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MONT. CODE ANN. § 75-1-203(2)—WHAT IS IT GOOD FOR? ABSOLUTELY NOTHING!

THE PROBLEMS IN DETERMINING A MAXIMUM APPLICANT EIS COMPILATION FEE UNDER MEPA AND A SOLUTION TO THOSE PROBLEMS

Laura D. Vachowski

I. INTRODUCTION

In 1971, the Montana legislature enacted the Montana Environmental Policy Act (MEPA). The legislature's purpose for doing so was, in part, "to promote efforts that [would] prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans." To meet this objective, the legislature set forth policies and guidelines, which currently require Montana state agencies to undertake certain activities before they issue leases, permits, contracts, licenses or certificates. Included in those activities is determining whether an applicant's project will have a significant impact on the environment. If the project will have a significant impact, the state agency is required to prepare an environmental impact statement (EIS).

If a state agency must prepare an EIS, it may elect to charge the applicant a fee to help defray the costs of compiling

3. See MONT. CODE ANN. § 75-1-103(b) (1997).
4. See MONT. CODE ANN. § 75-1-201 (1997).
5. An applicant subject to MEPA's rules includes persons, corporations, partnerships, firms, associations, or other private entities. See MONT. CODE ANN. § 75-1-201 (1997).
6. The term "environment" as used in MEPA is a broad, widely encompassing concept. It is not limited to the physical environment. See MONT. CODE ANN. §§ 75-1-101 to -324 (1997).
the EIS. However, the chargeable fee is subject to statutory limitations. Currently, the maximum fee that may be assessed an applicant is determined through calculations based on the sliding scale set forth in Montana Code Annotated § 75-1-203(2)(1997). That section states:

The maximum fee that may be imposed by an agency may not exceed 2% of any estimated cost up to $1 million, plus 1% of any estimated cost over $1 million and up to $20 million, plus 1/2 of 1% of any estimated cost over $20 million and up to $100 million, plus 1/4 of 1% of any estimated cost over $100 million and up to $300 million, plus 1/8 of 1% of any estimated cost in excess of $300 million.

This comment takes the position that the phrase “any estimated cost” as used in MCA § 75-1-203(2) is so vague and uncertain that actually calculating a maximum fee is virtually impossible for state agencies; and consequently, any reviewing court may be compelled to declare the statute void and inoperative. Given such a possibility, the purpose of this comment is to offer a template for a revised statute that will allow state agencies effectively to calculate a maximum fee, which they may charge an applicant, and, in turn, which will withstand court scrutiny.

Part I of this comment explores why MCA § 75-1-203(2) is ripe for invalidation. It begins by discussing the problems in determining the maximum applicant EIS compilation fee due to the vagueness of the statute's phrase “any estimated cost.” Part I then discusses whether either application of the rules of statutory interpretation or state agency implementation practices can clarify the vagueness. Part I ends by concluding that neither does so, and consequently, the statute, as written, does not allow state agencies to effectively calculate a maximum applicant EIS compilation fee.

Part II of this comment begins by proposing that MCA § 75-1-203(2) be revised to effectively tell state agencies how to calculate a maximum applicant EIS compilation fee. It then discusses various factors that should be considered in drafting such a revision. Part II ends by summarizing those factors that should play a major role in the statute's revision.

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8. See Mont. Code Ann. § 75-1-202 (1997) ("the fee assessed . . . shall be used only to . . . compile an [EIS]"). In cases where the EIS compilation costs do not exceed $2,500, no fee may be charged. See Mont. Code Ann. § 75-1-203(1) (1997).

Finally, Part III sets forth a revised MCA § 75-1-203(2) template.

PART I: THE PROBLEM

The Montana Supreme Court has said "[i]f an act of the Legislature is so vague and uncertain in its terms as to convey no meaning, or if the means of carrying out its provisions are not adequate or effective, it is incumbent upon the courts to declare it void and inoperative."\textsuperscript{10}

Section 75-1-203(2) dictates that the maximum fee which may be imposed upon an applicant by a state agency for an EIS compilation is limited to a certain percentage.\textsuperscript{11} To calculate any percentage, two items are required: the percentage amount, and the base upon which the percentage amount is applied. Montana Code Annotated § 75-1-203(2) provides specific percentage amounts, but provides only a non-specific base of "any estimated cost."\textsuperscript{12} Consequently, an agency must determine the specific base figure before attempting to calculate the maximum applicant fee. To do this, it must answer the question, "what comprises 'any estimated cost'?"

The answer to this question is not easily found. No Montana Supreme Court case answers the question. Additionally, as discussed below in Section A, even after following Montana's rules of statutory interpretation, the answer to the question remains uncertain. Further, as discussed below in Section B, state agency implementation practices fail to answer the question. Consequently, as discussed in Section C below, because no one knows what compromises "any estimated cost," the maximum applicant fee cannot readily be calculated, and thus, MCA § 75-1-203(2) is prone to invalidation.

A. Statutory Interpretation

To answer the question of what comprises "any estimated cost" in MCA § 75-1-203(2), one necessarily turns to Montana's rules of statutory interpretation. When the meaning of a statute is ambiguous or unclear on its face, as it is here, extrinsic

\textsuperscript{11} MONT. CODE ANN. § 75-1-203(2) (1997).
\textsuperscript{12} Id.
materials can help ascertain proper statutory interpretation. These materials may include related statutes, the statute’s legislative history, and agencies’ interpretations of the statute.

