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MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY

RIKKI HELD, ET AL., Plaintiffs v. STATE OF MONTANA, ET AL., Defendants.	Cause No. CDV-2020-307 (amd) Hon. Kathy Seeley **DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS UNDER M. R. Civ. P. 12(b)(1), 12(b)(6) & 12(h)(3)**

INTRODUCTION

Plaintiffs lack standing because their alleged injuries are not caused by the statutes they seek to invalidate. Plaintiffs allege the State Energy Policy, Mont. Code Ann. § 90-4-1001(1)(c)–(g), and the Montana Environmental Policy Act ("MEPA") provision prohibiting consideration of potential impacts beyond Montana's borders ("Montana limitation"), § 75-1-201(2)(a), are the cause of the State's aggregate acts that allow greenhouse gas ("GHG") emissions. They are not. The decisions of the State's agencies in the area of energy regulation are instead guided by numerous statutes that exist independently of the State Energy Policy and the Montana limitation to MEPA.

In recognition of this deficiency, Plaintiffs ask this Court to force the State to adopt a remedial plan to address climate change. (Doc. 1 ¶¶ 8–9.) Yet the Ninth Circuit has already rejected a similar request to require the federal government to adopt a remedial plan to reduce GHG emissions. *Juliana v. United States*, 947 F.3d 1159, 1169–73 (9th Cir. 2020). Further, the Montana Supreme Court has rejected the approach of providing declaratory and injunctive relief directed towards an entire statutory scheme instead of invalidating a specific offending statute. *See Donaldson v. State*, 2012 MT 288, ¶¶ 8–10, 367 Mont. 228, 292 P.3d 364. Because Plaintiffs' request for relief intrudes upon the prerogatives of the legislative and executive branches, it also raises a nonjusticiable political question.

Plaintiffs would not be left with these scattershot tactics if their claims were more targeted to the administrative decisions they allege contribute to their injuries. (Doc. 1 ¶ 118.) Had these concerns been raised in the context of a specific challenge to an administrative decision, the relevant statutes and facts would be known. *See Qwest Corp. v. Mont. Dep't of Pub. Serv. Regulation*, 2007 MT 350, ¶ 25, 340 Mont. 309, 174 P.3d 496 ("Judicial appraisal of agency action stands on surer footing when it takes place in the context of a specific factual record."). The Montana Administrative Procedure Act ("MAPA") specifically allows courts to reverse or modify administrative decisions for violations of constitutional provisions. Mont. Code Ann. § 2-4-704(2)(a)(i). Accordingly, Plaintiffs should be required to exhaust their administrative remedies. *See Id.* § 2-4-702(1)(a).

FACTUAL BACKGROUND

I. Plaintiffs' claims

Plaintiffs are children and youth in Montana between the ages of two and 18. (Doc. 1 ¶ 2.) Plaintiffs ask this Court to invalidate portions of the State Energy Policy, Mont. Code Ann. § 90-4-1001(1)(c)–(g), and MEPA's Montana limitation, § 75-1-201(2)(a), because these statutes allegedly contribute to climate change. Plaintiffs argue that these two statutes are the cause of the State's "aggregate acts," which in turn allow individuals and business to emit GHGs. (Doc. 1 ¶ 118.) The "aggregate acts" Plaintiffs complain of include various decisions and statements from Governor Steve Bullock, the Montana Department of Transportation ("DOT"), the Montana Department of Environmental Quality ("DEQ"), the Montana Department of Natural Resources and Conservation ("DNRC"), and the Montana Public Service Commission ("PSC"). *Id.*

Plaintiffs don't stop there. They also ask this Court to: permanently enjoin Defendants from subjecting Plaintiffs to these two statutes and the State's aggregate acts; require "Defendants to prepare a complete and accurate accounting of Montana's GHG emissions"; require "Defendants to develop a remedial plan or policies to effectuate reductions of GHG emissions in Montana"; appoint a special master to review the remedial plan; and issue "[a]n order retaining jurisdiction over this action until such time as Defendants have fully complied with the orders of this Court." (Doc. 1 Prayer for Relief ¶¶5–9.) Plaintiffs bring these claims under the right to a clean of healthful environment, Mont. Const. art. II, § 3, art IX, § 1, the right to seek safety, health, and happiness, art. II, § 3, § 15, § 17, the right to individual dignity and equal protection, art. II, § 4, § 15, and the public trust doctrine, art. IX, § 3. (Doc. 1 ¶¶ 211–251.)

II. The State Energy Policy

The State Energy Policy, SB 225, was based on two years of study conducted by the Environmental Quality Council ("EQC") in the early 1990s. *Hearing on SB 225 Before the Mont. S. Comm. on Nat. Resources*, 53rd Reg. Sess. 4–5 (Feb. 1, 1993).[1] This study was in response to the Persian Gulf War and resulting uncertainty about energy security and supply. *Id.* The EQC was instructed to work with the Montana Consumer Counsel and the DNRC, which at that time was serving as the state's energy office, to study recommendations for an energy policy and options for its implementation. *Id.*

Upon its introduction, the sponsor of SB 225 said the State Energy Policy would lay "the ground work for future legislation." *Id.* at 4. The executive director of the EQC testified it is "intended to guide future state energy policy development." *Id.* Staff from DNRC stressed it is "not intended to dictate any outcome at all." *Id.* Once SB 225 passed, the EQC was directed to carry out the Policy "on an incremental basis" and it was instructed to "forward its recommendations to the legislature and to the appropriate state agencies for adoption." Mont. Code Ann. § 90-4-1003(3)(c) (1993). In 2009, this coordinating responsibility was transferred from the EQC to the Energy and Telecommunications Interim Committee. 2009 Mont. Laws 2757, ch. 454, § 2 (codified at Mont. Code Ann. § 90-4-1003).

[1] *Available at* <https://courts.mt.gov/Portals/189/leg/1993/02-01-snr.pdf>. While considering a motion to dismiss, a court is not required to accept as true any legal conclusions stated in the complaint. *Cowan v. Cowan*, 2004 MT 97, ¶¶ 9–17, 321 Mont. 13, 89 P.3d 6. Like case law, courts may consider legislative history in statutory interpretation. *Grenz v. Mont. Dep't of Natural Res. & Conservation*, 2011 MT 17, ¶ 28, 359 Mont. 154, 248 P.3d 785.

In 2011, SB 305 amended the State Energy Policy to provide a more defined energy goal. 2011 Mont. Laws 1606–08, ch 385, § 1 (codified at Mont. Code Ann. § 90-4-1001). As amended, the purpose of the State Energy Policy is to "enhance existing energy development and create new diversified energy development from all of Montana's abundant energy resources." Mont. Code Ann. § 90-4-1001(1)(b). The refined policy identifies wind, rooftop solar, biomass, oil and gas, and coal as potential energy sources. *Id.* at (1)(c)–(i).

