

BACKGROUND AND NEED FOR HB 51

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EXAMINEE
DATE 1.21.05
HB 51

Sponsor: Rep. Alan Olson

House Bill 51 seeks to rectify the oversight of the 2001 legislature, and return the statutory definition of "cumulative impacts" in MEPA to be consistent with the definition of "cumulative impacts" as contained within the 1988 Environmental Quality Counsel MEPA rules.

Up until the 2001 Legislative session, MEPA did not contain a express definition of "cumulative impacts". Instead, such meanings were provided by the EQC's 1988 MEPA rules, which provided in model rule II(7) that:

'Cumulative impact' means the collective impacts on the human environment of the proposed action when considered in conjunction with other past and present actions related to the proposed action by location or generic type. Related future actions must also be considered when these actions are under concurrent consideration by any state agency through pre-impact statement studies, separate impact statement evaluation, or permit processing procedures.

1988 MAR p. 2692, Eff.12/23/88. (emphasis added.)

The Department of Natural Resources and Conservation, adopted the 1988 model EQC rules. Consequently, it was required by ARM §36.2.525(3)(d) and Section 75-1-208(11), MCA, to evaluate impacts, including cumulative impacts, on the physical environment in the preparation of any environmental assessment document. The term "cumulative effect" is defined by DNRC's administrative rule, ARM §36.2.522(7) as:

the collective impacts on the human environment of the proposed action when considered in conjunction with other past and present actions related to the proposed action by location or generic type. Related future actions must also be considered when these actions are under concurrent consideration by any state agency through pre-impact statement evaluation, or permit processing procedures.

In the 2001, the Montana Legislature amended MEPA to include a statutory definition of “cumulative impacts”.

Section 75-1-208 (11), MCA, provides that:

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

Leg. intent

Section 1 of Chapter 299 of the Montana Laws of 2001 (emphasis added.)

Section 75-1-220, MCA, also currently defines “cumulative impacts” as:

... the collective impacts on the human environment of the proposed action when considered in conjunction with other past, present, and future actions related to the proposed action by location or generic type.

Thus, under the 1988 EQC model rules, state agencies were only required to consider future cumulative impacts, which were under concurrent consideration by other Montana state agencies. By contrast, under the 2001 statutory changes, because the word “state” was unintentionally removed, agencies were arguably required to consider future cumulative impacts under consideration by other forms of government (including federal agencies).

In Friends of the Wild Swan v. Montana Department of Natural Resources and Conservation and Montana Board of Land Commissioners, Cause No. BDV-2003-527 (Mont. 1st Judic. Distr. Ct., Lewis & Clark County), Judge Jeffrey Sherlock discerned the difference in the language between the definition of cumulative impacts in the 1988 Model EQC MEPA rules and the 2001 statutory enactments by the Montana Legislature. Accordingly, in his March 8, 2004 procedural ruling, the Court held that the DNRC was required to consider future federal actions, as well as state actions, because these were

under concurrently consideration by “a” agency; not just a state agency. See, pages 5 and 6 of the Court’s decision. (A copy of the Court’s ruling is attached.) The Court ruled that the statutory definition of MEPA prevailed over the EQC’s model rule definition.

House Bill 51 seeks to rectify the oversight of the 2001 legislature, and return the statutory definition of “cumulative impacts” in MEPA to be consistent with the definition as contained within the 1988 EQC MEPA rules.