THE MONTANA ENVIRONMENTAL POLICY ACT
THE FIRST FIVE YEARS

AN EQC STAFF REPORT
BY
STEVEN J. PERLMUTTER

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As a result of failure to formulate a comprehensive national policy, environmental decisionmaking largely continues to proceed as it has in the past. Policy is established by default and inaction. Environmental problems are only dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted. Important decisions concerning the use and shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades.

Today it is clear that we cannot continue on this course. (21)

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INTRODUCTION AND OVERVIEW

The Montana Environmental Policy Act (MEPA) became law in 1971. MEPA established a state policy for the environment, directed state agencies to incorporate this policy into their decisionmaking processes, and created the Environmental Quality Council (EQC) and its staff. The Act is now five years old and it is possible to review and to assess how it has been implemented by Montana state agencies. The purpose of this report is to provide members of Environmental Quality Council and the Legislature with a detailed analysis of MEPA and its implementation, to identify obstacles to the full realization of the environmental goals established by the Legislature with the enactment of MEPA, and to make recommendations for new approaches to the achievement of those goals.

The Federal Experience with NEPA

Since the enactment of the National Environmental Policy Act (NEPA)(1) in 1969, there have been hundreds of cases in the federal courts interpreting the Act and defining the duties of federal agencies. The federal courts have taken an extremely active role in the implementation of NEPA, and have, by and large, held executive agencies to a strict standard of compliance. The so-called "first generation" of NEPA cases dealt primarily with the procedural aspects of the law, and focused on the requirement to

> include in every recommendation or report on proposals legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement... (42 USC 4332(2)(C))

This first generation of cases dealt at great length and depth with such issues as: when is an EIS required; how is this threshold decision to be made; when is an action "major" enough, or "significant" enough, or "Federal" enough to call NEPA into play; to what agencies does NEPA apply. The courts also fleshed out the requirements for the content of impact statements: full disclosure of environmental impacts; discussion of alternatives; discussion of cumulative impacts (2).

In addition, the courts dealt with such judicial procedural questions as: who has standing to bring an action under NEPA; what scope and standard of review may a court apply to agency decisions, what remedies are available to the plaintiffs. These last questions led to the "second generation" of NEPA cases which are concerned with the substantive, rather than the procedural aspects of the law (3). The substantive question may be posed in this way: Suppose a federal agency has fulfilled the procedural requirements of NEPA as determined by the first-generation NEPA cases; that is, a thorough EIS was prepared and circulated for comment, and was presented to the agency decision-makers in advance of their decision. Nevertheless, the agency officials decide on a course of action which will have significant adverse effects on the environment. Does NEPA provide a remedy? Can a court, in reviewing the agency decision, reverse the agency on the merits, declaring that the proposed action would be inconsistent with the expressed policies of NEPA? Or can the court require only

that the agency give good faith consideration to environmental factors, and not substitute its own judgement for that of the agency? Or is the court limited to determining simply whether the required procedures were complied with?

These questions and others (e.g., the role of programmatic impact statements) are still being answered in the federal courts. Early cases tended to the narrow "procedures-only" view (4). More current cases are recognizing that NEPA requires at least a good faith consideration of environmental factors in the decisionmaking process, and courts have reversed agency decisions (or remanded to the agency for further consideration) if it appeared that environmental factors were ignored (5). It remains to be seen how far the courts will go beyond reviewing the methods of decisionmaking. How far will they go towards reading a mandatory, substantive policy for environmental protection into the law, and review agency actions on the merits of the decisions themselves?

The Status of MEPA in Montana

If there are important questions still to be answered in the federal system, the state of the law in Montana is even less certain. Whereas the federal courts took an active and central role in giving teeth to the federal statute, in Montana there has been very little court action under the Montana Environmental Policy Act (MEPA)(6). There have been only three district court cases (7) (one just recently initiated has not yet been decided) and only one, Montana Wilderness Society v. Department of Health (Beaver Creek) has reached the Supreme Court. The Beaver Creek decision marked a progressive approach to environmental law by the Supreme Court. While it leaves many questions still unanswered, it is

a promising beginning to judicial interpretation of MEPA. However, in an unusual move, the Court has agreed to a rehearing on the case and the decision is in danger of reversal. At this writing, therefore, it is still not clear what role the courts will play in the future of MEPA.

The Meaning of an Environmental Policy

It is easy to make the mistake of assuming that the entire environmental policy of the state of Montana is contained in MEPA. This is far from true. Thus, the Sanitation in Subdivisions Act declares a policy "to protect the quality and potability of water for public water supplies and domestic uses"(8). The Water Use Act makes it the policy of the state to "provide for the wise utilization, development and conservation of the waters of the state for the maximum benefit of its people"(9). Indeed, if one were to examine the full range of laws and regulations dealing with water and air quality, forest conservation, mining reclamation, wildlife management, etc., it would be clear that the state of Montana, through its Legislature, has repeatedly expressed an interest in preserving and improving the quality of the environment. Furthermore, within the relatively narrow scope of each such statute, the relevant executive agency is held to specific and enforceable standards of performance.

What, then, was the intent of the Legislature in expressing an environmental policy for the state of Montana? MEPA certainly was meant to be more than an announcement that state government is to concern itself with the protection of air and water quality and wildlife habitats. Individual statutes such as those mentioned above had already made that clear. And MEPA cannot be interpreted to mean that each state agency is to become an air and water pollution

control and wildlife management agency. Such an approach clearly would result in a welter of confusing and inconsistent decisions and actions.

If MEPA is to be interpreted as anything more than a broad statement of legislative sentiment, then, attention must be focused on the directive that state agencies "improve and coordinate state plans, functions, programs, and resources,"(10) and that a "systematic, interdisciplinary approach" be utilized in planning and decisionmaking (11). The characteristic which distinguishes MEPA from all other environmentally related statutes is that it addresses the entire range of environmental concerns, and calls for an integration and coordination of all other policies and duties set forth in other statutes.

Unfortunately, MEPA provides no specific directions for accomplishing this integration of programs and activities. It has been left to the initiative of the governor and the individual agencies to develop methods for accomplishing the goals of MEPA as effectively as possible within the constraints of their other statutory responsibilities. Almost by definition, however, the goals of MEPA pervade the entire range of government activity. No one agency, left to its own devices, could possibly achieve these goals. Nineteen departments, operating separately, will fall short of these goals nineteen separate times in nineteen separate ways.

In the absence of more explicit direction from the Legislature, MEPA is perceived by most state agencies primarily as a procedural statute. Many of the procedural interpretations which grew out of the first-generation NEPA cases have been adopted implicitly by the agencies, but are only now becoming legally binding with the adoption of MEPA regulations. The regulations provide a procedural framework, but many of the more "substantive" procedural issues

(e.g., what constitutes an adequate impact statement) are not resolved by the regulations and are still potential subjects of litigation.

MEPA includes certain "action-forcing" provisions which were designed, theoretically, to impose clearly defined duties on state agencies (12). In the federal system, the courts have been active in insuring some degree of adherence to these provisions. In Montana, however, no mechanism has developed to guarantee any level of performance or any degree of consistency or coordination among the various state agencies involved in implementing environmental policies. MEPA has had little influence on the methods of decisionmaking. Agencies are reluctant to rely on MEPA in order to make decisions on environmental grounds. There is little or no programmatic planning, or inter-agency cooperation, or other indications that agencies are using

> all practical means, consistent with other essential considerations of state policy, to improve and coordinate state plans, functions, programs and resources... (69-6503(a))

Only the provision requiring the preparation of environmental impact statements (EISs)(13) has received any attention. Agencies <u>are</u> preparing EISs, and can be forced to do so by a court of law. But since the responsibility for policy implementation is unclear and the other action-forcing provisions in Section 69-6504 have been ignored, no one is quite sure what the proper function of an impact statement is, what it should contain, or what should be done with it once it is prepared and presented to the agency decisionmakers.

Nevertheless, the EIS provision is the only clearly accessible handle available to citizens wishing to keep a rein on agency activity which may adversely affect the environment. As a result, litigation focuses on the adequacy of impact

statements rather than on the real issue: whether a proposed action is consistent with the policies of MEPA. And since the function of an EIS is unclear, it is impossible to determine with any certainty whether a given EIS is adequate. This uncertainty invites litigation and delay.

MEPA and the Permit Process

While these problems are present to some degree in almost every aspect of state government activity, they are most pervasive and intractable in the context of permit granting. There is general confusion as to MEPA's effect on an agency's authority to grant or deny a permit. If other, more specific statutes would allow for permit approval, agencies are reluctant to deny the permit on MEPA grounds, regardless of the severity of environmental harm which may result. Furthermore, there is a lack of coordination among agencies with overlapping jurisdiction over private activity. When a developer requires permits from several agencies, or when several developers require permits for a series of related projects, agencies continue to utilize a piecemeal approach, and the broad, cumulative impacts of development trends do not receive the necessary consideration. These inter-agency problems are exacerbated when local government review is involved, since local agencies are not subject to MEPA.

Agency personnel charged with permit granting responsibilities decry the lack of policy guidance from either the governor or the legislature for making the difficult decisions necessary if MEPA is to have a real impact on permit granting. Agencies have made no attempt on their own to address these problems in a systematic way. For example, instead of taking an overview of subdivision policy in the context of a programmatic impact statement, the Department of

Health wrestles with the problems over and over again from the limited perspective of individual subdivision applications, and concludes that the problems are beyond its authority to solve.

As a result of this lack of coordinated policy, the environmental impact statement becomes a meaningless exercise in data compilation, designed to avoid litigation and to support decisions which are made on other than MEPA grounds. In this context, it is not surprising that EISs are viewed by most agency personnel as a cumbersome, expensive, and superfluous burden.

Agency-Initiated Actions

The effect of MEPA on agency-initiated actions has received relatively little attention. Most people view MEPA exclusively in terms of EISs, and the vast majority of EISs deal with permit applications rather than with programs conceived, planned and implemented by state agencies. Those few EISs dealing with agency-initiated programs have attracted little criticism. Such programs are often aimed at enhancing the environment, so environmentally concerned groups are not likely to delay the agency's actions by attacking the impact statement. And in general, EISs on agency-initiated actions are of higher quality than those prepared for permit applications. When an agency reviews a project designed by a private applicant, the feeling seems to be that all the real decisions are up to the applicant, so the EIS is viewed as a mechanical but relatively meaningless, procedural requirement. In contrast, the agency seems more likely to make a thorough study of impacts and alternatives when the entire project is under agency control.

The EIS requirement has had a beneficial effect on individual agency projects

simply by forcing on agencies an awareness of and sensitivity to a wide range of environmental considerations which might not otherwise be considered. Nevertheless, MEPA has had little effect in terms of coordinating and integrating state policies and programs. The other "action-forcing" provisions of Section 69-6504 have received little attention.

There is little inter-agency coordination at the program-formulation stage. For example, the Air Quality Bureau has responsibility for the State Implementation Plan under the Clean Air Act, and must guide the development of control strategies within Air Quality Maintenance Areas. The Water Quality Bureau is involved in the pollution discharge elimination system, and in devising basin plans for water treatment, nonpoint source control, and so on. The Water Resources Division of DNR&C is currently developing a state plan for the utilization and management of the state's water resources. The Solid Waste Management Bureau is engaged in waste disposal projects. Environmental Sciences Division of DHES is presently considering rules for the implementation of the federal air quality nondegradation regulations; rules which will have pervasive land use implications. What is being done to coordinate these various programs? What studies are being made to determine how they will affect one another? How are priorities balanced and resources allocated among these programs? If there are conflicts, how are they resolved?

There are two characteristics of the "environment" which make these questions crucial: first, everything affects everything else, and second, the environment has a limited capacity to absorb the waste products of human activity. Dirt cannot simply be swept under the rug. It is bound to show up somewhere else.

For example, strict air quality controls may call for the use of more efficient scrubbers to remove particulates from stack emissions. Those particulates do not disappear. They become solid wastes and a potential source of water pollution. How is this inherent conflict resolved? Who sets the priorities? The real meaning of MEPA is not that each agency must do a better job of cleaning up its own little corner of the environment but that some degree of coordination be achieved. It does relatively little good to conduct a comprehensive environmental review and issue an EIS for an individual air or water pollution permit application if the coordination of air and water programs was ignored at the program-formulation level.

MEPA and the Courts

In addition to the other uncertainties which abound, it is not clear what role the courts will play in the development of MEPA as an element of state policy. Although a few tentative answers have been suggested by Beaver Creek, it is still not clear to what extent a court may substitute its judgement for that of an executive agency in evaluating the environmental impact of a government action. Neither is it clear in all cases who may bring a legal action, or against whom, or on what grounds. Questions such as these are still being answered on the federal level after more than four hundred lawsuits. Montana has seen only three MEPA suits to date. It may be that many issues which have been settled judicially in the federal courts will have to be settled by administrative or legislative action on the state level.