1. Related Statutes

In interpreting statutes, the Montana Supreme Court has said that “statutes do not exist in a vacuum, but must be read in relationship to one another to effectuate intent of [the] statute as a whole.” Montana Code Annotated § 75-1-203(2) is part of MEPA. MEPA itself, however, does not define “cost” or “estimated cost.” If one looks at MCA § 75-1-203(2)’s surrounding text in MEPA, two different “cost” items are discussed: the cost of compiling an EIS, and the cost of the applicant’s project for which the lease, permit, contract, license, or certificate is issued. Neither of these references, however, directly mention any applicability to section 75-1-203(2). Consequently, MCA § 75-1-203(2)’s related statutes offer no guidance as to what comprises “any estimated cost.”

2. Legislative History

If a statute is ambiguous, it is appropriate to turn to the statute’s legislative history to determine the meaning of the

13. See generally State v. Cudahy Packing Co. 33 Mont. 179, 190-91, 82 P. 833, 837 (1905) (where the plain meaning of the words in a statute are not useful in determining what the legislature meant, other rules of statutory construction may be applied).


The somewhat turbulent history of § 75-1-203(2) began on January 15, 1974 when Representatives Shelden, Baeth, and Turman introduced House Bill No. 882. Included in that bill was a provision dictating:

(3) Each agency of state government charged with the responsibility of issuing a lease, permit, license or certificate under any provision of state law shall adopt rules prescribing fees which shall be paid by the applicant for a lease, permit, license or certificate when an agency determines that it will be necessary to compile an environmental impact statement . . . . In prescribing fees to be assessed against applicants for a lease, permit, license or certificate, an agency shall adopt a sliding fee schedule which can be adjusted depending upon the size and complexity of the proposed project. *In assessing a fee, an agency may not prescribe a fee which exceeds two percent (2%) of the cost of constructing a project.*

After introduction, the bill was referred to the Committee on Natural Resources for review and recommendation. The Committee, after little debate, approved the bill and recommended it “do pass.” After adding language regarding agency requirements for rule revision and reporting, the Committee of the Whole recommended the bill “do pass” by a mere three-vote margin. When the House cast its final vote, the scale of this delicate margin tipped the other way and the bill failed by five votes. However, this was not the end of the EIS fee assessment story.
Representatives Shelden and Baeth, adhering to the ancient adage that if at first you don't succeed, you should try again, introduced House Bill 340 a year later. This bill incorporated House Bill 882’s general idea of assessing an applicant a fee and reiterated the limitation that the fee could not exceed “two percent (2%) of the cost of constructing a project.”

Oddly, while the previous H.B. 882 was referred to the Committee on Natural Resources, the new H.B. 340 was referred to the Committee on State Administration for review and recommendation. This time, notable debate took place at the Committee hearing, culminating in a “do not pass” recommendation.

Representative Shelden, not to be dissuaded, objected to the Committee’s report, and the bill was referred for a Second Reading. The legislative history sheds no light on either the Committee’s or the House members’ discussions immediately thereafter regarding the bill. The Committee, at some point however, changed its mind and approved the bill, and the House passed the bill by nearly a two-thirds vote.

following day. The motion failed. Interestingly, Representative Bardanouve was among those originally voting against the bill’s passage. See H.J. 882, 43d Leg., 2d Reg. Sess., at 603 (Mont. 1974).


31. The bill was titled “An act to authorize each state agency to adopt rules imposing a fee to be paid by an applicant for a lease, permit, contract, license, or certificate when an agency is required to compile an environmental impact statement.” H.J. 340, 44th Leg., Reg. Sess., at 176 (Mont. 1975).


36. See H.J. 340, 44th Leg., Reg. Sess., at 312 (Mont. 1975). Like the final H.B. 882 vote, a motion to reconsider the Committee vote was made, but failed. See Hearing on H.B. 340 Before the House Comm. on State Admin., 44th Leg., Reg. Sess., at 2 (Mont. 1975).


38. The total vote was 65 ayes (including Representative Bardanouve, see supra note 29), 24 noes, 6 excused and 5 absent or not voting. See H.J. 340, 44th Leg., Reg.
House Bill 340's travel through the Senate was less bumpy than its trip though the House, but its journey is of greater import because that is where the "any estimated cost" ambiguity originated. As in the House, upon introduction the bill was referred to the Senate's Committee on State Administration. 39 Considerable debate ensued at the Committee's first hearing. 40 Not satisfied that the bill was specific enough as to the maximum fee to be imposed, the Committee toyed with the idea of incorporating a sliding payment scale as originally suggested by H.B. 882. 41 In doing so, the phrase "cost of constructing a project" disappeared and the phrase "any estimated cost" surfaced. 42 After a second hearing, the Committee recommended the Senate pass the bill with an amendment changing the sentence, "[t]he maximum fee that may be imposed by an agency shall not exceed two percent (2%) of the cost of constructing a project" to:

The maximum fee that may be imposed by an agency shall not exceed two percent (2%) of any estimated cost up to one million dollars ($1,000,000); plus one percent (1%) of any estimated cost over one million dollars ($1,000,000) and up to twenty million dollars ($20,000,000); plus one-half of one percent (1/2 of 1%) of any estimated cost over twenty million dollars ($20,000,000) and up to one hundred million dollars ($100,000,000); plus one-quarter of one percent (1/4 of 1%) of any estimated cost over one hundred million dollars ($100,000,000) and up to three hundred million dollars ($300,000,000); plus one-eighth of one percent (1/8 of 1%) of any estimated cost in excess of three hundred million dollars ($300,000,000). 43

