

THE MONTANA ENVIRONMENTAL POLICY ACT
A LEGAL ANALYSIS OF MEPA'S ROLE

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Introduction

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 with a detailed analysis of MEPA and its implementation and to identify obstacles to the full realization of the environmental goals established by the Legislature with the enactment of MEPA.

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 decisionmakers 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 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 gone to court) and only one, Montana Wilderness Society v. Department of Health (Beaver Creek) has reached the Supreme Court. At the time of this writing, the Beaver Creek decision has not yet been issued.

As a result, there has been no definitive judicial statement clarifying either the procedural or the substantive aspects of MEPA. The Beaver Creek decision, hopefully, will provide some answers, but it doubtful that more than a very few of the many questions which have been raised in federal litigation will be resolved in that one decision. It is likely, then, that beyond the few issues directly confronted by the court in Beaver Creek, the status of MEPA will remain essentially unchanged, awaiting further judicial treatment, which, if past experience is any guide, will be slow in coming.

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 co-

ordination of all other policies and duties set forth in other statutes.

Unfortunately, MEPA provides no real guidance for accomplishing this integration of programs and activities. It has been left to the initiative of 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. Agencies, for the most part, view MEPA in terms of the requirement to produce Environmental Impact Statements (EISs). They are concerned with producing EISs which will avoid or stand up to court challenge. There has been little attention paid, however, to the use to which EISs should be put in decisionmaking. 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))

MEPA does include 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.

Only the provision requiring the preparation of environmental impact statements (EISs) (13) has received any attention. Agencies are 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-Granting Process

There is no question that MEPA expresses a state policy on environmental

protection. In Section 69-6503, 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. Since state government's involvement in these activities primarily takes the form of granting permits and licenses to private applicants, it must be concluded that MEPA was intended to affect the permit-granting process. To interpret the Act otherwise would place the bulk of environmentally significant activity beyond the range of MEPA's applicability. Unfortunately, MEPA does not address itself to many of the problems which arise in attempting to apply a broad, ecological perspective to the permit process.

An initial uncertainty is the effect which MEPA has on an agency's decision-making authority. Agencies have hesitated to rely on the policy statements in MEPA as a basis for changing their legal authority for decisionmaking. If the Department of Natural Resources, for example, is authorized by statute to grant water appropriation permits when certain criteria are met, the Department is reluctant to deny a permit application on the basis of general ecological considerations (14). Likewise, 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 sewage disposal, regardless of the possible harm to the environment which may be caused by a poorly planned subdivision (15).

This reluctance is understandable. In the absence of more explicit directives from the Legislature, an agency would be treading on thin ice if it denied a permit on the basis of vaguely defined environmental grounds. A

developer would be liable to sue the agency for deprivation of property without due process of law.

On the other hand, it would not be sufficient for the Legislature simply to grant the necessary authority to state agencies to base their permit decisions on environmental grounds. More attention must be paid to the ways in which various statutes interact with one another. It often happens, for example, that an agency is requested to grant a permit for a small part of a large project. A developer of a major industrial complex applies to the Department of Natural Resources and Conservation for a water diversion permit. In addition to the consumption of water, the project will have major effects on air and water quality, land use, wildlife, transportation requirements, stream bed alterations, etc. Permits will eventually be required from the air and water quality bureaus of the Department of Health and Environmental Sciences, from the Department of Fish and Game, and from local zoning authorities.

How should DNR&C approach the problem of performing an environmental review? Must DNR&C analyze the entire range of environmental impacts to be expected from the project as a whole? Can it base its decision on all those impacts which go beyond the water diversion problem? And what should the other agencies do? Should they all prepare EISs? Should each one of them perform the careful balancing of environmental costs and benefits in making its decision. This would lead to insupportable duplication of effort and the probability of inconsistent decisions. What would happen, for example, if DNR&C denied the water use permit because of the totality of adverse impacts, while the Water Quality Bureau of DHES approved the project after finding that water quality standards would not be violated? On the other hand, if it is decided that only one agency should make the ultimate decision and perform the comprehensive

environmental analysis, how will that agency be designated?