The Need for a Planning Process

The most frequently voiced complaint among state agency personnel is that

there is little or no coordinated policy guidance to aid them in their decisions; no uniform state policy towards the environment. The discussion which follows will highlight some of the more visible symptoms of that lack of coordination. It will also indicate some of the obstacles which stand in the way of effective achievement of MEPA's goals. One of the central conclusions of this report is that a responsive and responsible state policy for the environment cannot be formulated in the information vacuum which prevails at present. The people of Montana are not sufficiently aware of the threats to the environment and the inherent limitations which the environment imposes on all other human activities. The governmental decisionmakers are not sufficiently aware of the priorities and preferences of the people they are paid to serve. No one has an adequate grasp of the multitude of state policies, programs and activities which affect the environment. This report concludes with some recommendations for closing those information gaps and setting in motion a process which may lead to the formulation of a comprehensive and responsible policy for the environment.

MEPA AND THE PERMIT PROCESS

In Section 69-6503 of MEPA, the legislature recognized the threat to the environment caused by population growth, urbanization, natural resource exploitation, and other human activity. The legislature indicated its intention that the plans, programs and activities of state government be improved and coordinated in order to reduce the adverse impacts on the environment which result from such activities. MEPA did not address itself specifically, however, to an important fact: that state government's involvement in these activities primarily takes the form of granting permits and licenses to private developers. It is within the private sector that most of the environmentally significant activities are initiated, but MEPA addresses itself exclusively to state agencies. It is generally accepted that MEPA does apply to the permit-granting functions of state government. To interpret the act otherwise would remove the bulk of environmentally significant activity from MEPA's influence. Nevertheless, the act is not phrased in terms which are easily applied to the permit process without creating ambiguities. As a result, while the problems which have arisen in the application of MEPA to "agency-initiated actions" are largely failures of execution, the problems relating to the permit process are more fundamental and conceptual. For this reason, it seems appropriate to consider the permit process separately from other aspects of state government activity.

The Problem of Authority

In 1974, application was made to the Department of Natural Resources and Conservation for a major water diversion proposal for the Prickly Pear Creek near Helena. Pursuant to the procedural requirements of MEPA, the Department

prepared and circulated an environmental impact statement discussing the proposed action. The EIS noted that the water use permit, if granted, might have severe adverse impacts on the quality of water in the stream, and might result in the complete dewatering of the creek downstream from existing appropriators. Nevertheless, the Department felt itself to be constrained by the Water Use Act which states that permits shall be granted for beneficial uses whenever unappropriated water is available (14). The Department recognized that policy statements in MEPA and elsewhere in the laws of the state might support denial of a permit on environmental grounds, but that the legal basis for such a move had not been firmly established. Therefore, the EIS concluded

> that the Department's immediate legal obligation is to grant a permit for that amount of water, over and above that required for existing rights, which can be put to beneficial use--even if the result is dewatering of the stream. (Department of Natural Resources and Conservation, Final EIS on the Prickly Pear Water Diversion Proposal, August, 1974, p. 38)

This example illustrates what is probably the most pervasive obstacle to effective implementation of MEPA in the permit process--the lack of consistent definition of agency authority. When agencies grant or deny permits or licenses, they are operating under specific statutory authorizations which, in most cases, set out conditions for granting or denying permits. Agencies hesitate to rely on the policy statements and directives of MEPA as a basis for decisionmaking, preferring to limit their considerations to the range of factors set out in the specific permit-authorizing statute. Thus, the Department of Natural Resources will grant water use permits if certain criteria are met, in spite of the general ecological degradation which may result from the dewatering of a stream. The

Department of Health and Environmental Sciences does not believe it has the authority to refuse to lift sanitary restrictions from subdivisions on any basis other than water quality and waste disposal, regardless of possible irreversible harm to the state's environmental resources which may be caused by a poorly planned subdivision. Similar conflicts arise when the Department of Health considers water pollutant discharge permits or air pollutant emission permits; or when the Department of State Lands approves mining plans under the various reclamation statutes. In many cases, MEPA's only effect is to delay the announcement of decisions, which are made without regard to MEPA's policies in any event, until an impact statement is prepared. Virtually the only exception is in the granting of certificates of public need and environmental compatibility under the Major Facility Siting Act, administered by the Department of Natural Resources and Conservation. There, the requirement of considering a broad range of environmental factors is specifically written into the authorizing statute (15).

This controversy arises from language in MEPA which makes it clear that the law was meant to change the way in which agencies approached their duties under other statutes. First, the legislature directed that all policies, regulations, and laws of the state were to be interpreted and administered in accordance with the policies of MEPA (16). Secondly, agencies are to develop methods and procedures for giving appropriate consideration to "presently unquantified environmental amenities and values" which previously had not been weighed along with economic and technical factors (17). Thirdly, the law states explicitly that the policies and goals of MEPA are supplementary to those set forth in the

existing authorizations of all state agencies (18). All of these directives are to be pursued "to the fullest extent possible," and agencies are directed "to use all practicable means, consistent with other essential considerations of state policy," in achieving the goals of the act (19).* Thus it is as if the policy statements and goals of MEPA have been incorporated into the policy statement of every other statute.** Only where MEPA is in direct and unavoidable conflict with another statute may environmental concerns play a subordinate role in agency considerations, and such exceptions must be narrowly construed. The language "to the fullest extent possible" creates a presumption that MEPA applies, and an agency should bear the burden of proving that it does not.

A review of the policy statements and criteria for granting or denying permits contained in the important permit statutes reveals that explicit conflict is rare (20). Most of these statutes state a general policy for protection of the environment, emphasizing the impacts of a particular problem, such as water pollution or solid waste disposal. The statutes then describe conditions under which permits may be granted or denied. The criteria vary in specificity; for

*A more mechanical consideration--that EISs are to be prepared and presented to the decisionmaker in advance of the decision--will be discussed at greater length at p. 23 below. Briefly, the argument is that it would make little sense to require officials to look at EISs if the information contained therein were not to influence the decision.

**Indeed, during the Senate committee hearings which lead to the enactment of the National Environmental Policy Act, exactly that purpose was expressed. Senator Jackson, Chairman of the committee, indicated that instead of trying to revamp all the operating statutes of the various agencies, it might be better to "lay down a general requirement that would be applicable to all agencies that have responsibilities that affect the environment rather than trying to go through agency by agency." (Hearings on S. 1075, S. 237 and S. 1752 Before the Senate Committee on Interior and Insular Affairs, 91st Cong., 1st Sess. at 116; April 1969)

the most part, the responsible agency is directed to establish standards. Almost without exception, the criteria are nonexclusive; that is, permits may be granted if certain specified conditions are met, or permits may (or must) be denied if certain other conditions prevail. However, with two notable exceptions, these statutes do not say that permits must be granted, or that permits may not be denied in the specified cases.***

***The exceptions are in the Hardrock Mining Act (50-1201 et seq., R.C.M. 1947) which states:

> A permit may be denied for any of the following reasons:
> (a) The plan of development, mining, or reclamation conflicts with the state water and air purification standards;
> (b) The reclamation plan does not provide an acceptable method for accomplishment of reclamation as required by this act. (50-1214)

and in the Water Use Act (89-865 et seq., R.C.M. 1947) which states:

> The Department shall issue a permit if:
> (1) there are unappropriated waters in the source of supply;
> (2) the rights of a prior appropriator will not be adversely affected;
> (3) the proposed means of diversion or construction are adequate;
> (4) the proposed use of water is a beneficial use;
> (5) the proposed use will not interfere unreasonably with any other planned uses or developments for which a permit has been issued or for which water has been reserved.

In the case of the Water Use Act, at least, an aggressive interpretation of MEPA might create enough flexibility in the definition of "beneficial use" so that environmental values might still enter into the decision.

The specified criteria may therefore be characterized as minimal conditions, it involves no inherent contradiction to supplement such conditions with the kind of ecological considerations required by MEPA.**** Nevertheless, personnel in the Department of Health and the Department of State Lands have indicated that the environmental review process has no bearing on the decision whether or not to approve a permit application. The specific criteria listed in the authorizing statute remain the only basis for decisionmaking, and "methods and procedures" for expanding the agencies' perspectives have not been developed.

The Problem of Coordination

One of the primary goals of the Montana Environmental Policy Act was to replace the fragmented, piecemeal approach to environmentally significant decisionmaking with a more coordinated approach. The degree of fragmentation of environmental regulatory authority is documented in EQC's Permit Directory. Some examples will serve to illustrate the kinds of problems which arise.

****This was the approach taken by the federal district court in Kalur v. Resor, 335 F.Supp. 1 (D.D.C. 1971) which involved the granting of refuse permits by the Army Corps of Engineers. According to the authorizing statute, a water quality certification is a prerequisite to the granting of such a permit. The court held that under NEPA additional factors must be considered:

> Water quality certifications essentially establish a minimum condition for granting of a license. But they need not end the matter. The Corps of Engineers can then go on to perform the very different operation of balancing the overall benefits and costs of a particular project, and consider alterations above and beyond the applicable water quality standards that would further reduce environmental damage.

Several months ago, application was made to the Department of Natural Resources for permission to drill a series of wells near Wolf Creek in the Northeast part of the state. The purpose of the wells was to lower the water table by drawing off the brackish groundwater which was proving harmful to agricultural operations on the applicant's land. The water was to be discharged directly into Wolf Creek. When the Department of Health was informed of the water use application, it objected because of the adverse impact the brackish wastewater would have on the water quality of the stream. Indeed, the applicant would most likely have to apply for a water pollutant discharge permit from the Department of Health before disposing of the water, and from DHES's preliminary review of DNR's environmental analysis, it was doubtful at best that such a discharge permit would be issued. Unfortunately, however, the appropriation of groundwater and the discharge of that water into a stream are two separate activities, subject to two separate agency jurisdictions, requiring two separate permit applications. As in the Prickly Pear case, the Department of Natural Resources was again constrained by the language of the Water Use Act, and refused to consider water quality problems in deciding to grant the permit. The water quality problem would be handled later by the Department of Health, who would then be faced with a fait accompli in the construction of the wells.

This example illustrates one of the most common problems in inter-agency coordination--the "one developer:several agencies syndrome." One developer's actions are subject to the jurisdiction of a variety of regulatory agencies operating under a variety of statutory and administrative policies. The resulting confusion is not only expensive and frustrating for the developer,

but it makes a coordinated approach to environmental problems difficult.

The example above illustrates how the piecemeal approach may cause important environmental factors to be ignored because the agency with specific authority to consider it is not brought into the decision process until the harm is done. It is also possible for applicants to play one agency off against another. Applications under the Hardrock Mining Act are made to the Department of State Lands, which must approve mining and reclamation plans. Such operations also may cause pollution of ground or surface water, requiring review by the Department of Health. However, the Department of State Lands operates under an accelerated time schedule; it is required by law to make its decision within sixty days of receipt of the application. Applicants know this, and they know that the Department of State Lands has never shown any inclination to deny permits on broad environmental grounds. Exacerbating the situation is a communication problem: the Department of Health often has difficulty obtaining information from State Lands as to the location of new mining operations. The result of all this is that the mine has received approval from State Lands before the Health Department's review has begun, and the developer is able to begin preliminary operations before the question of water pollution is ever considered. Faced with the large investments of time and capital which have been made, the Department of Health is then under increased pressure to grant a permit or agree to a favorable compliance schedule.

In late 1974 a situation was brought to the attention of a number of state agencies which typifies another aspect of the lack of inter-agency coordination.

The State Board of Land Commissioners had leased oil and gas development rights on a parcel of state lands in the northeast corner of the state. The lessee had injected water into the gas wells under pressure to force the gas to the surface--a common procedure. The water thus used becomes brackish, and after its return to the surface must be stored in holding ponds. The holding ponds in this particular instance were improperly sealed, and brackish water was seeping through the ground and affecting the groundwater underlying a neighboring landowner's land.

Complaint was made to the Board of Oil and Gas Conservation which has direct regulatory authority over all oil and gas development operations, including the maintenance of holding ponds. The Conservation Board decided that this was a job for the Department of Health and Environmental Sciences, whose Water Quality Bureau had the responsibility under the Water Pollution Control Act to prevent contamination of state groundwaters. The Department of Health referred the matter to the Board of Land Commissioners, since the incident occurred on state lands and was a violation of the oil and gas lease. The Land Board completed the circle by determining that the primary responsibility was with the Oil and Gas Board.

