's and IOU's focus on increasing their cooperative planning and policy

development efforts, with emphasis on conservation programs and renewable resource development.

Since new buildings represent the major “lost opportunity” resource in the region if they are not initially built to conserve energy, the NWPPC encourages the IOU’s and PSC’s to consider providing incentives to homebuilders to modify building practices for more efficient construction. Options open to the IOU’s include marketing programs similar to the Super Good Cents program and participation in BPA’s research on more efficient buildings. The Action Plan indicates that the PSC’s could consider providing favorable rate treatment for utility expenditures for conservation purposes.

According to the Action Plan, weatherization programs throughout the region should be operated at minimum viable levels, but it is noted that lost opportunities can be created by only partially weatherizing homes. Hence, utilities are encouraged to install all cost-effective measures in homes that are weatherized. Also, utilities are urged to encourage more participation by low income persons and to pay the full cost of weatherization measures installed in their homes.

While aggressive acquisition of renewable energy resources is not needed at this time the Action Plan urges PSC’s and IOU’s to establish consistent policies for pricing these resources, and acquiring only those that are cost-effective when compared to BPA’s purchase rate for other new resources. The Action Plan further recommends that the IOU’s and PSC’s exercise care in not over-committing to long-term, out-of-region sales of existing resources because of the uncertainty concerning the duration of the current energy surplus. PSC’s are encouraged to consider ways to provide favorable rate treatment for utility costs of developing and holding an inventory of energy resource options that they would not actually construct or purchase until the energy is needed. PSC’s are also urged to encourage transaction opportunities among utilities with surplus resources and those within the region that currently need them.

State and Local Government Action

The Action Plan directs BPA to continue providing technical and financial assistance to both state and local governments for a variety of purposes including identifying conservation opportunities in institutional buildings and long-term efforts to implement the MCS. BPA sponsors numerous conservation-related training seminars and educational programs for all segments of the shelter industry (builders, architects, bankers, realtors, appraisers, code officials and interested homeowners) as well as MCS-demonstration programs.

The DNRC administers many of these training programs. Further training efforts are oriented toward irrigators and irrigation specialists regarding energy efficient irrigation techniques and strategies.

Implications for Montana

This section addresses only the major topics contained in the Action Plan that require a response from Montana state and local governments and utilities. When evaluating specific aspects of the Action Plan and the activities it calls for, it is important to keep the main purpose of the overall power planning effort in mind: ensuring an adequate supply of electric energy at the lowest cost.

Model Conservation Standards

Recent data from the NWPPC indicate that if 85 percent of electric-heat, new single family homes in Montana were built to the MCS over the 20-year future, an estimated 19 average megawatts worth about \$7.6 million per year (1986 dollars unadjusted for inflation) would be saved by Montana consumers. Considering only western Montana, 8 average megawatts worth approximately \$3 million would be saved.

According to 50-60-202 and 50-60-203, MCA, the Montana Department of Commerce (DOC) is responsible for adopting or modifying the state building codes through rule-making. County and municipal governments may subsequently choose to adopt and enforce all or a portion of the codes but they may only adopt codes already approved by the DOC.

An interim legislative committee was established in 1983 to review the original plan and report to the 1985 Montana Legislature. The interim committee recommended that the state should “review and upgrade the energy provisions of the State Building Code ...and should specifically consider the incorporation in the Code of the Model Conservation Standards ...for at least that portion of Montana including the Bonneville Power Administration Service territory.” To date this administrative action has not occurred, in part due to the apparent controversy over the issue, and also because western Montana local governments have not requested the option of adopting the MCS.

Adoption of the MCS as a building code in Montana is a complicated issue for many reasons. As noted previously, only about one-third to one-half of the state is affected by the plan and by BPA's activities (depending on whether the MPC service area is included). Energy efficiency in new home construction is the most cost-effective energy option for both the region and for the individual homeowner, although a period of several years is needed for the homeowner to recoup the higher up-front cost of incorporating energy efficient features that exceed current building practices.