III. MEPA

The Montana Legislature enacted MEPA in 1971. *See* 1971 Mont. Laws ch. 238. In 2001, MEPA was amended to state, "The agency may not withhold, deny, or impose conditions on any permit or other authority to act based on parts 1 through 3 of this chapter." 2001 Mont. Laws ch. 268 (codified at Mont. Code Ann. § 75-1-201(4)(a)). The purpose of this 2001 amendment was to "clarify that MEPA is a procedural act and not a substantive act." *Hearing on HB 473 Before the Mont. H. Comm. on Nat. Resources*, 57th Reg. Sess. p. 12 (Feb. 12, 2001) (Attach. A).

In 2011, the Montana Legislature limited the scope of MEPA review to environmental impacts in Montana: "an environmental review conducted pursuant to subsection (1) may not include a review of actual or potential impacts beyond Montana's borders. It may not include actual or potential impacts that are regional, national, or global in nature." 2011 Mont. Laws. ch 396, § 2 (codified at Mont. Code Ann. § 75-1-201(2)(a)). This amendment's purpose was to ensure MEPA's procedural review does not become mired in an analysis of activities taking place outside of Montana and "to narrow the scope of the

review to evaluating impacts on Montana's environment . . . ." *Hearing on SB 233 Before the Mont. S. Comm. on Nat. Resources*, 62d Reg. Sess. 08:48:49–08:49:21 (Feb. 2, 2011).[2]

STANDARD FOR MOTION TO DISMISS

Justiciability is a threshold question in establishing whether a Court has jurisdiction to hear a case. *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 18, 333 Mont. 331 (2006). If a case does not present a justiciable issue, dismissal under Rule 12(b)(1) is necessary. *See* M. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action."). Moreover, a Court should dismiss a case under M. R. Civ. P. 12(b)(6) when, after viewing the facts in the light most favorable to the Plaintiff, "it appears beyond doubt the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Cossitt v. Flathead Indus.*, 2018 MT 82, ¶ 9, 391 Mont. 156, 415 P.3d 486 (citation omitted).

ARGUMENT

I. Plaintiffs lack standing.

Standing is a threshold jurisdictional requirement that limits Montana courts to deciding only cases or controversies (*i.e.*, case-or-controversy standing) within judicially created prudential limitations (*i.e.*, prudential standing). *Mitchell v. Glacier Cty.*, 2017 MT 258, ¶¶ 6, 9, 389 Mont. 122, 406 P.3d 427. Standing embodies "two complementary but somewhat different limitations." *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 7, 355 Mont. 142, 226 P.3d 567. Case-or-controversy standing limits courts

[2] *Available at* <http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/21017?agendaId=96153>.

to deciding actual, redressable controversies. *Id.* Prudential standing confines the courts to a role consistent with the separation of powers and prevents them from addressing political questions. *Bullock v. Fox*, 2019 MT 50, ¶ 44, 395 Mont. 35, 435 P.3d 1187.

A. Plaintiffs fail to establish case-or-controversy standing.

Under Montana law, to establish case-or-controversy standing: (1) "the complaining party must clearly allege past, present, or threatened injury to a property or civil right," and (2) "the alleged injury must be: concrete, meaning actual or imminent, and not abstract, conjectural, or hypothetical; redressable; and distinguishable from injury to the public generally." *Bullock*, ¶ 31. Similarly, under federal law, case-or-controversy standing has three elements: "injury in fact (a concrete harm that is actual or imminent, not conjectural or hypothetical), causation (a fairly traceable connection between the injury and the conduct complained of), and redressability (a likelihood that the requested relief will redress the alleged injury)." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 32, 360 Mont. 207, 255 P.3d 80. Federal precedent on justiciability is persuasive in interpreting Montana law on the same subject. *Bullock*, ¶ 30. Plaintiffs fail to establish causation and redressability through their claims.

1. Plaintiffs' alleged injuries are not caused by the State Energy Policy or MEPA's Montana limitation.

To establish standing, a plaintiff's injury must be traceable "to the *challenged action* of the defendant . . . ." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (emphasis added). A plaintiff "must show that he has sustained, or is in immediate danger of sustaining some *direct* injury . . . and not merely that he suffers in some indefinite way in common with people generally." *Mitchell*, ¶ 10 (emphasis added) (citation omitted).

Plaintiffs' alleged injuries are not caused by the State Energy Policy or the Montana limitation to MEPA for two reasons. First, the State Energy Policy contained in Mont. Code Ann. § 90-4-1001 is not the Legislature's only policy concerning energy. Many other statutes contain independent policy declarations regarding energy. *See, e.g.*, Mont. Code Ann. §§ 15-24-3101, 15-32-101, 15-32-401, 15-72-102, 50-60-801, 69-3-1202, 69-3-2002, 69-8-601, 75-20-102, 76-15-902, 90-4-301, 90-4-1010, 90-4-1011, 90-4-1101. If this Court were to invalidate Mont. Code Ann. § 90-4-1001, the State's other policies on energy would remain.

Second, the State's actions complained of by Plaintiffs are not caused by these two statutes. Instead, they are result of many substantive laws scattered throughout the code. Plaintiffs nevertheless argue, "Defendants, pursuant to and in furtherance of the State Energy Policy, have taken, and continue to take, affirmative actions to authorize, implement, and promote projects, activities, and plans (hereinafter, 'aggregate acts') that cause emissions of dangerous levels of GHG pollution into the atmosphere." (Doc. 1 ¶ 118.) Plaintiffs then enumerate 23 separate governmental decisions within these "aggregate acts" that are allegedly the result of the State Energy Policy, including decisions concerning utility planning, *id.* at (a), (d), rates for renewable energy resources, *id.* at (b)–(c), coal-fired power plants, *id.* at (f), (j), coal mines, *id.* at (g)–(i), (k), oil pipelines, *id.* at (l)–(m), oil and gas exploration and extraction, *id.* at (n), petroleum refineries, *id.* at (o)–(p), fuel taxes, *id.* at (q), and transportation planning and infrastructure, *id.* at (s).