The kinds of coordination problems described above are exacerbated when one of the agencies involved is a local agency. This situation arises most often during subdivision review under the Sanitation in Subdivisions Act. The local agency is required to consider a wide range of factors in its decision; i.e., it has the most explicit duty to perform the balance between environmental and nonenvironmental values. But the local agency is not bound by the

policies and directives of MEPA. Indeed, local officials are often subject to so much pressure at the local level, that they find it difficult to adhere to those statutory directives by which they are bound. In a recent case, the Cascade County Planning Board approved a subdivision plat in spite of the fact that the tract's location near the Great Falls Airport made the area highly questionable for residential development. The planning board recognized this problem, but decided that the "free enterprise" system required the board to protect the developers' investment. This kind of reasoning seems to fly in the face of the legislature's intent in passing House Bill 666 during the 1975 legislative session. HB 666 required public officials to consider the "public interest" before granting subdivision approval.

The coordination problem arises when the subdivision proposal is presented to the Department of Health and Environmental Sciences for approval under the Sanitation in Subdivisions Act. The Department's policy is not to prepare impact statements on subdivisions until after the plat is approved by the local officials. The Department thus feels great pressure from the local officials as well as the developer to concur in the approval in spite of adverse environmental impacts which may have been ignored by the locals.

The examples presented above should be sufficient to make the point that inter-agency coordination in the permit process is seriously lacking. For this reason, it would be insufficient to simply resolve the question of authority discussed earlier. Attention must be paid to the ways in which various statutes interact with one another. The solution cannot be found within any one agency. Nor can it be found by continuing the piecemeal, case-by-case approach to environ-

mental analysis. A comprehensive, inter-agency, programmatic approach must be developed. Such an approach will be discussed later.

The EIS in the Permit Process

As mentioned earlier, the preparation of environmental impact statements is virtually the only "action-forcing" provision of MEPA which has received any attention. But since the proper approach to implementation of MEPA policy is unclear, the role of the EIS is similarly unclear. The role of the EIS will be discussed in more detail later. Here we will be concerned in particular with the shortcomings of the EIS as part of the permit process.

One common problem is that the EIS is presented to the decisionmakers after the real decision has already been made. As noted earlier, this situation arises most often during subdvision review. The Department of Health prepares an EIS and supposedly considers it before deciding whether to lift sanitary restrictions, but the board of county commissioners has already approved the subdivision plat. The Department doubts that it has the authority to overrule the board, so the EIS is worthless as a decisionmaking tool, except insofar as it relates to water quality and sewage problems.

A similar situation prevails for many decisions of the Department of State Lands, particularly with respect to the Hardrock Mining Act. As noted earlier, a sixty day time limit is in effect. In many cases, there is no way to delay the decision until an adequate impact statement is prepared. In practice, the decision is made and the EIS is rushed to completion, usually without public circulation, and the announcement of the decision and issuance of the impact statement occur almost simultaneously.

A related problem arises in the consideration of alternatives to the proposed action. The exploration of alternatives which might have less adverse impact on the environment is theoretically one of the most important functions of environmental review. In the context of agency permit granting, however, this valuable exercise is almost completely ignored. The reason is that permitting agencies believe that they have only two alternatives: to grant the permit or to deny it. Sometimes, a third alternative is discussed briefly; granting a permit conditioned on various superficial design changes.

These examples point out the fundamental shortcoming of the EIS in the permit process. The EIS, as defined in MEPA, is well-suited to be a part of the formulation and implementation of agency-initiated actions. Where all aspects of a proposed action are within the control of the agency, the discussion of alternatives and the review of environmental impacts prior to decisionmaking take on real meaning. In the permit-granting process, however, the significant decisions are made by the private applicant before the state or local officials become involved. Choices as to location, magnitude, and design of a project are up to the developer, and the government agency does not feel it has the authority to participate in these decisions.

The EIS is therefore relegated to a subordinate role; it is a descriptive document, a compilation of data, a defense against litigation. But it is not an integral part of the decisionmaking process. It is seen by agency personnel as an unwanted and irrelevant burden imposed on them by a legislature which does not understand their problems. As with so many other problems relating to

permit-granting, this narrow and unimaginative view of the environmental review process arises from a failure to develop comprehensive, inter-agency, programmatic approaches to the state's regulatory activities.

And Now the Good News

Before concluding this discussion of MEPA and the permit process, one point should be made. It would be a mistake to assume that MEPA has had no positive effects on the permit activities of state agencies. If this discussion has tended to over-emphasize the problems, it is because the report is aimed at searching for solutions. There is no question that MEPA has had a significant healthy impact.

First and foremost, MEPA has gone a long way towards opening up the decision-making processes in state government. Officials find it much more difficult now to make decisions behind closed doors without adequate studies documenting their decisions. The increased role of public participation through the EIS commenting process is by itself a significant step forward. Regardless of the relative merits of this or that impact statement or the flaws in an agency's EIS circulation system, the fact that agencies are required to receive public comments before announcing environmentally related decisions has made both the agencies and the public more aware of the difficult environmental problems which must be addressed.

Although few, if any, permit applications have been denied because of MEPA considerations, there is no doubt that many proposed actions have undergone substantial modification under the weight of official and public scrutiny. Developers have begun to include a degree of environmental planning in their projects in anticipation of adverse public comments during the EIS process. Although there have been few court cases, the fear of litigation is often enough to convince both

the developer and the regulatory agency to seek compromise mitigating measures which lessen adverse impacts.

Compared with the pre-MEPA situation, then, progress has been made towards more responsible decisionmaking. Compared with the potential impacts of MEPA, however, and the urgent needs still to be addressed, we have barely begun.

THE PROGRAMMATIC APPROACH

The description of MEPA and the permit process so far has revealed a number of problems: the confusion of agency authority; the lack of inter-agency coordination; the misuse of the impact statement. Agency personnel have repeatedly cited the lack of clear and precise standards and guidelines which would enable them to go beyond the narrow confines of their operating statutes. It is generally felt that MEPA does not contain enough substantive content to aid them in decisionmaking. They don't want to be put in the uncomfortable position of having to exercise independent judgement on environmental matters where "unquantified values" are involved. They want someone to supply them with a mathematically precise system of environmental measurements, and a set of clearly defined threshold limits beyond which permits may not be granted.

It is true that MEPA does not provide mathematical precision in the definition of environmental degradation. And it is true that within the range of concerns expressed by MEPA there is room for a good deal of subjective judgement. But it is not true that because those judgements are often delicate and difficult, the executive branch may be excused from making them. The making of difficult decisions, the balancing of competing values on a case-by-case basis, is part of the executive function.

It is also part of the executive function to develop standards and procedures consistent with the policy and purpose of the law. The legislature did not specify precise air quality standards in the Clean Air Act, or precise reclamation procedures in the reclamation laws. The legislature stated a

policy and directed the appropriate executive agency to develop standards and adopt rules and regulations for enforcing them. The situation with MEPA is the same, except that it is the responsibility of the executive branch as a whole, rather than any one agency, to develop the necessary measures.

It is the purpose of this section to demonstrate that MEPA does provide adequate policy guidance for the kinds of steps that need to be taken, and that the failure to take those steps has not resulted so much from a lack of authority as from the failure to develop an integrated, inter-agency approach to environmental problems.

MEPA as Substantive Law

Contrary to the common assertion that MEPA provides no substantive policy guidance to state agencies, a brief perusal of Sections 6503 and 6504 reveals a wealth of policy statements and directives which would provide an adequate basis for creative action by the executive branch. Senator Henry Jackson, sponsor of NEPA and chairman of the Senate Committee on Interior and Insular Affairs, which held hearings on the bill, pointed out that NEPA "...provides a statutory foundation to which administrators may refer...for guidance in making decisions which find environmental values in conflict with other values" (21). Thus, when making decisions which have an environmental impact, agencies are required to act in a manner consistent with MEPA's policies; i.e., in a manner calculated to restore and maintain environmental quality. This approach must be applied before making any decision which affects the environment. Section 6504(b)(3) requires preparation of a detailed statement (EIS) prior to "major actions of state government significantly affecting the quality of the human

environment," but the policy of MEPA itself and the duty of state agencies to implement that policy require that environmental impacts be considered even where EISs are not required. Section 6504 lists several substantive duties which go beyond the preparation of environmental impact statements.

In order to comply with MEPA, agencies must establish procedures for assessing the environmental impact of every action, policy and program: does the action involve adverse impacts on the environment, or impacts running counter to the stated policies and goals of MEPA? For example, does the action or the conduct of the program ignore the needs of future generations, endangering the supply of critical resources available to them? Does the action or program reduce the range of beneficial uses to which a scarce resource may be put, or disrupt the balance between population and resource use in a given area? Does the action or program jeopardize the sustained value of renewable resources such as timber, agricultural land, and wildlife?

If an adequate consideration of environmental impact indicates that an action will be beneficial, or at least nonharmful, then there is no conflict between environmental values and other values and the action is permissible under MEPA. If, however, adverse environmental effects are shown, then the agency has a duty to consider alternatives to the proposed action or alternate formulations of the proposed program. If an alternative is found which does not cause the adverse environmental effects expected from the proposed action, then MEPA requires that the alternative be adopted if possible within existing statutory authorizations. As noted above, state officials are required by MEPA to act in a manner which will restore and maintain environmental quality when conflicts occur between environmental and other values. If such a conflict can be resolved

by the adoption of a less environmentally destructive course of action, it would be a breach of duty not to do so.

Some proposals which have adverse environmental effects will not have feasible alternatives which eliminate or lessen the adverse effects. In such cases, the agency has the responsibility under MEPA to reassess the justification for the proposed action. For agency-initiated actions, the alternative of dropping the proposal altogether must receive serious consideration. Where the agency is required by law to take some action, the agency has the responsibility to bring this conflict of policy to the attention of the legislature. Section 6505 of MEPA directed agencies to do just that, but for the most part, the only conflicts reported by the agencies were mechanical matters, such as the sixty day time limit imposed by the Hardrock Mining Act. Now, five years later, agencies contend that they are unable to avoid environmentally harmful actions because of statutory and policy limitations. One wonders why these conflicts were not noticed in July, 1972, the deadline for reporting them.

If, after all efforts to seek less harmful alternatives, adverse environmental impacts remain, the agency must balance those impacts against other considerations of state policy to determine whether the adverse impacts are acceptable. The only permissible actions with adverse impacts are those whose long-range social benefits outweigh their long-term environmental costs. Thus the agency must balance costs and benefits in making its decision.

In striking this balance, the agency must give consideration to a variety of noneconomic factors identified in MEPA: the rights of future generations

and the benefits which will accrue to them; public health and safety; the productivity of natural resources; the state's historic, cultural, aesthetic and natural heritage (including special scenic values, wildlife, etc.); multiple use of resources and amenities; maintaining diversity and variety of choice for Montana's people (protection of recreational opportunities and access to public lands and waters); maintaining a balance between population distribution and resource use; enhancement of the quality of renewable resources while encouraging the recycling of depletable resources; and, in general, preventing the degradation of environmental quality. The emphasis on maintaining the widest range of choice in allocation of resources requires agencies to consider other existing or potential uses of an area or resources: Are they compatible with the proposed use? Would they be irreversibly precluded by the proposed use? What other state, local and federal agencies have policy jurisdiction over such potentially competing uses? Are those other policies coordinated with the deciding agency's policies?

Even if the agency succeeds in demonstrating that an environmentally destructive action is justified on other grounds, its responsibility does not end. The agency must then take all available steps to minimize the adverse effects of its action. This conclusion follows from the application of MEPA to all of the subordinate decisions after the initial decision is made. A consideration of alternative techniques of implementing the decision is especially important at this stage of the decisionmaking process.

Throughout the process outlined above, the burden of proof must be placed on those who wish to disturb the environment. Those who wish to take environ-

mentally destructive actions must prove either that the proposed action will not impair environmental quality or that social benefits (benefits to the public) outweigh social costs (costs to the public). They must also prove that no alternatives exist which would eliminate the adverse effects or minimize such effects if the environmentally destructive action has been justified by social utility. Such proof must be made in a reviewable record, which may take the form of an environmental impact statement.

The foregoing discussion is meant to show that MEPA does provide sufficient policy guidance and authority to support a creative and aggressive environmental policy. This is not to belittle the difficulty of the task, especially in the context of the permit-granting function. An agency may feel, with some justification, that its hands are tied in the search for alternatives within the confines of a narrowly defined permit program. An agency may find it difficult to establish meaningful criteria for weighing environmental costs and benefits in areas which lie outside its traditional range of expertise. The following discussion suggests that if solutions are to be found, the agencies must make efforts to overcome the fragmented approach which currently prevails.