The Senate Committee of the Whole concurred in the bill as

41. A proposed amendment recommended the maximum fee not exceed: three percent (3%) of any estimated cost up to one million dollars ($1,000,000.00); plus one percent (1%) of any estimated cost over a million dollars and up to twenty million dollars ($20,000,000.00); plus one-half of one per cent [sic] (0.5%) of any estimated cost over twenty million dollars and up to one hundred million dollars ($100,000,000); plus one-quarter of one per cent [sic] (0.25%) of any estimated cost over one hundred million dollars and up to three hundred million dollars ($300,000,000); plus one-eighth of one percent (0.1%) of any estimated cost in excess of three hundred million dollars.
Id. at "Exhibit C."
42. See id.
amended on its third reading by a 38 to 12 margin.44

Subsequently, the House concurred in the Senate's amendment by a 76 to 5 margin45 and on April 8, 1975, the Governor signed House Bill 340.46 Effective July 1, 1975, the maximum fee assessment language and its unclear "any estimated cost" phrase became law.47

In sum, the legislative history of MCA § 75-1-203(2) reveals two important points. First, neither of the legislative bills discussed above indicate the legislature ever contemplated using the cost of compiling an EIS as the base for determining the maximum EIS fee which may be charged an applicant. Second, at one time the phrase "any estimated cost" now found in MCA § 75-1-203(2) originally read "the cost of constructing a project." Given these two points, it is reasonable to believe that the legislature intended that "any estimated cost" be comprised of the costs of constructing an applicant's project. This theory is further supported when one considers that the statute speaks of costs ranging from $1 million to $300 million, amounts which better correlate with the cost of an applicant's project than the cost of compiling an EIS.

In applying the legislative history to the question, "what comprises 'any estimated cost'," the answer becomes, "the costs of constructing an applicant's project." This, in turn, indicates that a state agency attempting to calculate a maximum applicant EIS compilation fee should use the costs of constructing an applicant's project as the base for its percentage calculations. But is this base any more tangible than the vague phrase "any estimated cost"? What exactly are the "costs of constructing a project"? Does the phrase's legislative history merely lead to a double ambiguity,48 or does the substitution of "costs of constructing the project" for "any estimated costs" make the statute more tenable?

B. Agency Interpretation

When a statute is ambiguous and its legislative history provides no clarification, a court will often defer to an agency's

44. See S.J. 340, 44th Leg., Reg. Sess., at 1176 (Mont. 1975)
45. Eighteen (18) votes were either absent or not voting and one vote was excused. See H.J. 340, 44th Leg., Reg. Sess., at 1423-24 (Mont. 1975).
46. See MONTANA LEGISLATIVE COUNCIL, LEGISLATIVE REVIEW (1975).
47. See id.
interpretation of a statute in ascertaining how a statute should be construed. As discussed above, MCA § 75-1-203(2) is facially ambiguous, and its legislative history raises more questions than it answers. Thus, it is appropriate to review Montana state agencies’ interpretation of the statute to determine whether they can help in answering the question of what specifically comprises “any estimated cost” under the statute.

Agency interpretation primarily consists of: 1) an agency’s rules; and 2) the history of an agency’s implementation of those rules. Both of these items, as related to MCA § 75-1-203(2), are discussed below.

1. **Agency Rules**

After MEPA’s enactment, the Montana Environmental Quality Council (EQC) drafted model rules to assist state agencies in implementing MEPA. In 1988, the EQC revised its model rules, which included the following language:

**XXIV. FEES: DETERMINATION OF AUTHORITY TO IMPOSE**

... (3)... the agency shall notify the applicant that a fee must be paid and submit an itemized preliminary estimate of the cost of acquiring the data and information necessary to compile an EIS. The agency shall also notify the applicant to prepare and submit a notarized and detailed estimate of the cost of the project being reviewed in the EIS....

**XXV. FEES: DETERMINATION OF AMOUNT**

(1)... The fee assessed must not exceed the limitations provided in 75-1-203(2), MCA.

Like MEPA itself, the model rules speak to both the costs of

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49. See Christenot v. Department of Commerce, 272 Mont. 396, 401, 901 P.2d 545, 548 (1995); Helena Aerie No. 16, F.O.E. v. Montana Dep’t of Revenue, 251 Mont. 77, 82, 822 P.2d 1057, 1060 (1991) (judicial deference to interpretation given a statute by executive agency charged with its enforcement is appropriate when the statute is ambiguous).

50. The EQC is a legislative branch. See MONT. CODE ANN. § 5-2-504 (1997). The EQC is governed by MONT. CODE ANN., Title 75, Chapter 1, Part 3.

51. See MONTANA ENVIRONMENTAL QUALITY COUNCIL, MONTANA ENVIRONMENTAL POLICY ACT HANDBOOK (1991) [hereinafter HANDBOOK].

52. Id. at B-16 to B-17.
compiling an EIS and the cost of an applicant’s project — the state agency must prepare an EIS compilation cost estimate and the applicant must prepare a project cost estimate. Unfortunately, also like MEPA, the rules do not specify which of these costs, if either, should be used in calculating the maximum applicant EIS fee. Thus, the model rules themselves do little to help clarify what comprises “any estimated cost” under MCA § 75-1-203(2).