But there are numerous other laws, besides the State Energy Policy, that control administrative decisions in these areas. The following table is a rough summary of the state authorities that *could* apply to these subject areas:

Utility Planning	**Electric Utility Industry Generation Reintegration Act**: Mont. Code Ann. §§ 69-8-419 to -421; Mont. Admin. R. 38.5.8201–8229. **Montana Integrated Least-Cost Resource Planning and Acquisition Act**: Mont. Code Ann. §§ 69-3-1201 to -1209; Mont. Admin. R. 38.5.2001–2016.
Rates for Renewable Energy Projects	**Small Power Production Facilities**: Mont. Code Ann. §§ 69-3-601 to -605; Mont. Admin. R. 38.5.1901–1910.
Coal-fired Power Plants	**Montana Major Facility Siting Act**: Mont. Code Ann. §§ 75-20-101 to -411; Mont. Admin. R. 17.20.301–1902. **Clean Air Act of Montana**: Mont. Code Ann. § 75-2-201 to -429; Mont. Admin. R. 17.8.101–17.8.1815.
Coal Mines	**The Montana Strip and Underground Mine Reclamation Act**: Mont. Code Ann. §§ 82-4-201 to -254; Mont. Admin. R. 17.24.301–1826.
Oil Pipelines	**Montana Major Facility Siting Act**: Mont. Code Ann. §§ 75-20-101 to -411; Mont. Admin. R. 17.20.301–1902. **Easements on State Lands**: Mont. Code Ann. §§ 77-2-101 to -107; Mont. Admin. R. 36.25.135. **Use of Beds of Navigable Rivers**: Mont. Code Ann. §§ 1109 to -1117; Mont. Admin. R. 36.25.1101–1108. Eminent Domain for Pipeline Carriers: Mont. Code Ann. § 69-13-104.
Oil and Gas Exploration and Extraction	**Oil and Gas—General Provisions**: Mont. Code Ann. §§ 82-10-101 to -604. **Oil and Gas Conversation**: Mont. Code Ann. §§ 82-11-101 to -306; Mont. Admin. R. 36.22.101–1707. **Oil and Gas Leases on State Lands**: Mont. Code Ann. §§ 77-3-101 to -512; Mont. Admin. R. 36.25.201–237.
Petroleum Refineries	**Clean Air Act of Montana**: Mont. Code Ann. §§ 75-2-204, -211, -213, -215; Mont. Admin. R. 17.8.740–772.
Fuel Taxes	**Gasoline and Vehicle Fuels Taxes**: Mont. Code Ann. §§ 15-70-101 to -720; Mont. Admin. R. 18.15.101–805.
Transportation Planning and Infrastructure	**Highways and Transportation**: Title 60 of the Montana Code Annotated; Title 18 of the Montana Administrative Rules

Plaintiffs acknowledge the existence of some of these authorities when describing the Defendants' jurisdiction over these subject areas. (Doc. 1 ¶¶ 86–105.) Yet Plaintiffs do not allege any causal connection between these statutes and their alleged injuries. As the sample of authorities in the table demonstrates, any relation between the State Energy Policy and Defendants' actions is much too diffuse to provide standing because the alleged actions Plaintiffs complain of are the result of many other statutes. *See Mitchell*, ¶ 10.

The State Energy Policy did not, and could not, cause any of the alleged "aggregate acts." Rather than directing any particular outcome, the State Energy Policy is largely symbolic and aspirational. It was intended to lay "the groundwork for future legislation" and "guide future state energy policy development," and was "not intended to dictate any outcome at all." *Hearing on SB 225 Before the Mont. S. Comm. on Nat. Resources*, 53rd Reg. Sess. 4 (Feb. 1, 1993).[3] The State Energy Policy's text also suggests it was not intended to guide any substantive administrative decisions. *See* Mont. Code Ann. § 90-4-1003(2) (identifying the provisions in subsection one as "goal statements").

Similarly, MEPA's Montana limitation could not have dictated the alleged substantive outcomes listed in the Complaint. MEPA is procedural—not substantive. *Northern Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs*, 2012 MT 234, ¶ 14, 366 Mont. 399, 288 P.3d 169. It exists to inform the public and the Legislature. Mont. Code Ann. § 75-1-102(1)(2). "Nowhere in the MEPA is found any regulatory language." *Montana Wilderness Ass'n v. Board of Health & Envtl. Sciences*, 171 Mont. 477, 485, 559 P.2d 1157, 1161 (1976). Therefore, an "agency may not withhold, deny, or impose

[3] *Available at* <https://courts.mt.gov/Portals/189/leg/1993/02-01-snr.pdf>.

conditions on any permit or other authority to act" based on its MEPA analysis. Mont. Code Ann. § 75-1-201(4)(a). Additionally, one of the Defendants—the PSC—is entirely exempted from MEPA review. *Id.* at (3).

As none of the State's alleged aggregate acts are the result of the State Energy Policy or MEPA's Montana limitation, Plaintiffs have failed to show the challenged statutes caused them direct injury, and thus lack standing.

2. Plaintiffs' claims are not redressable because the remedy for constitutional violations is to invalidate the offending statute.

"[D]eclaring the parameters of constitutional rights is a serious matter." *Donaldson v. State*, 2012 MT 288, ¶ 10, 367 Mont. 228, 292 P.3d 364. A court should avoid "deciding constitutional issues whenever possible." *Id.* (citation omitted). Further, statutes "are presumed to be constitutional" and "[t]hat presumption can only be overcome after careful consideration of the purpose and effect of the statute, employing the proper level of scrutiny." *Id.* (citations omitted).

Both Montana and federal courts have declined to grant the type of broad relief Plaintiffs request here. As described above, the aggregate acts complained of are not the result of the State Energy Policy or MEPA's Montana limitation, and invalidating these two statutes would not redress Plaintiffs' alleged injuries. Accordingly, Plaintiffs ask this Court to direct the State to adopt a remedial plan to fill in these gaps. (Doc. 1 ¶¶ 8–9.) This is beyond the relief that courts may provide in resolving cases or controversies.

The Supreme Court rejected a similar challenge to an entire statutory scheme in *Donaldson*. The plaintiffs, who were in same-sex relationships, sued the State asserting their constitutional right to marry. Rather than challenging a particular statute, plaintiffs asserted

that the "current statutory scheme" violated their rights. *Id.* ¶¶ 3–5. The Montana Supreme Court declined to hear their claims as pled, finding:

> [T]he broad injunction and declaratory judgment sought by Plaintiffs would not terminate the uncertainty or controversy giving rise to this proceeding. Instead, a broad injunction and declaration not specifically directed at any particular statute would lead to confusion and further litigation. As the District Court aptly stated: "For this Court to direct the legislature to enact a law that would impact an unknown number of statutes would launch this Court into a roiling maelstrom of policy issues without a constitutional compass."

Id. ¶ 9.

The same is true here. The scope of Plaintiffs' claims cannot be distilled to a constitutional challenge of one or two statutes. Instead, Plaintiffs' requested remedial plan would require this Court to evaluate several statutory schemes and monitor the State's revision of dozens of statutes (at a minimum). As a result, "Plaintiffs' requested relief exceeds the bounds of a justiciable controversy." *Id.* ¶ 9.