The Failure of the Adjudicatory Process

The foregoing discussion has shown that the proper implementation of MEPA requires that difficult and far-reaching decisions be made affecting the manner in which entire programs are conducted. A state official charged with the responsibility of approving or denying a subdivision proposal must be familiar with the range of relevant environmental considerations, have a set of feasible alternatives and mitigative measures available to him, and have some indication

of the manner in which environmental and social costs and benefits are to be weighed against one another. However, instead of addressing these problems in a systematic way for the entire permit program, the responsible agency attempts to deal with these weighty decisions of policy on a case-by-case basis in the context of individual permit applications. This is like trying to design a house by judging the quality of each brick, one at a time. Any attempt to promote the systematic consideration of environmental factors in governmental decisionmaking is, in essence, an attempt to reorder the priorities which determine how society's resources are to be allocated. The decision to give to previously ignored environmental values the same (or greater) weight than is given to traditional economic, social and technological considerations, may result in a fundamental reorientation of attitudes and life-styles. The attempt to structure an entire permit program to be responsive to the mandates of MEPA requires the balancing of factors which go far beyond the contingencies of the individual case. It is doubtful that the licensing or permitting process is the proper forum for performing this kind of delicate balancing of priorities.

A licensing or permit-granting procedure is essentially adjudicatory in nature, that is, it is modelled after the judicial process. An applicant makes his case to the permitting authority, marshalling the facts in the most favorable light possible. Intervenors, if any there be, do their best to point out the inadequacies of the applicant's presentation. The agency decision-makers are subject to a variety of pressures. If a hearing is required, many of the formalities of courtroom procedure is adhered to. All these features

are essential to guarantee that the applicant receives the full benefit of due process.

But a court-like adjudicatory procedure is designed specifically as a fact-finding mechanism. The facts are presented in an adversary context, and the agency (or the reviewing court) applies those facts to the relevant statutory or regulatory requirements, and determines whether the applicant is entitled to its license. The adjudicatory process is not well suited for policy making. The rearranging of priorities, the important policy decisions of resource allocation, cannot be made on a case-by-case basis. The adjudicatory process only works if the policy decisions have already been made, if standards of performance, and criteria for weighting the various environmental and nonenvironmental factors have already been set. The agency can then apply the facts of a given case to those already-existing policies and criteria, instead of trying to create policy for every case.* The difficulty of making policy under such

*The President's Council on Environmental Quality made this point in its Third Annual Report, at p. 228:

> It has long been recognized that agencies can administer their programs better if they establish their policies and practices, whenever possible, by general rule rather than acting on a case-by-case basis. Rulemaking allows the agency to weigh competing considerations in depth and to determine a future course of action that will best accomplish its ends....
>
> NEPA requires a rather finely tuned and systematic balancing of its policy against other agency objectives. It requires agencies to reexamine the basic premises on which they have operated and to take a new direction when those premises do not square with the required concern for environmental effects.
>
> Nothing in NEPA says that such balancing or reexamination must be performed anew each time the agency proposes to act, without regard to previous agency consideration of the relevant interests. No person or institution can operate effectively under a requirement to question its basic premises before taking each action....An agency can be both effective and responsible if it adopts rules to guide its daily choices and reexamines those rules as necessary to respond to changes in circumstances or in public policy. Environmental issues not adequately covered in the rulemaking process can be considered on a case-by-case basis.

conditions contributes to the agencies' reluctance to go beyond the well-established criteria contained in their other statutory authorizations. As a result, except for the preparation of EISs, MEPA goes largely unimplemented in permit decisions.

The Failure of the Single-Agency Approach

Very few activities subject to permit approval have ramifications which are limited to the narrow range of values addressed in the permitting agency's authorizing statute. An obvious example is the subdivision program. The Subdivision Bureau's immediate concerns under the Sanitation in Subdivisions Act are water quality and solid waste disposal. A poorly planned or unwisely situated subdivision, however, may have serious impact on a wide range of environmental and social factors which come under the regulatory authority of a variety of state and local agencies. Subdivision activity makes demands on ground and surface water supplies (Water Resources Division, DNR), transportation facilities (Department of Highways), ambient air quality (Air Quality Bureau, DHES), solid waste disposal facilities (Solid Waste Bureau, DHES), utility services (Energy Planning Division, DNR), recreation and wildlife opportunities (Department of Fish and Game), and municipal and social services such as police, fire, and health (local agencies).

Thus, a subdivision approved by the Department of Health this year is likely to lead to a variety of regulatory decisions by other state and local agencies in the years to come. It makes little sense for the Subdivision Bureau to do a policy study, write an impact statement and make a decision now based on water quality criteria, followed some months (or years) later by policies, decisions

and impact statements by Natural Resources, Highways, or Fish and Game based on their own special criteria. If a programmatic approach to the analysis of the subdivision program is to make any sense, the programmatic analysis must be a cooperative, inter-agency effort.

The subdivision program is only one of many for which such an inter-agency analysis would be appropriate. Other important examples are the Health Department's rules for "prevention of significant deterioration" of air quality (a federally mandated program which may have far-reaching implications in land use planning and growth management), the nomination (or disnomination) of lands for federal coal leasing, and the granting of water reservations in the Yellowstone Basin.

What Programmatic Analysis Means

In discussing these matters with Health Department personnel, the idea of a programmatic review of the subdivision program met with a great deal of resistance. A programmatic review would involve the Department in land use planning, it was felt. This is outside the Department's authority and would meet with stiff opposition from the county authorities.

Several points should be made. First, if a meaningful programmatic analysis is done, it will be the joint effort of a number of agencies. The Health Department's authority will thus be supplemented by the authorizations of the Departments of Natural Resources, Fish and Game, Highways, Community Affairs, etc. Secondly, even if the Health Department's authority to protect water quality is considered in isolation, there is still a need for programmatic analysis because clean water is, in many cases, a scarce and threatened public resource.

Suppose, for example, that water quality is a limiting factor for residential growth in a particular geographic area; that is, with unplanned, haphazard development, the area could support up to, say, 500 new housing units before water quality standards are violated. Suppose on the other hand that with planning and wise allocation of resources, the area might support as many as 1000 units.

Consider now the public policy of the state:

> to (a) conserve water by protecting, maintaining, and improving the quality and potability of water for public water supplies, wildlife, fish and aquatic life, agriculture, industry, recreation and other beneficial uses;
>
> (b) provide a comprehensive program for the prevention, abatement, and control of water pollution. (69-4801, R.C.M. 1947; see also 69-5001)

These policy statements are set forth in authorizing statutes of the Department of Health. Is it not, then, within the scope of the Department's authority to approach the preservation of this limited resource of clean water from a long-range perspective, giving due consideration to the impacts on wildlife, agriculture, industry, etc., and developing a policy for the use of this scarce resource which, "to the fullest extent possible," restores and maintains the quality of the environment?

A final point must be made with respect to the Health Department's reluctance to engage in land use planning. While the paragraphs above suggest that some form of management plan for a given region might be a feasible approach to water quality control, it is not the intent of this discussion to insist that a programmatic analysis must result in such a plan. We are much more concerned with the development of a decisionmaking process than with dictating the decisions to be made.

We are more concerned with developing methods for defining classes of alternative futures than with identification of alternatives that are "right" or "optimal"

> Likewise, our primary concern is to identify institutional policies which impose boundary conditions on change and development, rather than with the simulation of detailed temporal paths of change. The purpose of these policies is to identify and avoid various future alternatives which are economically, ecologically, technically or socially irreversible, so that if conditions arise that are undesirable, it will be possible to alter the trajectory of development (22).

How is this to be done within the context of a permit program? The discussion so far has identified a number of aspects of any permit program which lend themselves to programmatic analysis rather than case-by-case adjudication.

First, agencies should identify, for each type of action or for each type of program being formulated the types of environmental impacts to be expected and threshold levels beyond which an impact may be considered significant enough to require more detailed analysis.

Secondly, agencies must determine for each program the range of feasible and appropriate alternatives available to them or to other agencies within the scope of existing statutory authority. For agency-initiated actions, that range of alternatives is far-reaching and should include the alternative of maintaining the status quo and taking no action. For permit programs, it must be determined for each type of activity what kinds of alternatives are available to the agency. If statutory obligations do not allow for denial of a permit on strictly MEPA grounds, the agency should explore the possibility of requiring mitigative measures, or of involving itself at an earlier stage of the project planning

process so that environmental concerns are an integral part of the project.

Third, the agency should explore, for each type of activity, the range of mitigative measures that are available to it in implementing its decisions, so that the unavoidable impacts of an action may be lessened.

Fourth, the agency must establish guidelines for performing the delicate balance of environmental and social costs and benefits; guidance for decision-makers in weighing the competing values. The actual balance must be struck for each individual case, but the rules of the game should be established in advance rather than in the heat of the adjudicatory process.

What is proposed, then, is that the rules governing the conduct of permit programs be expanded so as to be responsive to the substantive requirements of MEPA. This does not require land use planning of any kind. Nor does it require that agencies determine in advance which permits will be approved and which will be denied. Nor does it require that agency decisions be based on environmental values exclusively. It does require that agencies accept the responsibilities imposed on them by MEPA to interpret and administer all policies, regulations, and laws of the state in accordance with the policies (not just the procedures) of MEPA.

Rule Making Authority Under MEPA

The program-level decisions described above should be made in the context of rule making under the Administrative Procedures Act. Agency officials should not have to determine anew for each permit application the range of alternatives available, or the proper weights to be given to competing environmental and social values. Those decisions should be made once and for all on the program

level through rule making. Individual decisions can then be measured against agency policies and guidelines as set out in the rules.

A question naturally arises at this point: does MEPA confer on agencies the authority to adopt rules as suggested here? With respect to strictly procedural rules governing the preparation and distribution of impact statements, there was not much controversy. Six state agencies have adopted such procedural rules, citing only MEPA as authority (23).

The question of substantive rules is another story. Agencies are reluctant to take the responsibility. The regulated interests fear increased obstables to development. The legislature's Administrative Code Committee has expressed concern that agencies might exceed their authority by adopting substantive rules.

The discussion of MEPA as substantive law earlier in this report (p.28 above) has demonstrated that there is adequate policy guidance in MEPA to support the adoption of substantive rules. Certainly the policy statements of MEPA are at least as specific as those in the Weather Modification Act (89-312.1 et seq., R.C.M. 1947) which authorizes the Board of Natural Resources to establish such standards "as it deems necessary or desirable to minimize danger to health, safety, welfare or property."

That MEPA supplies adequate policy guidance, however, does not answer the question of whether there exists statutory authority to adopt rules. In answering this question, we should refer to the language of MEPA as well as the experience of federal agencies under the National Environmental Policy Act.

Section 69-6503(a) of MEPA states that it is the responsibility of the state

> to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate state plans, functions, programs and resources... (emphasis added)

for the purposes of achieving the stated goals of the Act.

Section 69-6504 describes general directions to state agencies for carrying out the duty defined in the previous section:

> The legislative assembly authorizes and directs that, to the fullest extent possible... (emphasis added)

the state and its agencies shall engage in certain activities. The directions to the state as a whole are to interpret and administer all policies, regulations and laws in accordance with the policies of MEPA. State agencies are directed, inter alia, to utilize an interdisciplinary approach in decisionmaking, to prepare environmental impact statements on major actions affecting the environment, to develop alternative courses of action which may reduce conflicts in use of natural resources, and to

> 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. (emphasis added)

It should first be noted that the language "all practicable means" and "to the fullest extent possible" has been interpreted as imposing a duty of strict compliance on government agencies. In effect, unless there is explicit statutory conflict which makes compliance impossible, MEPA is to be interpreted as broadly as possible, and its directives are to be followed rigorously. That has been the holding of such federal cases as Calvert Cliffs Coordinating Committee v. A.E.C. 449 F. 2d 1109; and the Montana Supreme Court in Montana Wilderness Ass'n v. Department of Health (Beaver Creek) has cited such federal

authority with approval.

Secondly, it should be noted that the legislature has not only directed but also authorized that appropriate actions be taken. Thus the fear, often expressed by agency personnel, that they have a duty without the necessary authority is groundless. The duty and the authorization to perform it, having been created together, must be commensurate and co-extensive. Thus, if it is the duty of the state to coordinate plans and programs and to develop procedures for the consideration of environmental amenities in decisionmaking, and if such coordination and procedural innovation necessitate rule making, then the authority to make rules exists and extends as far as is necessary to perform the duty.

Finally, Section 69-6507 of MEPA states:

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

The Supreme Court in the Beaver Creek case cited this language as supporting the position that the policies of MEPA are added to existing authorizations in all other statutes. Thus, where rule making authority is explicitly granted, for example in the Sanitation in Subdivisions Act, the goals and policies of MEPA must be read along with the goals and policies of the statute granting such authority to determine the proper scope of rule making. Therefore, when an agency adopts rules implementing a specific statute, it must include in those rules procedures guaranteeing that environmental amenities be given the appropriate consideration. This duty must be performed as long as there is no inherent inconsistency between MEPA and the specific statute.