Currently, seven state agencies have rules governing the assessment of an EIS fee. Most of these rules simply parallel the EQC’s 1988 model rules. The Department of Environmental Quality (DEQ) and the Department of Livestock (DOL), however, expand on the model rules governing MEPA’s implementation. While their rules offer nothing more about calculating a maximum fee than the general citation used in the model rules, both provide a list of items which should be included in an applicant’s project cost estimate. However, the DOL’s list does not indicate the costs are limited to those identified, and the DEQ makes it clear that its list is not exclusive and is to be used only “as a basic guide.” Since the legislative history indicates that “any estimated cost” in MCA §

53. The agencies are: 1) the Department of Agriculture; 2) the Department of Commerce; 3) the Department of Environmental Quality; 4) the Department of Fish, Wildlife and Parks; 5) the Department of Highways; 6) the Department of Natural Resources and Conservation; and 7) the Department of Livestock.


56. See MONT. ADMIN. R. 17.4.702(1) (1996) (Department of Environmental Quality) (reiterating the “fee assessed must not exceed the limitations provided in 75-1-203(2), MCA” language of the model rules); MONT. ADMIN. R. 32.2.303(2) (1980) (Department of Livestock) (substantively restating the language found in MCA § 75-1-203(2)(1997)).

57. See MONT. ADMIN. R. 17.4.720 -.725 (1996) (Department of Environmental Quality); MONT. ADMIN. R. 32.2.303 (1980) (Department of Livestock).


59. See id.
75-1-203(2) means the cost of the applicant's project, these rules are useful in determining what comprises that cost. However, because neither list is all inclusive, the rules do not fully answer the question of what comprises "any estimated cost." Consequently, it is necessary to seek further information through historical agency rule implementation.

2. Historical Agency Rule Implementation

Of the seven state agencies promulgating rules related to MEPA, only the DEQ, the Department of Natural Resources and Conservation (DNRC) and the Department of Fish, Wildlife and Parks (FWP) have actually assessed applicant fees for the compilation of an EIS. As discussed below, the FWP's method of assessing EIS compilation fees varies widely from the choice of the DEQ and DNRC.

a. The FWP

In assessing applicant fees for EIS compilations, the FWP has historically relied on the wording of MCA § 75-1-203(2) and its accompanying rules, which parallel the EQC's model rules cited above. Having chosen this path, the FWP currently finds itself in a dispute over its fee assessment method.

The current dispute surrounding the FWP's EIS maximum

60. See supra Part I, Section A.
61. Also, it is important to note that each agency's list applies only to EISs issued by that particular agency. Therefore the rules have a somewhat limited application.
62. The Department of Agriculture has never prepared an EIS that required assessing an applicant a fee. Telephone Interview with Dan Sullivan, Program Manager, Department of Agriculture (Dec. 2, 1998). The Department of Commerce has never prepared an EIS. See Letter from Annie M. Bartos, Chief Legal Counsel, Department of Commerce, to Laura Vachowski (Dec. 10, 1998). The Department of Highways has only been called upon to prepare an EIS requiring an applicant fee assessment in one instance. In that case, the Department of Environmental Quality was also a governing agency, and was elected the lead agency. Telephone Interview with Lyle Manely, Attorney, Department of Transportation (Oct. 9, 1998). The Department of Livestock has never prepared an EIS. Telephone Interview with Lon Mitchell, Attorney, Department of Livestock (Sept. 24, 1998).
63. The Department of Environmental Quality is comprised of several divisions. See generally Department of Environmental Quality Home Page (last modified July 24, 1998) <http://www.deq.state.mt.us/>. This paper focuses on EIS activities undertaken by the Permitting and Compliance Division of the Environmental Management Bureau.
65. See HANDBOOK, supra note 51, at B-16 to B-17.
fee assessment under MCA § 75-1-203(2) originates in an application for an expansion to an existing game farm. After conducting an environmental assessment for the project, the FWP determined an EIS was required. Citing MCA § 75-1-203, the FWP advised the applicant that the maximum fee could "not exceed 2% of the estimated cost of [the] game farm project." The FWP also requested the applicant prepare a "detailed estimate of the cost of the game farm project being reviewed in the EIS." The FWP told the applicant the "costs should include but [not be] limited to the value of the land (1100 acres), the cost of any fence you have already constructed or will construct, the cost of the animals that you will be placing upon the land, all costs of construction associated with the project, as well as any other expenses that you will incur." The applicant provided the requested estimate, which included the items specified by the FWP. However, the FWP refused to accept the applicant's estimate because the portion attributed to land was "unreasonably low" and the number of estimated animals was "inconsistent with what [the applicant did] with [its] present game farm." The FWP then recalculated the estimated cost of the project using its own estimated cost for land and animals. Apparently believing the maximum EIS compilation fee should be calculated using the cost of the applicant's project as a base, the FWP applied MCA § 75-1-203(2)'s sliding scale to its own recalculated project cost estimate and assessed the applicant the maximum amount. The applicant, although contesting the