An even more difficult problem arises when, instead of one developer applying for several permits, several independent projects are proposed, each by a different applicant, perhaps, but each growing out of the previous one. For example, a mining company applies for a coal strip mining permit from the Department of State Lands. The application is in order, and reclamation of the disturbed land appears feasible, so the permit is granted. Soon after, a coal-fired generating plant is proposed, perhaps preceded by a petition to redesignate the area from Class II to Class III under the Clean Air Act nondegradation rules. The generating plant requires a series of decisions by DHES and DNR&C. The construction causes an influx of residents and several subdivisions are proposed.

All of these developments were easily predictable, perhaps definitely anticipated, at the time DSL made its decision on the mine siting permit. How extensive an environmental review does MEPA require of DSL? How far beyond the criteria set out in the Strip Mine Siting Act can DSL go in making its decision? Regardless of what MEPA may require, the fact is that agencies do not go beyond their narrow authorizations. Each agency makes its decision based on a limited range of factors, then passes the problem on to the next agency, which is wearing a similar set of blinders (16).

This type of problem is intensified when one of the agencies involved in reviewing the project or projects is a local agency. This situation arises most often during subdivision review under the Subdivision and Platting Act and the Sanitation in Subdivision Act (17). The local agency is required to consider a wide range of factors in its decisions; 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. On the

other hand, the state Department of Health must review the subdivision proposal for adequate water supply and sewage disposal. Is the Health Department authorized to deny this certification on the basis of general environmental considerations, regardless of the actions taken by the local officials? This is one of the questions presented by the Beaver Creek case.

It is clear, then, that the Legislature must, at a minimum, clarify the division of responsibilities and the effect of MEPA on agency decisionmaking authority. But there is another, more subtle problem presented by the notion of making environmental decisions in the context of case-by-case licensing procedures.

Any attempt to promote the 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 lifestyles. Is the licensing process 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 its 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 decisionmakers are subject to a variety of pressures. If a hearing is required, many of the formalities of courtroom procedure are 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 (18). The difficulty of making policy under such 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.

Several things should have been made clear by the preceding discussion. First, it is essential that explicit legislative standards be set to guide agency decisionmaking. The language of MEPA should make it unmistakable that where MEPA applies, environmental values are to be weighed along with other considerations. The Act should indicate how much relative weight is to be given to environmental values, and under what conditions adverse environmental effects may be permitted. Once the priorities are established by the Legislature, it can be left to the agencies to perform the case-by-case balancing; but the agencies cannot be expected to set these priorities in the course of adjudication.

If the Legislature feels that it is impossible to adopt firm standards applicable to all agencies, general guidelines might still be provided, and the agencies directed to adopt specific standards through rulemaking. The crucial point is that fundamental policy decisions must be made in a legislative context, and standards and priorities set in advance of individual cases (19).

The second necessary step is to indicate clearly when MEPA applies. A statute-by-statute study should be conducted to identify critical decision points, and to determine the manner in which various statutory authorizations interact with one another. In this way it will be possible to identify the earliest feasible decisionmaking point at which the environmental review should begin. The appropriate lead agency can be identified, and responsibilities can be properly allocated.

A third essential point is that the "environmental balancing" be performed only once. It makes little sense for five different agencies to make five different assessments of costs and benefits from a broad ecological perspective, and arrive at five different conclusions. Once a lead agency is designated, that agency should have the responsibility to perform the balancing and make the decision. Other agencies will be required to contribute to the preparation of the EIS and will have to certify compliance with the specific statutory requirements over which they have jurisdiction, but only the lead agency will make the "MEPA decision."

In order to accomplish this, it will be necessary to establish a mechanism for coordinating the permitting activities of the various agencies (20). When the developer in our earlier example approaches DNR&C for a water use permit, he should be required to indicate at that time the full extent of the entire project, so that it can be determined 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.

This sort of approach should be of advantage not only to those interested in making the state responsive to environmental needs, but also to private applicants. It would 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. The Legislature might attempt to devise these mechanisms and include them in MEPA or in the individual statutes. A more flexible approach might be to indicate the desired goals, establish an inter-agency commission or designate some existing agency to devise the proper procedures and direct that the procedures be made effective within a given time limit.

In order to make this coordinated approach to the permit process work effectively, it will be necessary to include local decisionmakers as part of the

process. As mentioned earlier, it is often the local officials who have the most comprehensive review authority. The local agency is therefore the logical choice for lead agency. MEPA should explicitly indicate that, for the purposes of the statute, local agencies are "agencies of the state."