The Ninth Circuit made the same redressability decision in rejecting a similar youth-plaintiffs climate change lawsuit. In *Juliana*, youth plaintiffs claimed the federal government violated their constitutional rights by failing to take sufficient action to combat climate change. 947 F.3d at 1165. And they requested the same relief as Plaintiffs here: a remedial plan to "'phase out fossil fuel emissions and draw down excess atmospheric CO2.'" *Id.* at 1164–65; (Doc. 1 ¶¶ 8–9). The Ninth Circuit explained that an order "simply enjoining" the challenged affirmative actions of the government would not redress plaintiffs' alleged injuries. *Id.* at 1170. The Court recognized that it could not effectively provide relief for the youth plaintiffs' claims, which called "for no less than a fundamental transformation of this country's energy system, if not that of the industrialized world." *Id.* at 1171. Such

broad relief would involve "everything from energy efficient lighting to improved public transportation to hydrogen-powered aircraft." *Id.*

Plaintiffs try to get around this hurdle by claiming Montana courts "have approved declaratory and injunctive relief, including remedial plans, to remedy systemic constitutional violations like those at issue here." (Doc. 1 ¶ 9 (citing *Helena Elem. Sch. Dist. No. 1 v. State*, 236 Mont. 44, 769 P.2d 684 (1989) ("*Helena Elementary*") and *Columbia Falls Elem. Sch. Dist. No. 6 v. State,* 2005 MT 69, 326 Mont. 304, 109 P.3d 257 ("*Columbia Falls Elementary*")).) These cases are inapposite.

In *Helena Elementary*, the Court found the Foundation Program for the 1985–1986 system of funding public elementary and secondary schools was unconstitutional, 236 Mont. at 55, 769 P.2d at 690. But the Court declined to "spell out the percentages which are required on the part of the State under the Foundation Program and for the districts under the voted levy system." *Id.* 236 Mont. at 55, 769 P.2d at 691. Instead, it recognized "that the Legislature has the power to increase or reduce various parts of these elements, and in addition to add other elements for such funding." *Id.*

Later, in *Columbia Falls Elementary*, the Court invalidated the 1993 Montana Legislature's passage of HB 667, which was intended to address the constitutional deficiencies identified in *Helena Elementary. Columbia Falls Elementary*, ¶ 23. While the Court held HB 667 unconstitutional because the Legislature had not defined a quality education, the Court declined to take further specific action and "defer[ed] to the Legislature to provide a threshold definition of what the Public Schools Clause requires." *Id.* ¶¶ 25, 31.

The Court did not direct any particular action in these school-funding cases or retain jurisdiction to review the sufficiency of the State's response, and thus they do not provide support for Plaintiffs' broad, and ill-defined, remedial relief request. Indeed, the Supreme Court in *Donaldson* distinguished *Helena Elementary*, where it "held specific statutes unconstitutional," from a case like Plaintiffs' seeking generalized relief over an entire statutory scheme. *Donaldson*, ¶ 8. The Court has exercised similar restraint in other cases by only narrowly invalidating the offending statute, which is not possible here as explained above. *See, e.g., Montana Envtl. Info. Ctr. v. Department of Envtl. Quality*, 1999 MT 248, ¶ 80, 296 Mont. 207, 988 P.2d 1236 ("Our holding is limited to § 75-5-317(2)(j), MCA (1995), as applied to the facts in this case.").

Plaintiffs lack standing because their alleged injuries are not judicially redressable. The cases Plaintiffs cite do not support their position that this Court can order a broad remedial plan without any definable limit. Rather, they show that Plaintiffs' proposed remedy is beyond the scope of judicial relief this Court can grant and "contrary to established jurisprudence." *Donaldson*, ¶ 10.

B. Plaintiffs fail to establish prudential standing.

Prudential standing, including the political question doctrine, embodies the notion that "courts generally should not adjudicate matters 'more appropriately' in the domain of the legislative or executive branches or the reserved political power of the people." *Larson v. State*, 2019 MT 28, n.6, 394 Mont. 167, 434 P.3d 241. The political question doctrine precludes courts from hearing "controversies . . . which revolve around policy choices and value determinations constitutionally committed for resolution to other branches of government . . . ." *Larson*, ¶ 39.

Plaintiffs ask this Court to order the State "to cease and reform their unconstitutional conduct and prepare a remedial plan of the government's own devising, consistent with its authorities and the Court's declaration of law, to bring the state energy system into constitutional compliance." (Doc. 1 ¶ 8.) The Ninth Circuit has recognized such a remedial plan to address climate change would impede upon prerogatives of other branches of government:

> [I]t is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan. As the opinions of their experts make plain, any effective plan would necessarily require a host of complex policy decisions entrusted . . . to the wisdom and discretion of the executive and legislative branches. These decisions range, for example, from determining how much to invest in public transit to how quickly to transition to renewable energy, and plainly require consideration of "competing social, political, and economic forces," which must be made by the People's "elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country."

Juliana, 947 F.3d at 1171–1172 (citation omitted).

Here, as in *Juliana*, Plaintiffs' request for a remedial plan would intrude upon the legislative and executive branches' existing and future policy decisions. Plaintiffs, for example, have emphasized the importance of renewable energy in reducing dependency on fossil fuel energy sources. (Doc. 1 ¶ 210.) They also suggest that a 100% renewable portfolio by 2050 is feasible and desirable. *Id.* ¶ 207. But Montana already has a renewable portfolio standard. It requires utilities to "procure a minimum of 15% of [their] retail sales of electrical energy in Montana from eligible renewable resources" by 2015. Mont. Code Ann. § 69-3-2004(4)(a). Though not challenged in the Complaint, if Plaintiffs' request for relief were granted, this Court would be placed in position of second-guessing the Legislature's figures and determining that only a renewable portfolio standard of a certain percentage by a certain

date passes constitutional muster. The Montana Supreme Court has rejected such an intrusive approach to constitutional review. *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 26, 382 Mont. 256, 368 P.3d 1131 ("[O]ur role is not to second guess the prudence of a legislative decision.") (citation omitted).

Plaintiffs also urge this Court to require the State to adopt numerous other policies. (Doc. 1 ¶¶ 201–210.) For example, Plaintiffs assert the State must reduce carbon dioxide emission levels to 350 parts per million by 2100, *id.* ¶ 208, carbon sequestration should include "improved forestry and agricultural practices," *id.* ¶ 209, the State must abandon fossil-fuel based energy sources, *id.* ¶ 210, and the State should adopt a different cost-benefit analysis to favor the selection of renewable resources over fossil fuel energy sources, *id.* ¶¶ 206, 210. All these suggested components of a remedial plan "revolve around policy choices and value determinations" aimed at nonjusticiable political questions. *Larson*, ¶ 39. Plaintiffs' request that this Court order the Legislature and administrative agencies to adopt a broad, state-wide remedial plan presents a political question beyond this Court's power "to order, design, supervise, or implement." *Juliana*, 947 F.3d at 1171. Plaintiffs thus lack prudential standing.