66. See Joint Stipulation of Facts and Statement of the Issue at 1, In the Matter of Game Farm License No. 211 (June 12, 1998) [hereinafter Stipulation].
68. Id. at 1.
69. Id. at 2.
70. Id.
71. The applicant's total estimated cost for the project was $344,900. See Letter from Len Wallace, Big Velvet Ranch, to C. Richard Clough, Regional Supervisor, FWP (Nov. 1, 1996).
73. The FWP's recalculated estimate totaled $1,526,900. See id.
74. The FWP originally calculated the maximum fee by multiplying its recalculated project cost estimate by two percent and told the applicant it should remit that amount ($30,538). See Letter from C. Richard Clough, Regional Supervisor, FWP, to Len Wallace, Big Velvet Ranch (Nov. 1996). The applicant advised the FWP it had erroneously calculated the maximum fee (per MCA § 75-1-203(2), two percent is to be applied to the first $1,000,000 plus one percent thereafter up to $20,000,000). See Letter
assessed amount, remitted the assessed amount so that the EIS process could be completed. The applicant subsequently requested a hearing under the Montana Administrative Procedures Act to determine what the correct calculation of the maximum fee should be under MCA § 75-1-203(2) and the FWP’s applicable rules.

In their briefs, both parties concluded that the phrase “any estimated cost” in MCA § 75-1-203(2) meant the cost of constructing the applicant’s project. Both agreed that the applicant’s maximum EIS compilation fee should be calculated using that cost as the base figure. The parties disagreed, however, on what should be included in the cost of constructing the applicant’s project—namely, whether land already owned by the applicant at the time of application should be included. Further, the parties disagreed about how that land, if it was to be included in the base figure, should be valued.

The hearing examiner charged with reviewing the parties’ briefs determined that the applicant’s project cost should include the land already owned by the applicant, and that the land’s valuation should be based on the land’s “next best alternative use.” Assuming that “any estimated cost” in MCA § 75-1-203(2) was a “Cost of the Project” for assessing EIS Fees, In the Matter of (July 7, 1998).
203(2) meant the cost of the applicant’s project, the examiner chose not to decide what the land’s “next best alternative use” was, and instead left the FWP to define those parameters.

In short, the FWP’s on-going dispute suggests that land already owned by an applicant at the time of application should be added to the list of items that should be included in determining an applicant’s project cost. Further, in calculating the applicant’s total project cost, it appears that the value of such land should be the land’s next best alternative use. However, this inclusion and its required valuation method give rise to yet another unanswered question — “how should one determine a piece of land’s next best alternative use?” Consequently, while the FWP’s dispute provides some assistance in answering the original question of “what comprises ‘any estimated cost’” under MCA § 75-1-203(2), the dispute may be more useful for another reason: to demonstrate that basing the maximum applicant EIS compilation fee on an applicant’s project costs truly gives rise to a double ambiguity. In turn, this double ambiguity may readily lead to yet another seemingly endless string of unanswered questions. Perhaps that is why the DEQ and the DNRC have chosen to take a different approach to assessing applicant fees for EIS compilations.

b. The DEQ and the DNRC

Both the DEQ and the DNRC have chosen to approach EIS compilation fees by a different route than the FWP, although the procedures described in their rules are similar. Historically, when the DEQ or the DNRC prepared an EIS subject to fee assessment, the agency entered into either a Memorandum of Agreement or a Memorandum of Understanding (collectively “Agreements”) with an applicant,
whereby the applicant basically agreed to fund the required EIS. That practice continues today.

An Agreement generally includes a provision dealing with the applicant fees, including a reference to the maximum fee that may be charged. The typical language is similar to the following:

The parties agree that MEPA authorizes DEQ to collect fees to accomplish the activities necessary to complete the EIS. The parties agree that fee collection may be accomplished under this Agreement, rather than the formal procedure contained in ARM 26.2.628, 629, and 630, with the express understanding that fees will not exceed the statutory maximum that could be collected under MEPA, absent further agreement between the parties. The fees collected will be used for project management costs, scoping and EIS review meetings, internal review meetings, and third-party consultant costs.

Using an Agreement to fund an EIS generally serves to circumvent calculating the maximum fee using the sliding scale

90. Telephone Interview with Sandi Olsen, Deputy Administrator, Department of Environmental Quality, Permitting and Compliance Division (May 26, 1998); Telephone Interview with Tommy Butler, Legal Counsel, Department of Natural Resources and Conservation (Sept. 24, 1998).

The Agreements typically contain several provisions related to the funding of the EIS. Generally, the applicant is required to provide funds to establish an initial agency "operating balance," then advance funds to the agency when the balance dips below a certain amount. The agency, in turn, is required to provide incremental cost estimates to the applicant, which are subject to the applicant's approval in some situation. Additionally, the applicant generally has the right to audit the agency's accounts and records relating to any expenditures made under the agreement.

See, e.g., Memorandum of Agreement Between Montana Department of Environmental Quality and Golden Sunlight Mines, Inc. (Sept. 7, 1995) at 5-6 [hereinafter Golden Sunlight Memo]; Memorandum of Agreement Between Montana Department of State Lands and Seven-Up Pete Joint Venture (Nov. 1, 1993) at 5-6 [hereinafter Seven-Up Pete Memo]; Memorandum of Understanding Between Montana Department of State Lands and ASARCO Incorporated (April 1, 1988) at 2-3 [hereinafter ASARCO Memo].

91. The DNRC's EIS activities are now part of those handled by the DEQ. Telephone Interview with Wayne Wetzel, Special Projects Coordinator, Department of Natural Resources and Conservation (Sept. 24, 1998).