The statutory arguments set out above are supported by the experience of federal agencies in implementing NEPA. (Again, recall that the Montana Supreme Court in Beaver Creek has recognized that federal precedent is an appropriate guide to interpretation of MEPA.) Regulations adopted by federal agencies for the implementation of NEPA (24) rely essentially on NEPA for the statutory authority to adopt such rules. (Reference is also made to CEQ guidelines and Presidential executive orders, but these are in the nature of policy directives rather than statutory authorizations.) The point is, that MEPA and NEPA use identical language in defining agency duties and responsibilities. The practice of adopting regulations under NEPA's authority is well-established on the federal level. The Montana Supreme Court has recognized federal precedent as being relevant to the interpretation of MEPA. It follows that rule making based on MEPA's authority is well-founded.

It should not be supposed, furthermore, that federal agencies have adopted only procedural rules. The following excerpts from "Department of Housing and Urban Development; Procedures for protection of Environmental Quality" (ELR 46185) are a good example of the degree of substance which has gone into environmental rule making:

> Action resulting from clearance. Based on the Environmental Impact Statement clearance, including comments and suggestions by other agencies and interested parties, HUD shall attempt to mitigate adverse environmental impacts to the extent practicable. If there remain adverse environmental impacts which are unavoidable, and based on HUD environmental policies and standards, such impacts are also considered unacceptable, the proposal shall be rejected. Otherwise, unavoidable adverse environmental impacts shall be weighed against benefits to be obtained from approval of the proposal. When environmental costs which would be incurred outweigh such benefits, the proposal shall be rejected. Where benefits of the proposal outweigh environmental costs, processing may proceed; conditions or safeguards found to be necessary in order to protect and enhance environmental quality or minimize adverse environmental impacts shall be set forth in the contract, grant, or comparable document. (ELR 46185; 41 FR 23878 et seq.)

THE ENVIRONMENTAL IMPACT STATEMENT

As the discussion up to this point should have suggested, the problems with the EIS process stem largely from an unclear perception of duties and responsibilities under MEPA in general. With no central policy to which environmental review can be related, the EIS becomes a mechanical exercise with no real effect other than as a compilation of data. Agencies tend to pad the documents in order to avoid criticism and as a result the EISs are cumbersome and too technical to be of use to the average reader or decision-maker. Effective use of the EIS process will require the definition of a comprehensive state policy for the environment and fundamental changes in agency procedures.

There are several functions which the environmental review process should perform. First, it should serve as an "early-warning system," to call the attention of other agencies and the public to the fact that a project or program is being considered which might have significant environmental impacts (25). At this early stage, it is not necessary to produce an exhaustive environmental analysis. The project description and projection of impacts need only be detailed enough to enable other agencies to make a determination whether they should become involved. Coordination of permit-granting activity could begin at this point. The Preliminary Environmental Review (PER) which agencies are now preparing under the new MEPA rules could satisfy many of these needs. It is essential, however, that the PER be circulated to other agencies and the public. Under current procedures, agency rules do not require them to circulate PERs for public review.

The EIS process should provide a mechanism for the exchange of information among state (and local) agencies (26). In addition to the hard biophysical data, which is usually made available during the draft EIS commenting process, commenting agencies should also provide information as to their own program status, indicating the ways in which the agencies' programs will interact; identifying potential points of conflict or overlap of jurisdiction. In this regard, the discussion of alternatives required in an EIS could take on new significance. A lead agency currently limits itself to a discussion only of alternatives available to that agency. At least in the context of agency-initiated programs, the approach should be to identify the objectives of the proposal, and to discuss alternatives available to state government as a whole which might accomplish some or all of those goals with fewer adverse impacts (27).

Inter-agency communications is one of the areas requiring considerable attention. With the exception of the Highway Department's "Action Plan," agencies have not developed formal mechanisms for coordinating environmental review activities. Information is exchanged on an informal basis, and the efficiency of the exchange depends to a large extent on the personal contacts which EIS coordinators have been able to develop in other departments. Agencies with a broad range of in-house expertise (e.g., the Energy Planning Division of the Department of Natural Resources) have little trouble developing the needed information. Other agencies with limited access to technical personnel must shop around for assistance. Agencies are reluctant to devote much time to another agency's EIS, and will usually charge for the cost of its services.

Draft EISs are circulated to other agencies for comments, but this process

has not reached its full potential. Agencies such as Fish and Game which do a great deal of commenting on other agencies' impact statements have become discouraged because their comments rarely have any influence on the lead agency's decision. The Beaver Creek decision stressed the value of comments and, if the decision survives the rehearing, should encourage Fish and Game and others to continue a vigorous commenting policy.

Of course, the EIS has value as a source of environmental information, and it is in this context that the EIS is presently most well developed. Nevertheless, there is a need for more clearly defined standards of adequacy. The range and depth of considerations which are appropriate for an adequate impact statement should be set out in some detail by either the executive branch or the legislature. The function of an EIS as a "full-disclosure" document, for example, should be made clear. The EIS serves as a source of information not only for the decisionmakers involved in the project under immediate consideration; the information is also of use to officials in other agencies, the Legislature, and the general public, as a basis for decisionmaking and policy formulation in the future (28). The EIS should therefore deal with the broadest practicable range of environmental impacts, and should pay particular attention to "secondary impacts"; the growth-inducing effects of a project which will lead to further developments which will have their own set of impacts. The standards may vary depending on the type of project being discussed. The kinds of information necessary in an EIS on a subdivision review may not be appropriate for an EIS on rule making, or legislation, or policy formulation. There is no reason why all EISs must look the same. Some flexibility of format can be

introduced to accommodate the great variety of governmental activities which require environmental review.

Another function of the EIS process is to promote public participation in government decisionmaking. This has probably been the most successful aspect of EISs to date, to the chagrin of many agencies. The opportunity to comment and provide information during the draft EIS stage is of great value to both the commenters and the agency. Some agencies (DHES, DNR) have extensive mailing lists for their EISs and issue press releases on the major ones. Other agencies (DSL) issue no press releases, and try to get by with a minimum of public notice or involvement in their decisionmaking.

The environmental impact statement should provide a reviewable record of the agency's efforts to implement the policies of MEPA, and the impacts of the proposed project should be related directly to those policy goals as described in Section 69-6503. This is an aspect of environmental review which requires the greatest attention. EISs have had little use as policy documents because of an absence of predetermined environmental policy. Agencies are unsure of what is meant, for example, by "the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity," so the obligatory section in the EIS dealing with it is so vague as to be valueless. If this discussion were related to an affirmative state policy directing all agencies to:

> fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
>
> attain the widest range of beneficial uses of the environment without degradation...;

achieve a balance between population and resource use...;

and enhance the quality of renewable resources...(29)

the discussion could take on some focus.

The environmental impact statement review process should not end with the approval of the proposed action. As the decision is implemented, the EIS can be supplemented with descriptions of mitigative measures actually taken. Finally, the agency should monitor the actual impacts of the decision after it is implemented and the EIS can be periodically updated to reflect those impacts. Such an environmental "post-audit" procedure has not yet been attempted, but it has great potential. By comparing actual impacts with predicted impacts, agencies can refine their impact prediction techniques. Monitoring of actual impacts will also provide invaluable information which can guide agencies in revising and refining their guidelines, standards and procedures. The extended EIS thus becomes a feedback mechanism to guide future decisions.

The EIS is viewed in this discussion as a complete record of the agency's decisionmaking procedures; from the inception of the proposal through the search for alternatives and mitigative measures, the projection of unavoidable adverse environmental impacts, the presentation and balancing of competing environmental and nonenvironmental values, input from other agencies and the public, the justification for the final decision, the record of subsequent mitigative measures, and the actual impacts of the action as implemented.

The importance of programmatic analysis was discussed at length earlier in this report (p. 27, above). If the overall coordination of state government's activities can be achieved, as suggested earlier, the role of the "programmatic

impact statement" could take on added significance. The notion of programmatics has been discussed within state government for some time, but no one is quite sure what to do with them. The difficulty largely stems from the fact that most EISs are prepared for permit applications and most state agencies tend to think of their EIS responsibilities in terms of a response to private applicants. Since there is no way to predict who will apply for what permits when and where, the agencies argue, there is no way to develop a programmatic approach.

First of all, this argument has no validity with respect to agency-initiated actions. With regard to permit activity, if the kind of coordination could be achieved which has been suggested earlier, a programmatic approach would make sense even in the context of permit granting.

A programmatic EIS on subdivisions, for example, could be prepared in conjunction with an inter-agency analysis of the subdivision review process as suggested earlier. Similar EISs might be prepared for other permit programs, and they all could be related to one another through some sort of state-wide environmental policy planning process.

Within the framework of that state policy, individual permitting agencies would adopt regulations governing their permit activities. Those regulations would make clear the manner in which permit decisions would comply with the overall state policy. A second-level EIS on this rule making would be appropriate to discuss the impact of the proposed rules.

Finally, EISs on individual permit applications would be prepared where necessary. Each level of environmental review would serve as an analytical foundation for the following level. The discussion of overall policies, and

the broader aspects of cumulative effects, secondary impacts, etc., could be handled at the higher levels, and would not have to be repeated for each individual project-specific impact statement. The individual project EISs would deal primarily with the details of the specific project, and could incorporate by reference the broader policy framework contained in earlier statements. This "tiered" approach to the EIS process should eliminate duplication, and relate individual EISs more clearly to a coordinated state policy (30).

The prevalent agency attitude towards environmental impact statements is that they are an unwanted, extraneous burden which must somehow be grafted onto existing agency procedures at the cost of additional money and personnel. EISs are often prepared as an afterthought to fulfill legal requirements and to avoid litigation.

This attitude is most evident at the Department of State Lands, where only one person works fulltime on impact statements. It is clearly impossible for that one person to prepare EISs on all the projects which require them, so an EIS is written only when time permits. This situation is made worse by the statutorily imposed sixty day time limit under the Hard Rock Mining Act. The Department of Health also has only one fulltime EIS coordinator who receives technical input from water and soils engineers within the Department.

In contrast, the Departments of Natural Resources and Highways have a more integrated approach. The bureau staff people responsible for technical review of the proposed action are also responsible for EIS preparation. Special environmental staffs are available to assist bureau people with nontechnical

aspects and with inter-agency coordination. This system seems to work much better, but it should be noted that it is made possible by the relatively wide range of expertise available within those two departments.

The view of impact statements as something added on to existing agency procedures is wrong. MEPA mandates a variety of new approaches to decision-making, policy implementation, and other actions: e.g., use of a "systematic, interdisciplinary approach," consideration of "unquantifiable amenities," and development of mitigative measures and alternative courses of action. MEPA requires agency officials to consider the broad impacts of an action rather than merely relying on traditional tests of conformity to law, economic costs and benefits, and client satisfaction. In other words, MEPA's policies and goals were meant to become an integral part of the workings of every agency.

MEPA represents sound management policies, regardless of how one feels about environmental values. Government decisionmakers should always have the benefit of a thorough impact analysis before making important decisions of any kind. This is merely good government. If MEPA had not required EISs, responsible decisionmakers should have devised some such document on their own. An environmental impact statement should merely reflect and describe the ways in which the new approaches to decisionmaking have been integrated into agency procedures. It should not be an additional cost or paperwork burden. To the extent that agencies have built the criteria of Sections 6502 and 6503 of MEPA into their assumptions and policies, and have utilized the planning procedures indicated in 6504, the impact statement need be no more than a summary of agency action. It might be generalized that impact statements of great length

and tedious detail indicate programs or projects of dubious environmental merit.*

*In a study done by the President's Council on Environmental Quality evaluating federal implementation of NEPA, the point was made that it is difficult to separate the costs of implementing NEPA from other agency operations:

> A major goal of NEPA is to make environmental analysis a routine and integral part of agency operations just as economic and technical analyses are. The more integration, the more difficult it becomes to identify NEPA-related costs. ...Many agencies...have no exact method of determining EIS costs because the EIS process is an inextricable part of their administrative planning and decisionmaking. (Council on Environmental Quality, Environmental Impact Statements: An Analysis of Six Years' Experience by Seventy Federal Agencies, March, 1976; p. 43-44)

The 1975 Montana Legislature enacted a bill enabling agencies to collect fees from permit applicants to help pay the costs of EIS preparation. As of mid-summer, 1976, no fees had yet been collected. Many agencies had not yet determined how charges would be assessed. There was confusion about how the fee bill would apply when more than one agency is involved in review of a project or preparation of an impact statement. It is also unclear how fees can be assessed for programmatic EISs not related to a specific permit application.