Significant progress is being made in educating the shelter industry and the public at large about both the benefits of energy-efficient construction and the "hands-on" techniques required to build MCS homes. However, a large educational task remains. Some persons feel that greater understanding of the MCS is needed by all segments of the shelter industry and the homebuying public before a regulatory approach to MCS implementation, such as building codes, can be successful. Those persons tend to favor the current emphasis on marketing and incentives to encourage energy-efficient building construction. Other persons point to the examples of local jurisdictions in Washington state that have already adopted the MCS as codes, and statewide improvements in building codes in both Washington and Oregon that achieve part of the objectives of the MCS. It should be noted that from 1986-88 BPA is providing special financial and technical assistance under the Early Adopter Program to local governments that adopt the MCS.

Resource Options

The 1985 Legislature passed a bill amending the Major Facility Siting Act in a manner designed to accommodate the resource optioning process called for in the Action Plan. The amendments provide a six-year period following issuance of a siting certificate before construction must begin on generating facilities. There are also provisions for extending that time if the project sponsor can show that good faith efforts are underway to obtain any other necessary permits or if the project is under judicial review. The purpose of these provisions is to allow project sponsors to obtain necessary permits and complete as much of the regulatory process as possible but to avoid constructing new generating facilities until the electricity is needed and thereby minimize costs.

Most other aspects of the resource acquisition process discussed in the Action Plan are administrative and focus on improving coordination among project sponsors, BPA and state governments in order to ensure that new energy resources can be acquired in a timely manner when needed. The plan also calls for

data collection to better explore renewable energy resources, and recommends that the PSC's in the Northwest states develop a consistent approach to setting the price utilities pay renewable energy developers to purchase electricity.

In summary the Northwest Electric Power Planning and Conservation Act established an on-going effort to plan the electrical energy future of the Northwest and to rectify past damage to the region's fish and wildlife resources due to hydroelectric development. The NWPPC, in association with the BPA, the region's utilities, and numerous public interest groups, is continually refining the information that is used to develop projections of future energy demand, manage the current energy surplus, and achieve the best blend of future supply options.

Montana's participation in this process will be an area for continuing EQC monitoring and involvement.

DOCUMENTS SUBMITTED UNDER MEPA, 1986

State agencies submitted the following preliminary environmental reviews and final environmental impact statements in 1986

	PER	FEIS
Health and Environmental Sciences	140	1
Highways	16	2
State Lands	32	2
Fish, Wildlife and Parks	5	1
Natural Resources and Conservation	1	
TOTAL	194	6

MONTANA ENVIRONMENTAL POLICY ACT

Part 1

General Provisions

75-1-101. Short title. This chapter 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 the adoption and application of environmental rules, 90-1-101.

75-1-102. Purpose. The purpose of this chapter is to declare a state policy which will encourage productive and enjoyable harmony between man and his environment, to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man, to enrich the understanding of the ecological systems and natural resources important to the state, and to establish an environmental quality council.

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

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

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

- (a) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
- (b) assure 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) preserve important historic, cultural, and natural aspects of our unique heritage and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

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

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

(3) The legislature recognizes that each person shall be entitled to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

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

Cross-References

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

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

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

Renewable resource development, Title 90,
ch. 2.

75-1-104. Specific statutory obligations unimpaired. Nothing in 75-1-103 or 75-1-201 shall in any way affect the specific statutory obligations of any agency of the state to:

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

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

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

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

75-1-105. Policies and goals supplementary. The policies and goals set forth in this chapter 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.

Part 2

Environmental Impact Statements

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

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

(b) all agencies of the state, except as provided in subsection (2), shall:

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

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

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

(A) the environmental impact of the proposed action;
(B) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(C) alternatives to the proposed action;
(D) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

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

(iv) study, develop, and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

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

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

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

(viii) assist the environmental quality council established by 5-16-101; and
(c) prior to making any detailed statement as provided in subsection (1)(b)(iii), the responsible state official shall consult with and obtain the comments of any state agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate state, federal, and local agencies which are authorized to develop and enforce environmental standards shall be made available to the governor, the environmental quality council, and the public and shall accompany the proposal through the existing agency review processes.

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

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

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.