These agreements may be used by the agencies, in part, because it gives them some assurance it will have adequate funding for the EIS. Telephone Interview with Wayne Wetzel, Special Projects Coordinator, Department of Natural Resources and Conservation (Sept. 24, 1998). Additionally, such an agreement is beneficial to the applicant because it can arrange for financing in increments, rather than having to pay one lump sum prior to the EIS being prepared. See id.

92. See Golden Sunlight Memo, supra note 90, at 6; see also Seven-Up Pete Memo, supra note 90, at 6; ASARCO Memo supra note 90, at 2-3.
in MCA § 75-1-203(2). Consequently, the DEQ and the DNRC EIS fee assessment methods do not help in answering the question of what comprises "any estimated cost" under MCA § 75-1-203(2).

C. Summary

Montana Code Annotated § 75-1-203(2) is undeniably facially ambiguous. Nothing in the statute or MEPA itself gives any guidance as to how the phrase "any estimated cost" should be interpreted. The statute's legislative history indicates the phrase means the cost of constructing an applicant's project. The state agencies actually assessing applicants fees apparently recognize this. However, defining all the specific costs has been a troublesome task for the agencies. Additionally, the FWP's ongoing dispute reveals trying to actually calculate the maximum applicant EIS compilation fee based on an applicant's project costs has proven to be almost as elusive as trying to calculate the fee using the ambiguous "any estimated cost" phrase.

In sum, even after a review of the materials routinely used in statutory interpretation, the answer to the question, "what comprises 'any estimated cost'" under MCA § 75-1-203(2) remains unclear. Thus, the base on which the percentage amount is to be applied in calculating the maximum EIS compilation fee remains unknown. Because the base remains unknown, the percentage of "any estimated cost" cannot be calculated and, in essence, it is virtually impossible for a state agency to determine what an applicant's maximum EIS compilation fee may be under the statute. As a result, the statute is ineffective and, essentially, meaningless. As such, given the directive by the Montana Supreme Court that ineffective or meaningless statutes should be declared void and inoperative, MCA §75-1-203(2) is readily susceptible to such a declaration.

PART II: SEARCHING FOR A SOLUTION

Having established that MCA § 75-1-203(2) is subject to

93. The DEQ has never required any mining entity to prepare a project cost estimate using the criteria set forth in current DEQ rules. Telephone Interview with Sandi Olsen, Deputy Administrator, Department of Environmental Quality, Permitting and Compliance Division (May 26, 1998). This is likely due to the fact that any project cost calculated using the items listed in the DEQ rules would easily surpass the cost of preparing an EIS.
being declared void by a reviewing court due to the vagueness of the phrase "any estimated cost," the statute should be revised. In revising the statute, however, several factors should be considered. This Part discusses those factors.

The factors to be considered in revising a statute necessarily depend on what is hoped to be achieved by the revised statute.\textsuperscript{94} Here, the objective is three-fold: to provide a statute that incorporates the original legislative intent in enacting MCA § 75-1-203(2); to provide a statute that allows state agencies (and likewise, applicants) to readily calculate the maximum applicant EIS compilation fee; and to provide a statute that will withstand a reviewing court's scrutiny.

The first factor to consider in revising the statute, therefore, is the intent behind the original drafting of MCA § 75-1-203(2). That intent is discussed in Section A, below. The second factor to consider is what method of maximum fee calculation can be most readily implemented by state agencies. That subject is discussed in Section B, below. Finally, consideration should be given to other state statutes and rules that may offer guidance as to how Montana's statute might be revised effectively to calculate a maximum fee assessment and, in turn, withstand court scrutiny. Thus, those items are explored in Section C, below. This Part concludes with Section D, which summarizes the factors that should be incorporated in revising MCA § 75-1-203(2).

\textit{A. Legislative Intent}

Legislative intent can be found in two obvious places: 1) a statute's legislative history; and 2) other statutes within a particular statute's referenced act (in this case, other statutes within MEPA). Each of these is discussed below in conjunction with MCA § 75-1-203(2).

\textit{1. Legislative History}

The legislative history provides some insight as to what the legislature intended in passing MCA § 75-1-203(2). House Bill 882's original draft stated, "[i]t is the intent of the legislature that the fees appropriated pursuant to this act be used to strengthen agency competence in making complex

\textsuperscript{94} A template for a revised statute is provided in Part III, \textit{infra}.
interdisciplinary decisions requiring a variety of expertise." Additionally, House Bill 340’s original draft included the statement, “[i]t is the intent of the legislature that the fees derived under this section be appropriated to the agencies for the compilation of environmental impact statements as required by this act.” Similarly, the Senate’s State Administration Committee minutes include the following excerpts regarding statements from state agency representatives who supported House Bill 340:

[A]s far as environmental impact statements go, it is impossible to predict in advance how many major private projects will be triggered within a two-year period. Therefore it is not possible to come to the Legislature to ask for the money they will need to do these statements . . . .

. . . There are many people who are waiting for permits, according to Mr. Doney, and they are unable to issue them because they have not had the money or the time to do the environmental impact statements. In one instance where they completed such a statement, the cost amounted to $15,000 and their agency absorbed the entire cost.

. . . He pointed out that most of the environmental impact statements done are through his agency. He quoted some figures on three of these statements, and stated that these take in such costs as personnel, legal counsel, instrumentation, and printing. He also noted that the percentage of the cost of these impact statements in relation to the total projects ranged from .34% to .45%, or less than one percent in each case.