BEAVER CREEK AND ITS IMPLICATIONS

In 1973 application was made to the Board of County Commissioners of Gallatin County for approval of a subdivision planned for development in scenic and relatively undeveloped Gallatin Canyon. In due course, the County Commissioners approved the subdivision pursuant to the Subdivision and Platting Act (31), and the state Department of Health and Environmental Sciences was requested to lift sanitary restrictions on the subdivisions under the Sanitation in Subdivisions Act (8). Following established policy, the Department prepared and circulated an environmental impact statement on the subdivision and subsequently lifted the sanitary restrictions. Two outdoor recreation organizations whose members make use of public lands in the Gallatin Canyon opposed the subdivision and brought suit against the Department to prevent its approval. The suit was based on MEPA and charged that the Department's impact statement was inadequate and must be redone before sanitary restrictions could be lifted. Plaintiffs won in the district court and the Department, joined by the developer as intervenor, appealed to the Supreme Court.

In the Supreme Court's view, there were three issues to be determined: whether plaintiffs had standing to sue a state agency under MEPA; whether the EIS complied with the requirements of MEPA; and whether injunctive relief against a state agency is an available remedy. The Court's affirmative holdings on the first and third issues are the clearest of the decision. The Court's reasoning in finding that the EIS was inadequate is less clear, and future litigation may be necessary to settle questions as to the content of an adequate impact statement.

Standing

In finding that the plaintiffs had standing, the Court set out three traditional criteria:

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

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

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

The Court relied on Article II Section 3 of the Montana Constitution to find that the right to a clean and healthful environment is a judicially cognizable civil right which is entitled to protection by the courts to the same extent as any other civil or property right. This was the major innovation in Montana's law of standing: A plaintiff must still demonstrate a personal involvement in the controversy distinguishable from the general public's interest. This criterion must be determined on a case-by-case basis:

> When the plaintiffs do not rely on any statutory grant of standing, as here, courts must look to the nature of the interests of the plaintiffs to determine whether plaintiffs are in a position to represent a 'personal stake in the outcome of the controversy' ensuring an 'adversary context' for judicial review.

In the Beaver Creek case, the Court found the requisite personal stake in the controversy because the plaintiff organizations were dedicated to wilderness preservation, their members made substantial use of public lands in the area, and they had participated in the EIS commenting process on the disputed

subdivision. It is not clear whether all of these factors must be present, or what other factors not yet mentioned might suffice to establish standing. Whether the degree of personal involvement in a given controversy will be sufficient cannot be known for sure until the case arises. It is not likely, however, as some people fear, that one need only to have driven through the Gallatin Canyon once and enjoyed the scenery in order to acquire standing. Almost certainly, courts will require a more substantial involvement than that.

It should be emphasized that the Court based its holding on the Constitution, not on MEPA. Theoretically, a plaintiff could bring suit directly against any individual who causes "unlawful environmental degradation," rather than against a state agency. If the Court reasserts its position on this point, it would go a long way towards establishing the rights which would have been included in the citizens-suit bill vetoed by the governor in 1975.

The EIS

In order to determine whether the Department of Health's impact statement was adequate, the Court had to make some preliminary determinations as to the function of EISs and the extent of the Department's responsibilities under MEPA. The Department and the developer had argued that the Department's responsibilities under MEPA are circumscribed by two other statutes: the Subdivision and Platting Act and the Sanitation in Subdivisions Act. Their argument was that the Subdivision and Platting Act placed primary environmental review responsibility on county officials, and that the Department of Health's duties under the Sanitation in Subdivisions Act were limited to technical approval of water, sewer, and solid waste facilities. It was therefore improper, they said, to withhold approval

of the subdivision while the Department engaged in a lengthy analysis of a broad range of environmental factors not directly related to water quality or solid waste disposal. The Department recognized its obligation to discuss broad environmental issues in its EIS, but disclaimed any authority to base its ultimate decision on other than narrow technical grounds. The adequacy of the impact statement should be judged within those constraints, applying a "rule of reason."

In ruling on these matters, the Court recognized federal NEPA case law as an appropriate guide to its deliberations. This in itself is an important development which should strengthen MEPA's influence on agency procedures. The Court found that local review of environmental issues was not meant to replace "the rigorous review required by responsible state agencies" under MEPA. While local officials might review environmental factors which have essentially local impact, "state involvement triggers a comprehensive review of the environmental consequences of such decisions which may be of regional or statewide importance." MEPA and the Subdivision and Platting Act, therefore, are not incompatible, but should be read together as creating "a complementary scheme of environmental protection."

Having thus held, the court proceeded to analyze the impact statement. Although the court's observations were not always consistent, the point was made that the impact statement must provide a sufficiently detailed analysis of environmental matters to allow the Department "to consider all relevant environmental values along with other factors and come to a conclusion with regard to them." (emphasis in court's opinion) The court stressed the need

to give careful consideration to such factors as wildlife habitats, aesthetic impacts, utility and transportation needs, and economic analyses. Thus a state agency is required to present a discussion in its impact statement of a broad range of environmental factors which go beyond the narrow criteria of its authorizing statute.

This opinion will not by itself settle the difficult question of what constitutes an adequate impact statement. That question is not completely settled at the federal level after more than 400 cases. There are no clear guidelines for impact statement preparation which might be distilled out of this opinion. However, state agencies have been put on notice that they are subject to a standard of strict compliance; that impact statements are meant to be meaningful decision documents and not just "window dressing" to justify decisions already made. The task of refining and improving the EIS process remains as an administrative responsibility.

Injunctive Relief

Questions had been raised about the availability of injunctive relief as a remedy against a state agency. The Department of Health and the developer alleged that an injunction was barred by section 93-4203(4), R.C.M. 1947, which states:

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

The court made short shrift of this argument by citing cases which have held

that illegal actions by public officials may be enjoined upon a showing of irreparable injury. Since the EIS had been found to be inadequate, the lifting of sanitary restrictions by the Department was illegal and subject to injunction.

Implications

It is difficult to assess the implications of the Beaver Creek decision at the time of this writing, since the Supreme Court has agreed to a rehearing on the case, and it is not known in what form the decision will survive. We will assume for the purposes of discussion that the decision will remain essentially unchanged.

The holdings on standing and the availability of injunction make MEPA a viable tool for enforcing agency responsibilities in environmental matters. Agencies and developers now know that they are subject to a meaningful check on their activities. This does not mean that "the floodgates of litigation" will swing open, deluging the courts with environmental lawsuits. Studies done in other states with citizen suit statutes indicate that the number of suits has remained quite small (32). It is still a costly process to engage in litigation, and only the most serious problems will arouse the most vitally concerned people to take action.

The effect of the decision on agency decisionmaking authority is not clear. Because the district court had ruled on procedural grounds, the Supreme Court explicitly limited itself to procedural matters, i.e., the adequacy of the impact statement. Nevertheless, the Court described the procedural duties imposed by MEPA in such a way as to indicate that substantive duties do exist.

For example, the Court stated the procedural question in this way:

> whether the Department provided a sufficiently detailed consideration and balancing of environmental factors which will ensure that the procedure followed will give effect to the policies of MEPA, aid the Department in decisionmaking, and publicize the environmental impact of its action.

And later in the opinion the Court noted that:

> it is within the Department's province under MEPA to reach its decision based upon a procedure which encompasses a consideration and balancing of environmental factors.

Thus, although the primary focus of the Court's review was on procedures, the adequacy of those procedures was judged by their effectiveness in enabling agencies to fulfill their substantive duty to consider environmental factors in decisionmaking. This reading of the opinion is reinforced by the Court's citation of Section 6507 of MEPA, which declares that the policies of MEPA supplement all other statutory authorizations, and the finding that MEPA is the controlling statute in spite of the more limited authorizations contained in the Subdivision and Platting Act and the Sanitation in Subdivisions Act.

Unfortunately, the Court's statements in this regard may be considered "mere dicta"; that is, they are comments introduced by the Court to explain its reasoning, but they are not essential to the holding of the case since the issue of substantive duties was not directly before the Court. Until the substantive question--whether an agency has the authority to deny a permit on MEPA grounds--is presented to the Court, it will be up to the executive agencies or the legislature to clarify that point. Agency reactions to the decision have been mixed in this regard. The Department of Natural Resources is generally favorable, and feels that Beaver Creek would support the denial of water use permits in

Prickly Pear situations (see p.13 , above). The Department of Health is still doubtful of its authority and is reluctant to base substantive decisions on MEPA alone. The Department of State Lands asserts that the decision will have no impact on its activities, and they will continue to make permit decisions without regard to MEPA's substantive policies. Clearly, regardless of the outcome of the Beaver Creek rehearing, there is much left to be done by the executive and legislative branches to clarify the meaning of MEPA.

MONTANA ENVIRONMENTAL POLICY PLANNING PROCESS

Background

For the past several months, the Environmental Quality Council and staff have been exploring the problems of state agency implementation of the Montana Environmental Policy Act (MEPA). We have discovered that, while many agencies have developed procedures for preparing environmental impact statements (EISs) to accompany their actions, those procedures have had widely varying degrees of effectiveness. A more fundamental problem is that EISs have served, for the most part, as descriptive documents with little substantive impact on policy or decision making. Furthermore, little progress has been made in developing mechanisms and procedures whereby unquantified and previously slighted environmental values can be given appropriate consideration. Nor has there been much progress in coordination of agency programs. In short, the policies of MEPA have been neither internalized by agencies nor emphasized by the Governor as a focus of executive branch activity as required by MEPA.

There are several reasons for this failure. One is the inherent reluctance of any executive branch agency to modify its goals and policies, i.e., its mission, without explicit direction. Another is the failure of the Governor to provide leadership in defining and coordinating policy. Much more enthusiasm is devoted to creating jobs and stimulating economic development. Those are worthy goals and essential elements of state policy. But MEPA makes environmental quality equally important as an element of state policy, and requires that the nature of our economic development and the manner in which our economy is

stimulated be consistent with the policies and goals of MEPA.

The failure results as well from a reluctance on the part of the Legislature to be more specific in indicating how the goals of the Act are to be implemented. That reluctance, in turn, grows out of an uncertainty as to what the people want done to accomplish MEPA's goals, or indeed how those goals are perceived by the people.

We are all in favor of maintaining and enhancing the quality of our environment, but at what cost? And by what methods? And with what criteria is the environment's quality to be measured? The answers to such questions and the determination to go where the answers lead us may require fundamental reorientation of priorities in the allocation of scarce resources of land, energy and money. Such fundamental reorientation of the state's direction requires that the state's leaders be well informed as to the conditions and needs of the environment, the desires of the people for dealing with those needs, and the institutional structure available to implement those desires.

The Process

The Environmental Policy Planning Process would be designed to provide the information needed to answer such questions and make vigorous pursuit of environmental goals possible. There are at least three arenas in which the generation and exchange of information should be conducted:

I. The Physical Environment.

An analysis should be made of the components of the physical environment; how it works; how its various systems interact; what sorts of things endanger it or interfere with its proper functioning; what needs must be addressed; what

is possible. Montana's scientific and academic resources should be mobilized to present this sort of information to the public and to the government so that those who set goals and policies will be aware of the physical constraints imposed by the environment.

In addition, the present state of the environment must be described and monitored so that we can identify the stresses which exist now. Continuation of the EQC Indicators Project is central to this effort. We must identify information needs and coordinate environmental monitoring in order to produce a comprehensive inventory of the state's environmental resources. Such monitoring is necessary not only to identify the most serious problems requiring priority treatment, but also to measure the effectiveness of our actions.

II. The Human Environment.

Communication with the people of Montana must be fostered in two directions. First, the people must be made aware, and kept aware, of the nature of the problem, as identified through the efforts described above. This is a primary function of environmental impact statements on a project-specific level. Analagous efforts must be made to provide the people with an overview.

Secondly, the policy makers in the legislative and executive branches must be made aware, and kept aware, of the thinking of the people. How do they perceive environmental problems? What sort of environment do they want? What other goals do the people have and how do they complement or conflict with environmental goals? What are their priorities? What would they like to see done? A series of public hearings throughout the state would be a valuable way to focus the public's attention on these matters and to stimulate the needed communication and participation.

III. The Institutional Setting.

The needs of the environment must be addressed and the goals of the people achieved through the agencies of government and other institutions. The structure and functioning of those institutions must be analyzed to understand the mechanisms through which institutional actions affect the environment. Once goals are identified, these institutions must be mobilized to accomplish such goals, so a thorough understanding of the workings of government as it relates to the environment will be essential to making the necessary adjustments.