II. Plaintiffs failed to exhaust administrative remedies.

Plaintiffs allege their injuries stem from various administrative decisions, but they have not exhausted remedies within those proceedings, and are procedurally barred from raising them at this point. Under MAPA, judicial review is only available to "a person who has exhausted all administrative remedies available within the agency . . . ." Mont. Code Ann. § 2-4-702(1)(a). MAPA challenges must be brought within 30 days of service of the

final written decision, *id.* at (2)(a), and may include allegations that administrative decisions have been made in violation of constitutional provisions, *id.* § 2-4-704(2)(a)(i).

Plaintiffs claim several administrative decisions have led to their alleged injuries: DEQ's permitting of Bull Mountain Mine, Spring Creek Mine, Decker Mine, and Rosebud Mine, (Doc. 1 ¶ 118(g)–(i), (k)); PSC's rate setting for small scale solar facilities, *id.* at (b)–(c); DEQ and DNRC's approval of the Keystone XL pipeline, *id.* at (l)–(n); DEQ's authorization of the Colstrip Steam Electric Station, *id.* at (j); and DEQ's certification of Exxon/Mobil, Phillips 66, CHS Laurel, and Calumet Refining petroleum refineries, *id.* at (p).

In describing these aggregate acts, Plaintiffs' 108-page Complaint only provides a cursory explanation of the administrative actions in question. (Doc. 1 ¶ 118.) The information Plaintiffs provide omits considerable portions of the administrative record. *See* Mont. Code Ann. § 2-4-614 (defining the administrative record). A court must limit its review of agency action to the administrative record, which must be provided by the agency within 30-days of service of the petition. *Id.* § 2-4-702(4), -704(1). Because Plaintiffs have not initiated judicial review under MAPA, this Court is deprived of necessary context that otherwise would have been provided by the administrative record.

This lack of context is evidenced by Plaintiffs' incorrect assertion that the State's aggregate acts are caused by the State Energy Policy and MEPA's Montana limitation. As described above, the State's aggregate acts are not the result of these statutes, but instead results from dozens of substantive statutes. Plaintiffs' lack of focus on the relevant statutes precludes constitutional review. *Donaldson*, ¶ 10. ("Broadly determining the constitutionality of a 'statutory scheme' that may, according to Plaintiffs, involve hundreds of separate statutes, is contrary to established jurisprudence.").

This lack of context is also demonstrated by Plaintiffs' nebulous request for relief. Plaintiffs ask this Court to enjoin the State from enforcing loosely defined aggregate "affirmative acts" resulting from the State Energy Policy. (Doc. 1 Prayer for Relief ¶ 5.) It is unclear whether Plaintiffs ask this court to invalidate these prior decisions.

Any claims Plaintiffs may have regarding these prior administrative decisions are procedurally barred for failure to exhaust administrative remedies and failure to initiate a petition for judicial review. Mont. Code Ann. § 2-4-702(1)(a) & (2)(a); *Molnar v. Mont. PSC*, 2008 MT 49, 341 Mont. 420, 177 P.3d 1048 (declining to hear a challenge raised nearly seven years after the PSC's decision was issued).

Alternatively, if Plaintiffs are attempting to preclude future administrative action, their claims are too speculative to assert now. "Courts do not function, even under the Declaratory Judgments Act, to determine speculative matters, to enter anticipatory judgments, to declare social status, to give advisory opinions or to give abstract opinions." *Donaldson*, ¶ 9; *see also Qwest Corp.*, ¶ 32 ("Judicial review . . . is not justified where the only allegation of harm is speculation that further agency action *may* take place, and *if* it takes place, it *may* have legal consequences."). Had plaintiffs raised these constitutional arguments in the context of administrative review, the nature of these administrative decisions would be much clearer, because MAPA would have provided a roadmap and an administrative record would have been developed.

This failure to exhaust administrative remedies is particularly important as it relates to Plaintiffs' claims that MEPA's Montana limitation is unconstitutional, because any alleged injury related to MEPA would be procedural in nature. *Northern Plains Res. Council, Inc.*,

¶ 14. Plaintiffs may not allege injuries resulting from the Montana limitation to MEPA without exhausting administrative remedies. *Shoemaker v. Denke*, 2004 MT 11, ¶ 18, 319 Mont. 238, 84 P.3d 4 ("'[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'").

Even if Plaintiffs presented a question of fact as to whether Montana's policies contributed to climate change to a significant degree—a tough sell given the small amount of GHGs produced in Montana as compared to the entire world, or even the United States[4]—the statutory schemes they focus on did not cause their injuries and the scope of the alleged injury is not remedial by this Court. The closest to a specific, remedial claim that Plaintiffs allege are challenges to several collective administrative acts. Because these claims are either too late, or too speculative, or both, they fail to state a claim and do not provide standing.

CONCLUSION

This Court should dismiss Plaintiffs' Complaint in its entirety as lacking justiciability and for failure to state a claim.

Respectfully submitted this 24th day of April, 2020.

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[4] *See Juliana*, 947 F.3d at 1170–71.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was delivered by email to the following on April 24, 2020:

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Attachment A

Hearing on HB 473 before the Mont. H. Comm. On Nat. Resources
57th Reg. Sess. (February 12, 2001)

MONTANA LEGISLATIVE HISTORY

Chapter 268 ~~PS~~ 2001

Bill H 473 S _____ Original bill & history ___C

H. Committee on Natural Res.		S. Committee on Natural Res.	
Hearing Date(s) 2-12	✓C	Hearing Date(s) 3-12	✓C
2-16	✓C	3-16	✓C
_____	___C	_____	___C
Free Conf 4-6	✓C	_____	___C
Date Out 4-11	✓C		

Did this bill originate in an interim committee? ___Yes ___No

Committee _____ Report _____

STATE'S ATTACH. A

HEARING ON HB 473

Sponsor: Representative Cindy Younkin, HD 28

Proponents: Ted Hoffman, H & F Logging Inc.
Cary Hegreberg, Montana Wood Products Association
Ed Regan, RY Timber Corporation
Tim Ryan Larex
Rita Windom, Lincoln County Commissioners
Dave Skinner
Don Serba, Pulp and Paper Workers Resource Council
Kim Lyles, PPWRC
Gail Abercrombie, Montana Petroleum Association
Donna Thorton, logging contractor
Ed Eggleston
John Bloomquist, Montana Stock Growers Association, Montana Water Resource Association
John Youngberg, Montana Farm Bureau
Roger Halver, Montana Association of Realtors
Frank Crowley, Asarco
Steve Flynn, Louisiana Pacific
Patrick Heffernan, Montana Logging Association
Don Allen, Western Environmental Trade Association
Mike Collins, Independent Montana Miners