In many cases, local authorities already operate, in essence, as agents of the state. In reviewing subdivisions (21), or applications for construction within floodplains (22), or on lakeshores (23), or along stream banks (24), local officials are required to apply criteria set forth by the Legislature. The local officials are therefore acting on behalf of the state. It is only a logical extension of this already existing situation to make local agencies responsive to the policies of MEPA as well. It would then be possible to designate the local agency as the lead agency for environmental review purposes. Most of the responsibility for performing the actual research and information-gathering could be left with the state agencies, and those state agencies would also have to certify that the project in question is eligible to receive whatever state permits are required but the ultimate decision, based on environmental as well as all other factors, could be left to the local decisionmakers. This decision would then be subject to the same scope and standard of judicial review as any state-agency decision under MEPA.

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. This situation arises most often during subdivision 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 (25).

A similar situation pertains 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 two 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. In the absence of a more explicit mandate from the Legislature, therefore, the EIS will remain essentially a descriptive document with no effect on the ultimate decision.

The problem may be restated in this way: in the context of permit-granting and licensing, the state or local agency becomes involved and begins its environmental analysis too late in the game to have any real effect on the outcome. The policies and priorities established by MEPA must be brought to bear at the earliest stages of decisionmaking in order to be effective. The earliest stage, of course, is the adoption of regulations by the agency, indicating the manner in which environmental values will enter into the decision. Environmental analysis should begin at this stage. An EIS on rulemaking need not contain the detailed biophysical descriptions found in project-specific impact statements, but should concern itself more with an analysis of policy options, presenting an overview of the impacts which those options will have on environmental decisionmaking. It is at this level of rulemaking and policy formulation that the notion of programmatic EISs makes sense. Findings which are made during the rulemaking process will then apply to all subsequent individual permit decisions.

On the level of individual project applications, MEPA policies and priorities should affect planning and design from the outset. Private developers should be encouraged, perhaps required, to consult and cooperate with the appropriate officials throughout the project design process to assure that environmental values are considered from the beginning. The initial siting decision by the developer is not too early to begin the review. The coordination of the permit procedure described earlier would facilitate this early initiation of environmental analysis.

Within this approach, the EIS could become more than simply a description

of present environmental conditions and potential impacts. The EIS might become part of the project formulation itself, providing a record of the efforts made during the planning process to reduce and mitigate adverse environmental effects. Instead of being a one-shot, static document, the environmental review could become an ongoing, integral part of planning and decisionmaking.

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 interagency 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.

This need for coordination was touched on in the discussion of the permit process. The formulation of rules for the implementation of the nondegradation requirements of the Clean Air Act is a perfect example of the need to conduct a coordinated, inter-agency programmatic analysis of policy options before individual applicants come along requesting reclassification of an area or permission to build a new source of pollution. Some frame of reference needs to be developed that the Department of State Lands can refer to in deciding on the fate of a strip mine, which will be followed by a mine-mouth generating plant, which will be followed by five subdivisions.

The magnitude of these problems clearly places them beyond the resources of any one agency to solve on its own. A mechanism for the coordination of agency activities is required. The agencies, and the governor, have repeatedly failed to develop such a mechanism on their own initiative. It is up to the Legislature to take the lead in recognizing the need, and suggesting a structure for dealing with it.

The Coordination of State Policy

The discussion thus far has made it clear, hopefully, that some mechanism is essential for the coordination of the policies, programs and decisions of state (and local) government. MEPA called for such coordination five years ago but that legislative mandate has been ignored. We must assume that it will continue to be ignored unless the mechanism is proposed by the Legislature. The EQC clearly cannot perform the necessary functions without invading the domain

of the executive. The coordination must take place with the executive branch.

The nature of this coordination might take many forms, both in terms of the level of planning, policy making and implementation, and in terms of the types of institutional arrangements. Institutional arrangements could range from an interagency advisory council comprised of department heads or lower level division or bureau chiefs, and perhaps representatives of local government, to the creation of 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 interagency 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 (26).