Collectively, these excerpts indicate that the primary intent behind the enactment of MCA § 75-1-203(2) was to ensure state agencies adequate funding to prepare any EIS required under MEPA. Consequently, any revised statute setting forth an applicant’s maximum EIS compilation fee should reflect that intent.

98. Further, MEPA itself requires that the “fee assessed . . . shall be used only to gather data and information necessary to compile an environmental impact statement. . . .” Mont. Code Ann. § 75-1-202 (1997).
2. Other Statutes Within MEPA

MEPA does not record the legislative intent behind MCA § 75-1-203(2). However, several provisions in MEPA hint at what the legislature did not intend in passing the statute: that small project applicants would always have to pay for the entire cost of an EIS compilation.

This proposition is evidenced by several MEPA provisions. First, the sliding scale found in MCA § 75-1-203(2) evidences such an intent. If the legislature wanted all applicants to pay the full cost of compiling an EIS, it could have passed such a statute in lieu of passing one that incorporated a sliding scale.\(^9\) Second, MCA § 75-1-203(1) permissively, not mandatorily, grants state agencies the right to adopt applicant fee schedules, and provides that such schedules "may be adjusted depending upon the size and complexity of the proposed schedule."\(^{100}\) Additionally, that section mandates that no applicant may be charged a fee if the costs of compiling an EIS do not exceed $2,500.\(^{101}\) Finally, in its policy statement, MEPA dictates that it is the state's continuing responsibility to "protect the right to use and enjoy private property free of undue government regulation."\(^{102}\) One might argue that if a small project applicant had to pay the full cost of an EIS, and it did not have the resources to do so, the applicant would be precluded from freely using its land.

Given these facts, any revision to MCA § 75-1-203(2) should ensure small project applicants are not required to pay the full EIS compilation cost.

B. Agency Implementation

The EQC believes it has a responsibility to assist state agencies in MEPA implementation and compliance.\(^{103}\) Through its model rules, the EQC indicates that two types of costs can be readily calculated: the estimated cost of an applicant's project

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\(^{9}\) The FWP dispute is a good example of how the sliding scale works. There, the EIS compilation costs were approximately $68,000. The applicant's fee, as assessed by the FWP, was only about $25,000. See supra notes 67, 74.

\(^{100}\) See MONT. CODE ANN. § 75-1-203(1) (1997).

\(^{101}\) See id.

\(^{102}\) MONT. CODE ANN. § 75-1-103(1)(d) (1997).

\(^{103}\) See HANDBOOK, supra note 51, at Preface; see generally MONT. CODE ANN. §§ 75-1-301 to -324 (1997).
and the estimated cost of compiling an EIS. By adopting these rules nearly word for word, the state agencies affected by MEPA seemingly agree these costs are readily determined.

If, in fact, both these types of cost are readily determined, either could provide the missing statutory base for calculating a maximum EIS fee assessment. However, as demonstrated by the FWP's on-going dispute, the cost of an applicant's project is not readily determinable. Further, because the cost of an applicant's project will necessarily depend on the applicant's unique situation, no all-inclusive list of project costs could likely ever be prepared.

On the other hand, MEPA itself sets forth concrete guidelines on how all EISs should be compiled, limiting the variables that might arise in the costs of compiling an EIS. Additionally, MEPA affirmatively suggests that under its guidelines, estimated EIS compilation costs can be readily calculated. This idea is supported by the manner in which the DEQ and the DNRC collect applicant fees for EIS compilations. As mentioned previously, those agencies routinely enter into Agreements with applicants subject to EIS compilation fees. Those Agreements include language requiring the state agency to furnish applicants with cost estimates for various EIS phases. This requirement indicates those state agencies are in a position to calculate an estimated EIS compilation cost. Likewise, as noted previously, the FWP has demonstrated it can estimate the cost of compiling an EIS.

Given the support of the EQC's model rules, MEPA itself, and the proven capabilities of the DEQ, the DNRC and the FWP, as well as the "project cost" shortcomings exhibited by the FWP's dispute, it appears that the most easily implemented method of assessing maximum EIS fees is to base them on the

104. See generally HANDBOOK, supra note 51, at B-16 to B-17.
105. See supra Part I, Section B.2.a.
106. This was apparently recognized by the DEQ when it promulgated rules stating that its itemized fee assessment categories were "not exclusive" and were "intended as a basic guide." MONT. ADMIN. R. 17.4.720 (1996).
107. See MONT. CODE ANN. § 75-1-201 (1997).
108. See MONT. CODE ANN. § 75-1-203(1) (1997) ("A fee may not be assessed unless the application for a lease, permit, contract, license, or certificate will result in the agency incurring expenses in excess of $2,500 to compile an environmental impact statement.") (emphasis added).
109. See supra Part I, Section B.2.b.
110. See supra Part I, Section B.2.b.
111. See supra note 67.
cost of compiling the actual EIS.

C. Other Statutes And Rules

Several other states have existing statutes and/or rules which impose applicant fees when an EIS is required.112 These legal directives generally fall into four categories: 1) those that base the applicant’s maximum fee on the cost of EIS preparation (or review of the EIS if it is prepared by the applicant);113 2) those that base the maximum applicant fee on what is reasonable;114 3) those that simply charge the applicant a flat fee for EIS preparation (or review);115 and 4) those that base the maximum fee on the cost of the applicant’s project.116

Of the four categories above, two do not merit in-depth discussion in this Part. First, because nothing in MCA § 75-1-203(2), its legislative history, or the rules promulgated thereunder contemplate assessing a flat fee for an agency’s EIS compilation, those statutes/rules will be of little value in revising the statute. Therefore, they will not be discussed. Second, as has been discussed throughout this Comment, the difficulties of basing a maximum applicant EIS compilation fee on the cost of the applicant’s project render such an approach impracticable. The lone New York rule that utilizes this method offers no solutions to the problems discussed previously.117 Therefore, it will not be discussed in this Part.