Opponents: John Wilson, Montana Trout Unlimited
Bob Stevens
Tracy Stone-Manning
Hal Harper
Jim Jensen, Montana Environmental Information Center
Janet Ellis, Montana Audubon
Paul Hawks, NPRC, Cottonwood Resource Council
Toby Day
Paul Edwards
Sherm Jenki
Steve Kelley, Friends of the Wild Swan
David Dittloff, Montana Wildlife Federation
Stan Frasier, Montana Conservation Voters
Joe Gutkoski, Montana River Action
George Ochenski, Confederated Salish and Kootenai Tribes
Hope Stevens

Opening Statement by Sponsor:

{Tape : 2; Side : A; Approx. Time Counter : 30.6}

REPRESENTATIVE CINDY YOUNKIN, HD 28, said that this bill will clarify that MEPA is a procedural act and not a substantive act. It comes down to the question of whether MEPA should dictate a result or a process. This is not a technical bill and it doesn't have a hidden agenda. It is just a matter of policy as to what this legislative body will make. We are the policy makers in government, not the agencies. MEPA was enacted in 1971 as a look-before-you-leap act. It was patterned after the national environmental policy act, which the United States Supreme Court has determined is a procedural statute. MEPA requires that we need to determine the environmental impact before it happens. Nowhere in the pages of MEPA does it say, "Thou shalt not pollute." It says, "Thou shalt not pollute in our air quality act and in out water quality act." We are not changing those at all. MEPA doesn't set any standard for water or air quality, nor does it say anything about whether mining or reclamation should be conducted and, if so, how and to what extent. Whether MEPA is substantive or procedural has not been discussed in the legislature for 18 years. If it is substantive, then MEPA itself dictates an agency's decision and it forces a particular action. If MEPA is procedural, then MEPA itself doesn't dictate a certain result, rather it is an information process, which is what was intended when it was originally passed. As long as the decision maker is fully informed, the decision maker can then make an appropriate decision under the specific circumstances and under the air quality act or the water quality act or the mining reclamation act, et cetera. There are all kinds of laws that are substantive and say, "Thou shalt not pollute." If there are other aspects of our environment that need specific protection, then we need to specifically protect them with a substantive law rather than relying on a procedural law to fill in the gaps. It's not fair to those areas of the environment, which may need protection, to rely upon a procedural act for protection. Having an agency relying on MEPA to provide the substantive environmental protection usurps the policy making power of this legislative body and doesn't adequately protect that which may need protection. We need to make sure that we have our MEPA laws in balance with the constitutional provisions of both the clean and healthful environment and the right to pursue a living in this state. We need to coexist in productive harmony with the environment.

Proponents' Testimony:

{Tape : 2; Side : A; Approx. Time Counter : 38.5}

Ted Hoffmann, H & F Logging Inc., wanted to explain the consequences a contractor incurs by shutting down timber sales once operations have started. In November of 1998, they were

approached by a timber company to harvest a portion of a timber sale. After two on-site inspections they negotiated a contract. They had arranged housing for the crew. They began falling trees on December 18th. After 100,000 feet had been fell, they had arranged to bring in the trucks. On December 23rd they received a call saying that an injunction had been placed on the sale and all harvesting activities had to cease. As a result they lost $5,000 or more, in addition to lost time. It could have put them out of business. The logs are just laying on the ground rotting.

Cary Hegreberg, Montana Wood Products Association, said that MEPA has hurt people. He echoed the previous testimony. The EQC operates on a consensus basis, that means that everybody has to agree before a recommendation is made. The EQC can't reconcile some of the issues contained in MEPA. What it amounts to is that you either like the open-ended and subjective language of MEPA or you don't. His critics like it because they can use it to stop timber sales and activities. After 30 years there have only been 27 lawsuits around MEPA. What is the threshold of significance? At what point do we recognize it as a problem? The original vote in the House was 99 to 1. He doesn't think that those 99 people in 1971 would have supported the bill if they would have seen the resulting litigation that has stopped people from working.

Ed Regan, RY Timber Corporation, submitted written testimony. **EXHIBIT(nah35a14)**

Tim Ryan, Larex, stated that this bill does not change current environmental laws. It identifies the issues and improves efficiency. The efficiency that this bill allows will allow companies, in advance, to know how long they will have to be tied up in the permitting process.

Leo Berry, Burlington Northern Santa Fe Railroad, said that he helped draft the first set of rules to help implement MEPA. He struggled with what exactly MEPA was because there are no parameters or guidelines to it. It is good to clarify that it is procedural because to find otherwise would constitute an unauthorized delegation of authority to a state agency. The EIS helps in the planning process, but there is no legal impact to the statement. There is no substantive law telling the agencies what to do with the EIS. If the law were to be placed as substantive, it would place too much authority with the executive branch agencies. MEPA provides no guidelines as to what an agency is to do with the EIS.

Rita Windom, Lincoln County Commissioners, said that we need to listen to REP. YOUNKIN; she said it well.

Dave Skinner said that what this bill amounts to is when the green flag drops the BS stops. What he likes about this bill is the fact that it tells the agency that they better not be changing the rules.

Don Serba, Pulp and Paper Resource Council, concurred with Mr. Hegreberg's testimony. This act doesn't work for everybody.

Kim Lyles, Pulp and Paper Workers Resource Council, reminded the committee that what they do affects thousands of lives across Montana. We have the opportunity to fix things and make this a more business friendly climate.

Gail Abercrombie, Montana Petroleum Association, said that we are here to try to make MEPA last another 30 or more years. This makes it sensible. It keeps an agency from holding an operator hostage. This will put some responsibility on the legislature to make laws for the agencies to follow.

Donna Thorton, logging contractor, said that she is going to be the last generation of her family to stay in the timber industry, even though they have their own logging company and three teenage sons. They aren't able to work enough months of the year to provide meaningful employment for anyone, including their family. There are mills closing all over northwestern Montana. We have a state that is so rich in natural resources and we have mills closing all over the place. Anything that the legislature can do to turn the economy around needs to be done now. We don't have a lot of time left.

Ed Eggleston said that MEPA is a good law. Part of what makes it a good law is the fact that it can be changed to make it better. This bill will do this.

John Bloomquist, Montana Stock Growers Association, Montana Water Resource Association, said that this bill cuts at one of the key issues of MEPA: Is it substantive or procedural? MEPA is a procedural statute. This bill is good administrative law and good legislative policy and good government.

John Youngberg, Montana Farm Bureau, concurs with Mr. Bloomquist and urges committee support.

Roger Halver, Montana Association of Realtors, supports this legislation.

Frank Crowley, Asarco, showed three volumes of administrative rules of the DEQ. There are enough substantive requirements for those who are trying to operate in the state.

Steve Flynn, Louisiana Pacific, supports this law from a business perspective. You have got to love a bill that gives bureaucrats a time frame.