To achieve these objectives, the Planning Process would include the following elements:

1. A statewide survey of Montana's citizens to identify their perceptions, priorities and preferences.
2. A series of public hearings throughout the state to focus public attention on the issues, and to establish the beginnings of a concensus which can be communicated to government decision makers.
3. An interim report based on (1) and (2).
4. A physical inventory of the environment should be initiated and an analysis made of existing environmental stresses. This process should begin as soon as possible, drawing on expertise from the University System and from government agencies.
5. An analysis of the legal and administrative structure should be made. The EQC Environmental Index will provide the format for this effort.
6. A draft Environmental Policy and Implementation Plan should be presented in EQC's Sixth Annual Report in early 1978. This draft will present findings from the poll, the hearings, and the physical and institutional analyses

and inventories, and will recommend a series of policies and goals for Montana, with suggested methods of implementation.

7. A further series of hearings and consultations with technical and scientific experts and government personnel to refine these recommendations.
8. Based on all the above, a final report containing a set of specific legislative recommendations will be presented to the Council in the fall of 1978 for approval and submission to the 1979 Legislative Assembly. This final report would set forth a comprehensive state policy for the environment with goals and priorities expressed as explicitly as possible, providing directions to the Governor and the executive agencies for implementing and coordinating policy.

RECOMMENDATIONS -- A MODEL FOR DECISION MAKING

This report has pointed out a number of difficulties which have arisen in the attempt to implement the policies of the Montana Environmental Policy Act: the confusion of agency authority, the lack of coordination in the permit process, the lack of a uniform and comprehensive state policy for the environment, the failure generally to internalize the attitudes and perspectives of environmental protection in agency procedures. A number of suggestions have also been made for dealing with these problems. The purpose of this section is to pull those suggestions together into an integrated model for environmental decisionmaking in Montana, and to make recommendations for legislation which may accomplish this goal.

The decision making model presented here is organized around four main elements:

1. The Montana Environmental Policy Planning Process;
2. The coordination of executive branch activities;
3. The agency decision process;
4. The role of the courts.

The Environmental Policy Planning Process

The nature of such a planning process was discussed earlier (p.59, above). This is an essential first step which should be initiated as soon as possible to provide the overall framework which will tie all the other element of environmental decisionmaking together. As the agency entrusted by the legislature with the responsibility of recommending environmental policy, the

Environmental Quality Council should play a central role in coordinating the planning process. Draft legislation has been presented to the EQC for the establishment of a planning process. Such a bill should be introduced to the legislature.

Executive Branch Coordination

It should be clear by now that initiatives must be taken within the executive branch to achieve coordination of the policies, programs and decisions of state government.

First, responsibility must be assigned for coordinating the executive branch's participation in the environmental planning process. In addition, there should be an ongoing review of state-wide environmental policy within the executive branch, and a procedure for reviewing individual agency actions and decisions to make sure they comply with that policy. Section 6505 of MEPA should be amended to require agencies to make reports and recommendations with respect to policy conflicts either annually or prior to every legislative session.

Second, there must be coordination of the various programmatic analyses called for earlier (p.38, above). For example, even though the Department of Health is the only state agency with direct permit authority over subdivision activity, it does not follow that responsibility for doing programmatic analysis of subdivisions lies entirely with the Health Department, or even that DHES is the appropriate lead agency. Subdivisions have impacts on a wide range of environmental factors, and a comprehensive analysis will require input from several agencies. In addition, programmatic analyses of other programs may involve factors which overlap with the subdivison study. There will have to be

coordination of all these activities within the framework of the state policy developed through the planning process. Legislation will be called for to clarify agencies' rule making authority, and to direct them to engage in the kinds of studies described here.

It should be at this programmatic rule making stage that agencies wrestle with questions of policy: Does the authority exist to deny permits on environmental grounds? If so, under what conditions? If not, what range of options is available to alleviate environmental harm? To what extent can a developer be required to alter his plans to mitigate impacts? When should other agencies be consulted and what weight should their comments have? How early and in what ways can the agency involve itself in a developer's planning so as to avoid environmental conflicts? In resolving all such policy questions, the agencies should be guided by the policies of MEPA. MEPA provides the seminal standards against which program policy formulation can be measured. Individual project-specific decisions can then be measured against the agency's own program policies.

Third, it is essential that mechanisms be developed to coordinate the permit granting activities of state government. When a developer approaches an agency for a permit, he should be required to indicate at that time the full extent of the entire project so that it can be determined at the outset what state and local agencies will eventually be involved.

The "systematic, interdisciplinary approach" should begin at that point. A lead agency should be determined, and all involved agencies should begin their environmental reviews. The lead agency will coordinate these efforts,

compile a final report, and will be responsible for applying an overall, ecologically sensitive analysis in determining the proper course. During this process of environmental review and analysis, the developer will be consulting with all the agencies involved in an effort to redesign the proposal wherever possible to reduce adverse impacts.

It should be possible for all the necessary permit procedures to be consolidated; only one comprehensive environmental review would be necessary. Only one governmental agency would have the authority to make the environmental determination, and that agency would be clearly designated.

In order to accomplish this sort of inter-agency coordination, it will be necessary to set up formal and efficient mechanisms for identifying which agencies will be involved in a project, designating the lead agency, coordinating the environmental review, consolidating permit procedures, etc.

Finally, there is a need for EIS coordination. An agency within the executive branch might serve as a clearinghouse for the environmental review process. It could make recommendations, based on PERs, as to when EISs are required. It could determine when different agency projects are closely enough related either functionally or geographically to require joint or coordinated environmental reviews. It could suggest the need for programmatic EISs. It could perform administrative functions in distributing EISs, collecting comments, etc.

In order to accomplish these things, it will be necessary to establish an entity within the executive branch with specific responsibilities. Such an entity might take many forms, ranging from an inter-agency council composed of department heads or lower level division or bureau chiefs, and perhaps

representatives of local government, to an Environmental Protection Agency within the governor's office, or as a twentieth department of state government. Both of these approaches have some advantages and some disadvantages. The inter-agency council would retain the fractionalization of interests and goals which exists among the various agencies. This has the advantage of guaranteeing that a diversity of views and values will be presented in the development of a coordinated policy. The disadvantage, of course, is that a council of independent agencies may have no more incentive or insight into coordinating policies than presently exists among the agencies. The advantage of creating a new independent agency with the responsibility of coordinating or implementing the state's environmental policy is that such new, mission-oriented agencies approach the problems with the kind of vigor and originality that is often lacking in older, established agencies which have their own set of priorities to protect (33). Whatever approach is taken, the responsible agency must be more than an advisory council. It must have real authority to influence the way environmental decisions are made. A bill should be introduced, either in the form of legislation or a resolution, directing that such an agency be established and defining its responsibilities.

The Agency Decision Process

A decisionmaking procedure has been suggested in this report which has the following elements:

1) Agencies should conduct programmatic analyses of major permit (and other) programs, resulting in rules, adopted under the Administrative Procedures Act which will guide individual project decisions. These rules must be consistent

with the uniform state environmental policy established through the Planning Process.

2) When a permit application comes in, a Preliminary Environmental Review (PER) will be prepared and circulated to other agencies and to interested citizens. The purpose of the PER is to alert other agencies to the need for inter-agency action, and to determine whether threshold levels of environmental impact have been surpassed, requiring more detailed analysis. Guidelines for determining these threshold levels will have been established programmatically [see (1)].

3) If indicated by the PER, the detailed environmental analysis will begin; alternative courses of action with less adverse impact will be explored, and mitigative measures will be proposed. All of these investigations will take place within the framework which will have been established programmatically [see (1)]. The record of these investigations will be circulated to other agencies and the public for comment, and revised if necessary. This EIS will explicitly analyze the projected impacts of the proposed action in terms of its effect on achieving the stated goals of MEPA (69-6503).

4) If unavoidable adverse impacts remain after all available mitigative measures have been applied, the responsible official will balance environmental, social and economic costs and benefits and determine whether the project should be approved. Guidelines for performing this balancing function will have been established programmatically [see (1)].

5) If the application is approved in spite of unavoidable adverse environmental impacts, the agency will accompany the decision with a written statement explaining why other considerations of state policy justify the decision. The

final approval will also include all necessary and feasible mitigative measures as conditions for granting of the permit.

6) The decision will be conditional for thirty days following its announcement to give the public an opportunity to review the decision and the written justification and to seek judicial review if necessary.

7) The agency will continue to monitor the project as actually implemented, recording mitigative measures actually taken and environmental impacts which actually occur. The EIS will be updated as necessary to reflect this information.

8) The agency will review its program periodically using the information contained in its previous impact statements. Changes will be made in procedures and in programmatic standards and guidelines as the need is indicated by the post-audit procedure [see (7)].

The Role of the Courts

It has been mentioned several times in this report that environmental litigation has focused on the adequacy of environmental impact statements rather than on substantive questions involving the conformity of a proposed project or program to the goals and policies of MEPA. Because of this, EISs are padded with excessive technical data in order to withstand attack, and litigation degenerates into a tedious delaying tactic which never confronts the ultimate questions.

For these reasons, it is proposed here that the EIS be eliminated as a grounds for injunction unless it can be shown than an inadequate EIS has led to an improper decision. Essentially, the final decision itself will be subject

to judicial review and injunction. The EIS would be simply a part of the reviewable record on which both parties might base their arguments.

To establish its prima facie case, the plaintiff would have to show that, first, the proposed action will have a significant adverse impact on the quality of the environment; and second, that the agency's decision was improperly arrived at. This second point might be established in a number of ways: by demonstrating the existence of a feasible alternative which would have fewer adverse impacts and which was not adequately considered; by pointing out inadequacies in the EIS which affected the decision; by showing that the agency failed to consider or give proper weight to relevant information; by pointing out mitigative measures which were not included in the final permit conditions; by demonstrating that the agency's statement justifying its decision (see p. 74, above) was arbitrary, capricious, or unsupported by the evidence contained in the record. The burden of proof should lie with the agency to show that the evidence supports its decision, and that the justification for the action is valid (34).

Under this formulation, the emphasis is on correct decisions rather than proper decisionmaking procedures. An agency should be challenged only after a final decision is made (or earlier, if necessary to prevent an irretrievable commitment of resources), and the challenge should be on the merits of the decision itself, not on the adequacy of the impact statement. The EIS should be challenged (or should be a basis for injunction) only in terms of its effect on the decision ; i.e., the plaintiff must show not only that the EIS is inadequate, but also that the inadequacy led to a wrong decision. The prima

facie case which must be made out by the plaintiff will thus include a refutation of the agency's justification for going ahead with the action.

Logically, then, a plaintiff's first step should be to call the inadequacy of the agency's procedures to the attention of the agency and request further consideration of the issue. If the matter is one which could have been considered during the draft EIS consultation process and the plaintiff failed to raise the issue at that time, or is unable to explain adequately why it did not, it should be estopped from seeking an injunction.

The actual mechanism for challenging agency actions might vary depending on the type of action involved. For example, if the agency has already conducted public hearings as part of the decisionmaking procedure, a plaintiff might go directly to court. It would then be up to the court either to remand to the agency for further consideration, or to decide the issue immediately. If there has been no public hearing, the plaintiff might be required to request a hearing before the agency, and only after that hearing would the plaintiff be able to take the matter to court.

Although the EIS should not in general be available as a basis for injunctive relief, the EIS still provides an essential informational service to other agencies and the public. For this reason, mandamus should be available to compel agencies to produce an adequate impact statement within a specified period of time, even though the permit might already have been granted or denied.

One final point with regard to citizens' standing to bring suit under MEPA. Regardless of how the Beaver Creek decision ultimately turns out, it would be valuable to clarify in the language of MEPA the citizen's right to sue or to intervene in administrative procedures.

APPENDIX

TEXT OF LEGISLATIVE RECOMMENDATIONS

I. The Environmental Policy Planning Process

Be it enacted by the Legislature of the State of Montana:

Section 1. Statement of Policy. The Legislature recognizes the need to coordinate state policies and programs for the purpose of accomplishing the goals set forth in the Montana Environmental Policy Act (69-6501 et seq., R.C.M. 1947), and the need to develop a clear statement of goals and objectives for the environment so that considerations of environmental quality will receive equal weight with economic, technical, and social considerations in government decision making.

Section 2. Definitions. As used in this act unless the context requires otherwise:

(1) "Council" means the Environmental Quality Council established by 69-6508, R.C.M. 1947.

(2) "Director" means the Executive Director of the Environmental Quality Council.

Section 3. Duties and Responsibilities of the Council and Director. Under the Council's direction, the Director shall develop and implement a program to study environmental problems and develop a comprehensive statewide environmental policy and planning process for Montana. The Director shall:

(1) Within one year of the effective date of this act, conduct a series of opinion surveys and public hearings throughout the state to identify the

opinions and priorities of the people, to focus public attention on environmental issues, and to encourage public participation in the environmental policy formulation process.

(2) Encourage research and studies in ecology and develop methods for integrating the results of such research into government policy making.

(3) Initiate a comprehensive inventory of Montana's physical environment and an appraisal of environmental stresses, and develop methods for integrating the results of such inventories into government policy making.