An executive branch environmental agency could perform one or more of the following functions:

- 1) Policy formulation. As discussed earlier, there is need for an integrated coordinated state environmental policy which can serve as a framework within which all other state agency programs can operate. This might take the form of an inventory of conditions and problems with policy recommendations; or a formal policy to which all state agencies must adhere; or an explicit environ-

mental program with directives for implementation. A planning process rather than a complete plan might be developed (27).

2) Program Review. The environmental agency might conduct a regular review of state agency activities and decisions to determine whether they are in compliance with the state plan. Recommendations could be made based on that review. These recommendations might be only advisory, or might carry greater weight. For example, if the environmental agency determined that some other agency's action was in conflict with the state environmental plan, an appeal could be made through some administrative review channels, with final resolution by the governor.

3) EIS Coordination. The environmental agency could 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.

4) Permit Coordination. The need to coordinate the permit process has been discussed earlier. An environmental agency could serve as a clearinghouse for permit applications, and determine when a consolidation of permit activities is needed.

5) Environmental Appeals. An environmental agency could be given quasi-judicial powers to resolve conflicts in environmentally related matters. Appeals might be made in the following situations: when an agency's decision not to prepare an EIS is challenged; when an agency's decision to grant or deny a permit is questioned; when an agency action is alleged to be in conflict with the state environmental plan.

Appeal to such an environmental board might be a prerequisite for bringing an action in court.

The possibilities are numerous, and a thorough discussion of the approaches which might be taken could be the subject of a future report (28). The only point which needs to be made here is that an executive-branch agency of some sort must be established with the clearly defined duty and authority to carry out the policies of MEPA. This agency would, in addition, be a natural contact point for the EQC. This would facilitate cooperation and an exchange of views and information between the executive and legislative branches.

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 decisionmaker. If the EIS process can be coordinated with a statewide environmental policy or plan, much of the duplication might be eliminated.

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 (29). 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.

The EIS process should provide a mechanism for the exchange of information among state (and local) agencies (30). 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 (31).

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 Legislature may wish to set out in some detail the range and depth of considerations which are appropriate for an adequate impact statement. 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 (32). 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 rulemaking, 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.

A fourth 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.

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...(33)

the discussion could take on some focus.

The EIS could become an integral part of the agency's planning process, and could reflect efforts made by the agency throughout the project formulation and implementation to mitigate and reduce adverse environmental effects. The EIS would thus be more than a one-shot static document, but would receive continual updating as the project progressed. Such a document would be of value to any environmental coordinating council or agency which might be established, to monitor agency compliance with a statewide environmental policy. It would also provide a reviewable record of value to a court in case of litigation.

If the overall coordination of state government's environmental activities can be achieved, as suggested earlier, the role of the "programmatic impact statement" could take on added significance. The notion of programmatic impact 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, the argument has some validity, at least in terms of the present approach to the licensing process. If the kind of coordination could be achieved which has been suggested here, a programmatic approach would make sense even in the context of permit-granting.

The environmental coordinating agency could produce a programmatic EIS or a series of EISs as part of the formulation of a state environmental plan or policy. 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 rulemaking 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 (34).

Enforceable Duties and the Role of the Courts

This discussion has made the point several times that the policies of MEPA have gone unimplemented because of the lack of a mechanism for coordinating executive agency activities. There are no well-defined standards for determining what is required of an agency in any given situation. There are no legislative guidelines against which to measure agency actions for compliance with the law. For this reason, agencies are challenged only on procedural

grounds, and not for deficiencies in policies or programs. Environmentalists tend to view litigation as a delaying tactic, because delay is all that can be achieved. With no well-defined statutory standards, a court is unable to pass judgement on the merits of an action. The ultimate question -- whether a proposed action is consistent with the policies of MEPA -- is never adjudicated, because no one is sure exactly what those policies require. The clear enunciation of standards by the Legislature, and the coordination of policy and implementation by the executive branch as suggested earlier, will go a long way towards defining the duties of executive agencies. Once that happens, the courts will be able to play a much more positive role in the MEPA process.

It has been mentioned before that the judiciary is not the proper forum for policy-making (35). The role of the courts is to compare the facts surrounding agency activity with the policies and directives contained in the statute, and determine whether agencies have complied with the law. If a statute is unclear in its statement of policy or in its directions to implement policy, a reviewing court is forced either to defer to the discretion of executive agencies, or to attempt to define and clarify policy on its own. On the other hand, if the Legislature provides clear guidelines, criteria, and directives, the role of the courts is much simpler. The discretion of executive agencies is restricted by the statutory standards, and the court need not try to set policy.