Patrick Heffernan, Montana Logging Association, wanted to reenforce that real harm has occurred because of a procedural statute. There are more lawsuits to come. They see this bill as being one piece of a puzzle that will affirm our future and provide a strategic safety net so that these well designed and fully environmentally compliant timber sales can go forward without undue influence and interference because of a procedural statute that is fatally flawed.

Don Allen, Western Environmental Trade Association, supports this bill.

Mike Collins, Independent Montana Miners, submitted written testimony. **EXHIBIT(nah35a15)**

Opponents' Testimony:

(Tape : 2; Side : B; Approx. Time Counter : 14.5)

John Wilson, Montana Trout Unlimited, submitted written testimony. **EXHIBIT(nah35a16)**

Bob Stevens submitted written testimony and supplemental information dealing with producing wind power. **EXHIBIT(nah35a17)** **EXHIBIT(nah35a18)**

Tracy Stone-Manning, Clark Fork Coalition, said that proponents will say that it costs too much and takes too much time. Often other influences cause the extended time and costs. The biggest problem with this bill is that it says an agency may not condition a permit unless it could show that the issuing of the permit without the conditions would create the likelihood that laws or standards would be broken. There would be countless ramifications of this. An example would be that mines are subject to a permit that includes traffic safety plans. It's not illegal for mines to run trucks through the community whenever they want, but it does make sense for communities to have a say as to when the trucks will go through their town. Under this bill, the MEPA process could no longer incorporate common sense traffic safety plans. It would be a grave mistake to scrap the ability to impose such conditions and simply hope that a company would restrict themselves. She feels that industry representatives are wrong when they say that gutting MEPA will provide more jobs.

Hal Harper said that things look different to the committee than they do to the rest of the public. He fears that what he reads and sees in the media is a blame game going on. In this case it is his belief that the environmental law and conservation laws are being blamed for the economic lows of the state of Montana. If you take your eye off of the real cause of the economic problems in Montana, you are not doing anyone a favor. The recommendations that stand out are the following: This law has saved a lot of litigation; this law has helped agencies make better decisions; find better ways to involve the public. He feels that the public is the one entity that is being forgotten at this point in time. If the committee passes this it allows the blame game to go any further and allows official policy of this legislature to say the reason that our economy is failing is because our environmental laws are to tough. If the committee wants to protect the remaining industrial jobs that we have and further the economy of the state, tackle the real problems and don't be blaming them on our environmental policy standards.

Jim Jensen, Montana Environmental Information Center, stated that in the EIS for Pegasus Gold's Diamond Hill Mine Project are listed some mitigation measures which were taken that don't have other statutory authority, such as fire prevention and control. He also pointed out that there is no air quality standard for asbestos; MEPA would be the only way to protect against that. How many hundreds of people have to die before we accept the value of sound environmental protection laws?

Janet Ellis, Montana Audubon, said that MEPA is substantive in two areas. **EXHIBIT(nah35a19)** All the mitigation that goes with a condition of a sale would be prohibited with this bill. No best management practices would be required if this bill passes. MEPA has been called a look-before-you-leap bill and that is what they want to keep it as.

Paul Hawks, Northern Plains Resource Council, Cottonwood Resource Council, submitted written testimony. **EXHIBIT(nah35a20)**

Toby Day pointed out that this bill doesn't cover noxious weeds. It does in some counties, but it won't in every county. If there is a project in a county where weeds are not controlled by a weed supervisor, then it won't cover them. Only 34 counties have a weed county control mechanism.

Paul Edwards said that there was no real purpose to this bill, except to gut and cripple MEPA. The proponents claim that this will bring on an influx of industrial development that will benefit us all. We have heard this before. This is a fool's bargain. It is appalling that in a state that not so long ago

was a wholly owned subsidiary of the monster snake Anaconda that took and took and left nothing behind but poverty, social dysfunction and the world's biggest, ugliest toxic hole in the ground, that this kind of thinking could rise from its grave to haunt Montana again. **EXHIBIT(nah35a21)**

Sherm Jenki said that he has learned to be cynical by watching the legislature. It is hard for him to believe that these things are done in a vacuum. He offered the following challenge to the committee: If SB 319 passes the Senate and comes to the committee, kill it. If you don't, then you are destroying part of the substance that is in place. Let's not sacrifice southeastern Montana.

Steve Kelly, Friends of the Wild Swan, opposes this bill.

David Dittloff, Montana Wildlife Federation, submitted written testimony. **EXHIBIT(nah35a22)**

Stan Frasier, Montana Conservation Voters, opposes this bill.

Joe Gutkoski, Montana River Action, opposes this bill.

George Ochenski, Confederated Salish and Kootenai Tribes, submitted written testimony. **EXHIBIT(nah35a23)**

Hope Stevens submitted written testimony. **EXHIBIT(nah35a24)**

Questions from Committee Members and Responses:

{Tape : 2; Side : B; Approx. Time Counter : 49.9}

REPRESENTATIVE BOB STORY asked if the tribal lands fall under MEPA. **Mr. Ochenski** said that they did not. However, tribal citizens are citizens of the United States, the state of Montana, as well as tribal members. They are fully capable of participating in MEPA decisions on any land surrounding the reservations.

REPRESENTATIVE DEE BROWN asked Ms. Stone to explain how deregulation has caused thousands to lose their jobs. **Ms. Stone** said that it seems to her that if Montana Resources can't pay its bills because they are too high under deregulation, and therefore has to shut down, those workers are out of a job because of deregulation. **REP. BROWN** asked of Ms. Stone realized that deregulation doesn't take place for another year and a half. **Ms. Stone** said that she stands by her statement. She believes that the cutbacks in industry are a direct result of deregulation.

REPRESENTATIVE DOUG MOOD asked Mr. Berry if he was familiar with the Supreme Court decision of Vermont and Yankee Nuclear Power Corporation v. Natural Resources Defense Council. **Mr. Berry** is familiar with it, but thought that there were others who were better informed.

REP. MOOD asked if Mr. Wilson was familiar with the BMPs that are currently being done in Montana. **Mr. Wilson** is. **REP. MOOD** said that he understood his testimony to be that he thought a forest practices act would be something that is necessary if they pass this bill. **Mr. Wilson** said that was correct. **REP. MOOD** asked if he thought that a forest practices act would do a better job protecting the forest than the BMPs currently have done. **Mr. Wilson** said that his point was that in state forest sales the state agency can't set conditions that the BMPs be used. **REP. MOOD** asked if the BMPs are voluntary. **Mr. Wilson** said that they are voluntary, but the agency can make them a condition of a timber sale.

REP. MOOD asked REP. YOUNKIN, having heard the statement here that there is reference to better ways to involve the public, does the sponsor recall the testimony and the recommendations for better ways to involve the public. **REP. YOUNKIN** said that the first thing she sees is to amend the MEPA statute to clarify the value of public involvement under MEPA. There are six other ways listed to further clarify the value and purpose of public involvement.