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

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

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

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

contract, license, or certificate will require an agency to compile an environmental impact statement as prescribed by 75-1-201. An agency must determine within 30 days after a completed application is filed whether it will be necessary to compile an environmental impact statement and assess a fee as prescribed by this part. The fee assessed under this part shall be used only to gather data and information necessary to compile an environmental impact statement as defined in this chapter. No fee may be assessed if an agency intends only to file a negative declaration stating that the proposed project will not have a significant impact on the human environment.

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

Cross-References

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

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

75-1-203. Fee schedule — maximums. (1) In prescribing fees to be assessed against applicants for a lease, permit, contract, license, or certificate as specified in 75-1-202, an agency may adopt a fee schedule which may be adjusted depending upon the size and complexity of the proposed project. No fee may be assessed unless the application for a lease, permit, contract, license, or certificate will result in the agency incurring expenses in excess of \$2,500 to compile an environmental impact statement.

(2) The maximum fee that may be imposed by an agency shall 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 ½ of 1% of any estimated cost over \$20 million and up to \$100 million, plus ¼ of 1% of any estimated cost over \$100 million and up to \$300 million, plus ⅓ of 1% of any estimated cost in excess of \$300 million.

(3) If an application consists of two or more facilities, the filing fee shall be based on the total estimated cost of the combined facilities. The estimated cost shall 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. Furthermore, each agency shall 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.

History: En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(2), (7).

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

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

Cross-References

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

75-1-205. Use of fees. All fees collected under this part shall be deposited in the state special revenue fund as provided in 17-2-102. All fees paid pursuant to this part shall be used as herein provided. Upon completion

of the necessary work, each agency will make an accounting to the applicant of the funds expended and refund all unexpended funds without interest.

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

Compiler's Comments

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. No fee as prescribed by this part may be assessed against any person, corporation, partnership, firm, association, or other private entity filing an application for a certificate under the provisions of the Montana Major Facility Siting Act, chapter 20 of this title.

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

Part 3

Environmental Quality Council

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

History: En. by Code Commissioner, 1979.

Cross-References

Qualifications, 5-16-102.

Term of membership, 5-16-103.

Officers, 5-16-105.

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

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

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

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

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

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

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

Cross-References

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

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

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

Criminal contempt, 45-7-309.

75-1-313. Consultation with other groups — utilization of services. In exercising its powers, functions, and duties under this chapter, 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 through 75-1-320 reserved.

75-1-321. Appointment and qualifications of executive director.

The council shall appoint the executive director and set his salary. The executive director shall hold a degree from an accredited college or university with a major in one of the several environmental sciences and shall have at least 3 years of responsible experience in the field of environmental management. He shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of all kinds; to appraise programs and activities of the state government in the light of the policy set forth in 75-1-103; to be conscious of and responsive to the scientific, economic, social, aesthetic, and cultural needs and interests of the state; and to formulate and recommend state policies to promote the improvement of the quality of the environment.

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

75-1-322. Term and removal of executive director. The executive director is solely responsible to the council. He shall hold office for a term of 2 years beginning with July 1 of each odd-numbered year. The council may remove him for misfeasance, malfeasance, or nonfeasance in office at any time after notice and hearing.

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

Cross-References

Official misconduct, 45-7-401.

Notice of removal to officer authorized to replace, 2-16-503.

75-1-323. Appointment of employees. The executive director, subject to the approval of the council, may appoint whatever employees are necessary to carry out the provisions of this chapter, within the limitations of legislative appropriations.

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

75-1-324. Duties of executive director and staff. It shall be the duty and function of the executive director and his staff to:

(1) gather timely and authoritative information concerning the conditions and trends in the quality of the environment, both current and prospective, analyze and interpret such information for the purpose of determining whether such 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 such 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 such programs and activities are contributing to the achievement of such policy and make recommendations to the governor and the legislature with respect thereto;

(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 such studies, reports thereon, 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 where 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 such

activities and with a general ecologic perspective, and suggest legislation to remedy such situations;

(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 groundwater) 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.

History: En. Sec. 14, Ch. 238, L. 1971; R.C.M. 1947, 69-6514.

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