(4) Conduct a comprehensive analysis of existing laws, regulations, policies and programs relating to or having impact on the environment.

(5) Within one year of the effective date of this act, submit a draft report to the Council setting forth the findings of the foregoing activities, and recommendations for policies, goals and methods of implementation. This draft report shall include, but not be limited to:

(a) environmental goals for the state;

(b) policies for critical areas and other environmental values of statewide importance;

(c) policies to abate pollution and enhance environmental health;

(d) policies for management of the state's natural resources;

(e) policies for environmentally sensitive growth, development and planning;

(f) mechanisms for policy coordination and implementation;

(g) provisions for a land use and resource information system; and

(h) provisions for technical assistance to county and local governments for environmentally sensitive planning and development.

(6) Submit a final report to the Council for approval and presentation to the 1979 legislative assembly. The final report shall contain specific legislative recommendations for implementation of the environmental planning process.

(7) Take or initiate any other lawful actions consistent with the purposes of this act.

(8) In all of the above, consult with and obtain the cooperation of the state's scientific, academic and technical communities, agencies of the state, local and federal government, and public and private groups and individuals.

Section 4. Commission on Environmental Quality. The Governor shall direct the Commission on Environmental Quality to cooperate with the Council and Director, and to coordinate the efforts of the executive branch in achieving the purposes of this act.

Section 5. Appropriation. The following moneys are appropriated to the Environmental Quality Council for the biennium ending June 30, 1979 for the purposes set forth in this act:

	Fiscal Year Ending 6/30/78	Fiscal Year Ending 6/30/79
From the General Fund:		
From the Renewable Resources Development Fund:		

This appropriation is in addition to any regular appropriation for the normal operations and activities of the Environmental Quality Council.

Section 6. Effective and Termination Dates. This act shall become effective upon passage and approval, and shall terminate July 1, 1979, unless further extended by law.

II. Amendments to MEPA

69-6503(c). No board, commission or agency of the state may implement any policy, adopt any rule, or approve any action inconsistent with the policies and goals expressed in this act unless such board, commission, or agency can demonstrate that

(i) there is no feasible alternative consistent with the public health, safety, or welfare;

(ii) the benefits of the policy, rule, or action, as defined by some other essential consideration of state policy, outweigh the harms to the environment; and

(iii) the formulation of the proposed policy or the planning and implementation of the proposed action includes all feasible efforts to comply with the policies, goals and procedures of this act and to reduce and mitigate adverse environmental impacts to the fullest extent possible.

69-6504(b). All agencies of the state shall

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

(i) the goals and objectives of the proposed action,

(ii) the environmental impacts of the proposed action,

(iii) feasible alternatives to the proposed action available to state

government, or to the applicant in the case of a permit, license or other entitlement, which will accomplish some or all of the goals of the action while reducing adverse environmental impacts,

(iv) feasible mitigative measures available to state government or to the applicant which may be included in the implementation of the proposed action or alternatives and which will reduce adverse environmental impact,

(v) any adverse environmental effects which cannot be avoided should the proposed action or alternatives be implemented after application of all feasible mitigative measures,

(vi) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity involved in the proposed action and each alternative,

(vii) any irreversible and irretrievable commitment of resources which would be involved in the proposed action or alternatives should they be implemented, and

(viii) the degree and manner in which the proposed action and each alternative comply with or depart from the goals and policies expressed in section 6503(a) of this act.

(4). Prior to making any detailed statement, the responsible state official shall consult with and obtain the comments of any state agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate state, federal, and local agencies and of interested members of the public shall be made available to the governor, the environmental quality council

and to the public, and shall accompany the proposal through the existing agency review processes.

(5). Accompanying every final decision for which a detailed statement has been prepared pursuant to subsection (b)(3) of this section, the responsible official shall prepare a written report explaining the reasons for the decision and demonstrating

(i) that the decision will involve no significant adverse environmental impacts after application of feasible mitigative measures,

or (ii) that the conditions contained in section 6503(c)(i)-(iii) of this act are satisfied. Copies of such report shall be made available to the governor, the environmental quality council and to the public.

(6). No final decision shall become effective, nor shall any action be taken committing resources or affecting legal rights, sooner than thirty days after transmittal of the report to the environmental quality council. During this period, any person who has been a party to administrative proceedings relating to the proposed action, or who has submitted oral or written testimony at public hearings or during the impact statement commenting process pursuant to subsection (b)(4) of this section, or who can demonstrate a personal interest not common to the general public which will be affected by the proposed action, or any organization whose members so qualify, may seek judicial review of the agency's final decision on the following grounds:

(i) the agency's action will cause significant adverse environmental impacts on the environment, and

(ii) the agency's decision was improperly arrived at because

(a) the agency failed to give proper consideration to significant adverse environmental impacts which would be caused by the action, or

(b) the agency's finding that the conditions of section 6503(c) of this act are satisfied was arbitrary, capricious, or unsupported by the record.

(7). Following approval of any action for which a statement was prepared pursuant to subsection (b)(3) of this section, such statement shall be revised from time to time to reflect all mitigative measures taken, and all significant environmental impacts actually resulting from the action.

(8). Conduct systematic, programmatic analyses of major programs administered by state agencies, and for each such program, prepare a detailed programmatic statement discussing

(i) the relevant environmental factors affected by the program, and threshold levels of environmental impacts beyond which an individual action within the program will require an impact statement pursuant to subsection (b)(3) of this section,

(ii) the range of feasible types of alternative actions and mitigative measures available to state government and consistent with other statutory authority which might be applied to the evaluation of individual actions and proposals within the program, and

(iii) guidelines for performing the balance of costs and benefits required by section 6503(c)(ii) of this act.

A Programmatic analysis and statement shall be, to the fullest extent possible, a joint effort of all state agencies with jurisdiction by law or special expertise over the environmental factors affected by the program. The governor shall designate a lead agency to coordinate the study for each program. Once such a programmatic analysis is completed, all agency decisions and actions within that program shall be consistent, to the fullest extent possible, with the standards and procedures set forth in the programmatic analysis.

(the remaining subsections of 6504(b), currently numbered (4)-(8) should be renumbered (9)-(13) and remain unchanged.

69-6505. All agencies of the state shall periodically review their current statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit or hinder full compliance with the purposes and provisions of this act and shall propose to the governor and the environmental quality council not later than ninety days before each legislative session such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this act.

69-6507. The policies and goals set forth in this act are supplementary to those set forth in existing authorizations of all boards, commissions, and agencies of the state, and all such boards, commissions and agencies are authorized and directed to amend existing administrative regulations, consistent with other statutory authorizations, so as to bring such regulations into compliance with the policies and goals of this act.

All rules proposed to be adopted or amended pursuant to this section shall be submitted to the environmental quality council. the council shall review all rules referred to it and may:

(i) prepare written recommendations for the adoption, amendment or rejection of a rule and submit these recommendations to the department proposing the rule when a rule making hearing will not be held;

(ii) prepare recommendations for the adoption, amendment or rejection of a rule and submit oral testimony at a rule making hearing; or

(iii) request that a rule making hearing be held in accordance with section 82-4204.

The council shall prepare a report to the legislature at least once each biennium and may recommend amendment, adoption, or repeal of rules necessary to bring agency policies and procedures into compliance with the policies and goals of this act.

REFERENCES

1. PL 91-191; 42 USC 4321-4347
2. For a general review of cases brought under NEPA, see NEPA in the Courts, by Frederick R. Anderson; Resources for the Future; Washington, D. C.; 1973
3. See Yarrington; "Judicial Review of Substantive Agency Decisions: A Second Generation of Cases Under the National Environmental Policy Act"; 19 South Dakota Law Review 279
4. See, e.g. Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 749 (E.D. Ark. 1971); Conservation Council v. Froehlke, 340 F.Supp. 222 (M.D. N.C. 1972)
5. See, e.g. E.D.F. v. Corps of Engineers, 470 F.2d 289 (8th Cir. 1972), where, in reversing the district court, the circuit court noted:

   > NEPA is more than an environmental full disclosure law... The unequivocal intent of NEPA is to require agencies to consider, and give effect to, the environmental goals set forth in the Act, not just to file detailed studies which will fill governmental archives. (470 F. 2d at 298)

6. Ch. 238, L. 1971; 69-6501 - 6518 R.C.M. 1947
7. Montana Wilderness Association v. Board of Land Commissioners, First Judicial District; No. 38544; 1975;
   Montana Wilderness Association v. Board of Health (Beaver Creek), Supreme Court; No. 13179; 1976
   Kadillak v. Anaconda Mining Co.; Second Judicial District; No. 61740; 1976
8. 69-5001, R.C.M. 1947
9. 89-866(3), R.C.M. 1947
10. 69-6503(a), R.C.M. 1947
11. 69-6504(b)(1), R.C.M. 1947

12. The directives contained in Section 69-6504 parallel those in Section 102 of the federal act, which were described as "action forcing" in the Congressional hearing.

13. 69-6504(b)(3), R.C.M. 1947

14. 89-885, R.C.M. 1947

15. 70-816, R.C.M. 1947

16. 69-6504(a), R.C.M. 1947

17. 69-6504(b)(2), R.C.M. 1947

18. 69-6507, R.C.M. 1947

19. 69-6503, R.C.M. 1947

20. See, e.g., the Water Pollution Control Act, 69-4801 et seq., R.C.M. 1947
the Montana Clean Air Act, 69-3904 et seq., R.C.M. 1947
The Major Facility Siting Act, 70-801 et seq., R.C.M. 1947
the Strip & Underground Mine Reclamation Act, 50-1034 et seq., R.C.M. 1947
the Strip & Underground Mine Siting Act, 50-1601 et seq., R.C.M. 1947
the Sanitation in Subdivisions Act, 69-5001 et seq., R.C.M. 1947
the Weather Modification Activities Act, 89-310 et seq., R.C.M. 1947

21. Hearings on S. 1075, S. 237 and S. 1752 before the Senate Committee on Interior and Insular Affairs, 91st Cong., 1st Sess., at 116-117 (April, 1969)

22. From Ecology, Engineering and Economics, by H. E. Koenig, T. C. Edens, and W. E. Cooper, in Porceedings of the Institute of Electronics and Electrical Engineering, Vol. 63, #3, March, 1975: p. 501, at 505.

23. Department of Agriculture; MAC 4-2.2(6)-P2010
Department of Fish & Game; MAC 12-2.2(10)-P290
Department of Health and Environmental Sciences; MAC 16-2.2(2)-P2000
Department of State Lands; MAC 26-2.2(18)-P250
Department of Livestock; MAC 32-2.2(2)-P210
Department of Natural Resources & Conservation; MAC 36-2.2(6)-P200

24. Department of Agriculture: 39 FR 18678
Department of Commerce: 36 FR 21368
Department of Defense: 39 FR 14699
Department of Housing & Urban Development: 40 FR 29992
Department of the Interior: 39 FR 19343
Department of Transportation: 39 FR 35234

25. See Council on Environmental Quality "Guidelines for Preparation of Environmental Impact Statements," 40 CFR 1500.6(e); (38 Federal Register 20550; 9/1/73)

26. See note 25; 40 CFR 1500.9

27. See note 25; 40 CFR 1500.8(a)(4); See also Natural Resources Defense Council v. Morton, 337 F.Supp. 165 (D.D.C. 1971)

28. See E.D.F. v. Corps of Engineers, 325 F.Supp. 728, 759 (E.D. Ark. 1971); Hanly v. Kleindienst, 460 F.2d 640 (2d Cir. 1972)

29. 69-6503(a), R.C.M. 1947

30. For a discussion of the "tiered" approach to impact statements, see "The National Environmental Policy Act" by Frederick Anderson in Federal Environmental Law; West Publishing Co.; Minneapolis; (1974) at pp. 362 et seq.

31. 11-3859 et seq., R.C.M. 1947

32. Do Citizen Suits Overburden Our Courts? a case study prepared by the Consumer Interests Foundation, Washington, D. C., 1973.

33. See Davies and Lettow: "The Impact of Federal Institutional Arrangements," In Federal Environmental Law (n. 16, supra) at pp. 129-130:

> An established agency's task of switching emphasis can be considerably more difficult and time consuming than a new agency's job of setting itself up in operation with a specific assigned task, such as that assigned to the special-mission Executive Office agencies.

For a general discussion of the types of coordinating plans and institutional arrangements which have been utilized in other states, see Integration and Coordination of State Environmental Plans, published by the Council of State Governments, Lexington, Ky.; 1975.

34. Because the agency has the expertise and the staff, as well as the statutory duty to compile data and consult with other agencies, the agency should carry the burden of justifying its actions by a preponderence of the evidence, once a prima facie case has been made out against it. See Sierra Club v. Froehlke, 359 F.Supp. 1289, 1334 (S.D. Tex. 1973)