REPRESENTATIVE KEITH BALES asked Mr. Wilson about the handout that he had presented. It, in essence, indicates that MEPA keeps things from being sited on private land where there might be archeological sites; where in MEPA does it say that? **Mr. Wilson** replied that he indicated that there was no statutory authority other than MEPA to prevent mitigating siting. **REP. BALES** asked if he would agree that the main controlling factor on that would be who owns the private land rather than anything in MEPA, and if there isn't anything in MEPA, they don't really have a say, do they? **Mr. Wilson** said that the private land owner does dictate what happens to historical sites and archeological sites on their property that have not been designated by the state historical officer. As part of the MEPA process you could have that site designated as a state historical site and then you could mitigate it through MEPA.

REP. BALES asked a question of Mr. Hawks. He was talking about an agreement between the mine and the people there, was that a voluntary agreement by the mine? **Mr. Hawks** said that it was. It was a negotiated agreement and it was legally binding.

REP. BALES clarified that it was not mandated. **Mr. Hawks** said that they were required to have a traffic plan. They took it a step further and put a view on that traffic plan so they knew what it would look like and they agreed to that. **REP. BALES** asked if the same thing could have been done by the local community.
Mr. Hawks said that he would think that in terms of a safety factor it could be. He emphasized that this agreement was done by people from the community.

REPRESENTATIVE JOAN HURDLE said that they have heard that they need to enact this law so that timber projects can go forward and that the MEPA process has stopped a lot of good timber projects. Could Mr. Kelley comment on that? **Mr. Kelley** said that he thinks people are frustrated with certain things and they are blaming the law. There are a lot of things that go into these studies. In his opinion, the DNRC is not the best and brightest agency in preparing environmental documents. Nobody equals DNRC in volume and trying to hide the trick. There is always a trick in there. **REP. HURDLE** couldn't see any signs of any serious delays in the process at all. **Mr. Kelley** doesn't think that delay is a huge problem. The recommendations of the study committee have addressed adequately the time frames. It is not the law causing the problems. There is bad blood among the primary opponents.

REP. HURDLE said that this seems to be a semantic argument. Certainly there are gaps in our substantive laws, if we say that this is procedural, won't that cause a problem? Why are we doing this? **REP. YOUNKIN** said that the EQC has studied this. The recommendation was that the legislature should determine whether it is substantive or procedural. **REP. HURDLE** asked for that citation. **REP. YOUNKIN** said it was on page 173. "The legislature should define whether MEPA is a substantive or procedural law or both." To answer the question of why are we doing this, it is because we haven't done it. This legislative body has never taken its responsibility to specifically define what this law is. **REP. HURDLE** asked if the sponsor was concerned that this would put a stop to a lot of mitigation which has brought about some good things. **REP. YOUNKIN** said that she is not. There is nothing in the bill that says that the agencies can not discuss mitigation. There is nothing that prevents that from happening.

REPRESENTATIVE RON ERICKSON asked the sponsor to look at page 1, lines 20 and 21 of the bill. It says, "All agencies of the state shall identify and develop methods and procedures that will ensure that presently unquantified environmental indemnities and values may be given appropriate consideration in decision making." Is it the sponsor's intention to cross out this line of

the law? **REP. YOUNKIN** said it is not her intention to strike that from the statute. Wiser decisions can only be made with information. This is an information gathering tool so that we can make wise decisions. **REP. ERICKSON** said that on page 3, section 4, it says that there has to be something already in statute before you can impose conditions. Why is it that lines 20 and 21 on page 1 don't counteract this portion? **REP. YOUNKIN** said that if there is something that needs protection then we need to have a substantive law to protect it. We can't decide to protect that based on this process alone. There needs to be an underlying substantive law because if you don't have that you can't provide adequate protection to that resource.
REP. ERICKSON said that until there are those statutes, these two parts of the bill are in conflict. **REP. YOUNKIN** said that some of those things can be covered already in statute under the community impact section of title 90. We should fill those gaps.
REP. ERICKSON asked why not wait until there are no gaps.
REP. YOUNKIN said that we will never discover what all those gaps are. We are an evolving society. In order to provide adequate protection there needs to be a specific substantive law.

REPRESENTATIVE DAVE WANZANREID asked Mr. Harper, if this bill is passed, will it increase the yield off of school trust lands?
Mr. Harper said that there is a target for timber cuts on state land that is set and will be maintained. **REP. WANZANREID** asked, if this bill passes, what gaps does he see that will exist in future timber sales on school trust lands. **Mr. Harper** said that there are a number of gaps that will become more apparent as things go on. If you declare MEPA to be solely procedural, those gaps are immediate. If you do not, those gaps are not immediate.

REPRESENTATIVE GAIL GUTSCHE said that by the testimony that was heard today, it looks like it might tie the hand of DEQ and other agencies. If this bill passes, do you believe that DEQ could no longer condition a permit? **Mr. North** said that is the way that he reads it. In the years that he has been with the agency he is aware of four or five instances where we have imposed conditions based on a substantive MEPA. Those have mainly been in the area of traffic conditions.

Closing by Sponsor:

{Tape : 2; Side : A; Approx. Time Counter : 22.5}

REP. YOUNKIN said that one of the statements we had was about the blame game. This bill is not being given to you as the solution to all of Montana's economic woes. It is not true that this bill will solve all of the economic problems. There are many, many reasons for the economic woes, and she feels that this is one of

those reasons. It's not the reason, but it adds to the problems that they are facing. The community impact laws in title 90 will continue to allow the departments to put conditions on various projects. There aren't as many gaps as you might think. There have only been three cases where MEPA has been applied substantively. We can fill those gaps. She asked the committee to read the chapter six in the green book in regards to the substantive versus procedural issue. There have been many court cases that have said that MEPA is procedural. That is what our courts have found; that is what the Supreme Court has found. All she is asking for is a little clarification so that they can stop asking the question and stop wondering if this is procedural, substantive or both. The governmental process established in MEPA should not be the reason for preventing an industry from conducting its business. We as the policy makers should make it clear that this process should not dictate a particular result. That is why we have our underlying substantive acts. They have not suggested that our air quality act or water quality or any other substantive laws should be weakened. Those are good laws. We are not trying to weaken any environmental laws. All we are trying to do is make a process work better and make sure that the governmental process is not specifically what dictates the outcome. The reason to prevent an action should be because it would degrade our environment beyond repair to the extent that humans and plant life and wildlife and aquatic life can't coexist in productive harmony. We must find a balance between our presence and the use of our natural resources which will permit high standards of living in Montana and allow for a wide sharing of life's amenities.

ADJOURNMENT

Adjournment: 7:10 P.M.

REP. CINDY YOUNKIN, Chairman

ROBYN LUND, Secretary

CY/RL

EXHIBIT(nah35aad)