The Legislature must assume the fundamental responsibility then, of setting the priorities and establishing the standards which will give substance to MEPA's policies. That initial setting of priorities cannot be left to the executive agencies (they have so far refused to exercise that responsibility in any event) or to the courts, which are least responsive to the will of the people. It will always be an executive agency, of course, which performs the actual case-by-case

balancing of costs and benefits, but the agency must be provided with a set of values and standards, and must be held answerable to those standards.

An example of what might be done: language could be inserted in Section 69-6503 stating that no agency action will be permitted which fails to be responsive to the policy goals described in Section 6503, or which in some way pollutes or destroys the environment, unless the agency can show:

- 1) that there is no feasible alternative consistent with the public health, safety and welfare;
- 2) that the benefits of the proposed action outweigh the harms; and,
- 3) that the proposal includes all practicable planning to reduce and mitigate adverse environmental impacts.

Where adverse environmental effects might result from an action, the burden would be on the agency to demonstrate these points.

A possible procedure might be the following: Whenever agency action would involve adverse effects on the environment:

- 1) the decision whether to proceed or not must be preceded by an EIS, which is given full consideration in the decisionmaking process;
- 2) the decision to proceed with the action must be accomplished by a written justification showing that
 - a) there is no feasible alternative consistent with public health, safety, and welfare;
 - b) benefits of the action outweigh the harms;
 - c) the plans include all practicable efforts to reduce and mitigate the harms;
- 3) the decision to proceed with the action would be conditional for some period of time (say, thirty days) during which time no action may be taken committing resources or affecting legal rights;
- 4) during the thirty-day conditional period, the action would be subject to challenge on one of the following grounds:

Missing Pages.

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 hearings.

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

14. See the Department of Natural Resources & Conservation Final EIS on the Prickly Pear Water Diversion Proposal; August, 1974; discussion of legal constraints at pp. 37 et seq.;

It appears 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 (p. 38)

15. See the Department of Health & Environmental Sciences Revised Final EIS on the Beaver Creek South Subdivision Proposal; October, 1974; discussion of alternatives at page 50:

Although there would be adverse environmental effects on wildlife and to many a degradation of the aesthetic quality of the area, no legislative mandate is in effect which would give legal justification for refusing to grant subdivision plat approval based on these grounds.

16. This "small handle" problem is discussed by Frederick Anderson in his chapter on "The National Environmental Policy Act," at pp. 293-4; Federal Environmental Law; West Publishing Co.; Minneapolis; 1974

17. 11-3859 et seq., R.C.M. 1947; 69-5001 et seq., R.C.M. 1947

18. For a more complete discussion, see "The National Environmental Policy Act and the Licensing Process: Environmentalist Magna Charta or Agency Coup de Grace?"; A. W. Murphy; 72 Columbia Law Review 963 (1972)

19. The 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.

20. An example of a permit coordination mechanism is Washington's Environmental Coordination Procedures Act of 1973; WRC 90.62.010 et seq. For a discussion of Washington's experience with this Act, see Masterson, "Coordinated Permits: The Washington Experience," Environmental Comment, October, 1975.
21. 11-3859 et seq., R.C.M. 1947
22. 89-3501 et seq., R.C.M. 1947
23. 89-3701 et seq., R.C.M. 1947
24. 26-1510 et seq., R.C.M. 1947
25. See n. 15, supra

43. Article IX, Section 1; Constitution of the State of Montana, 1972.
44. Neustadter, "The Role of the Judiciary in the Confrontation with the Problems of Environmental Quality," 17 U.C.L.A. Law Review 1070, at p. 1098.
45. 5 U.S.C. 702
46. For a list of such statutes, see "Do Citizen Suits Overburden our Courts?", published by the Consumer Interests Foundation; Washington, D.C.; 1973
47. Senate Bill 203, 1975 Session
48. Veto Message issued May 13, 1975
49. See report, note 46, supra; See also Sax, "Michigan's Environmental Protection Act of 1970: A Progress Report;" 70 Michigan Law Review 1003 (1972)