The other state statutes and rules that base an applicant’s maximum EIS compilation fee on the cost of compiling the EIS or on what is reasonable are discussed below.

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117. See id. Interestingly, the New York rule requires an applicant’s nonresident land be valued at fair market value if that value is higher than the purchase price. See id. This was the valuation desired by the FWP in its on-going dispute. See Brief of Department of Fish, Wildlife and Parks, supra note 78, at 6. The hearing examiner, however, found such a valuation was “not contemplated by the [Montana] statute.” Findings, supra note 48, at 16.
1. Maximum Fee Based on the Cost of EIS Preparation/Review

Because it has been shown that Montana state agencies are readily able to calculate the costs of compiling an EIS, it follows that using such costs as a base for calculating the maximum applicant EIS compilation fee is viable. Therefore, reviewing other state statutes and rules using such a method may be helpful in revising MCA § 75-1-203(2). Both New York and Wisconsin have statutes and rules that utilize these methods. Useful portions of their statutes and rules are provided in Appendix A.

2. Maximum Fee Based on What is Reasonable

While neither MCA § 75-1-203(2), its legislative history, nor state agency rules directly contemplate the reasonableness of costs in assessing a maximum EIS fee, common sense dictates that this factor be incorporated in assessing any fee subject to court scrutiny. Therefore, other state statutes and rules which use reasonableness as a basis for determining the maximum applicant EIS compilation fee can be of assistance in revising Montana’s statute.

Minnesota’s Environmental Quality Board has provided useful guidelines as to what types of EIS compilation costs are “reasonable.” These guidelines are provided in Appendix B.

D. Summary

Any revision to MCA § 75-1-203(2) should incorporate, at a minimum, the following factors: 1) the original statute’s legislative intent of ensuring state agencies have adequate funding for compiling a required EIS; 2) the apparent intent of the legislature to not require small project applicants to pay the full EIS compilation cost; 3) a method for calculating the maximum fee based on a state agency’s cost of compiling the EIS; and 4) a reimbursement limitation on EIS compilation costs which are deemed reasonable.

PART III: A SOLUTION

Part II, Section D, discussed the factors to be incorporated in revising MCA § 75-1-203(2). This Part incorporates those factors in a template for a revised statute.

The following is a template for revising MCA § 75-1-203(2):
(2) The maximum fee that may be imposed by an agency is as follows:

a) when the estimated reasonable EIS compilation costs total $XX or less, the maximum fee that may be imposed is X% of that estimated total cost;

b) when the estimated reasonable EIS compilation costs total more than $XX, but less than $YY, the maximum fee that may be imposed is Y% of that estimated total cost;

c) when the estimated reasonable EIS compilation total costs are equal to or greater than $YY, the maximum fee that may be imposed is 100% of the estimated total cost.

(a) The reasonable costs of compiling an environmental impact statement include:

1) The cost of agency staff time spent compiling the EIS and its revisions and supplements, including direct salary and fringe benefit costs;

2) Actual expenses for travel and supplies used in conjunction with activities directly related to the EIS compilation and its revisions and supplements;

3) The cost of consultants hired by the agency to assist in the EIS compilation and its revisions and supplements;

4) Other direct costs of the agency for the collection and analysis of information or data necessary for the EIS compilation and its revisions and supplements;

5) Indirect costs of the agency related to the EIS compilation and its revisions and supplements, not to exceed the agency's normal operating overhead rate;

6) The cost of printing and distributing the EIS and its revisions and supplements, as well as the cost of public notices of the availability of the documents; and

7) The cost of any public hearings or public meetings held in conjunction with compiling the EIS and its revisions and supplements.

(b) The reasonable costs of compiling an environmental impact statement do not include:

1) The cost of collecting and analyzing information and data incurred before the final determination has been

118. All agencies subject to MEPA currently have rules requiring the applicant to be reimbursed for any fee paid in excess of the actual cost of compiling an EIS. See MONT. ADMIN. R. 8.2.327(2) (1988) (Department of Commerce); MONT. ADMIN. R. 17.4.703(2) (1996) (Department of Environmental Quality); MONT. ADMIN. R. 12.2.453(2) (1988) (Department of Fish, Wildlife and Parks); MONT. ADMIN. R. 18.2.260(2) (1988) (Department of Highways); MONT. ADMIN. R. 32.303(2) (1980) (Department of Livestock); MONT. ADMIN. R. 36.2.611(2) (1995) (Department of Natural Resources and Conservation).
made that an EIS will be prepared, unless the information and data were obtained for the purpose of being included in the EIS;

2) Costs incurred by a private person other than the applicant or a governmental unit other than the agency, unless the costs are incurred at the direction of the agency for the preparation of material to be included in the EIS and its revisions and supplements;

3) The capital costs of equipment purchased by the agency or its consultants for the purpose of establishing a data collection program, unless the applicant agrees to include such costs

4) Agency costs related to compiling the EIS and its revisions and supplements that are reimbursed by the federal government; and

5) EIS compilation, revision and supplement costs reimbursed by the applicant under another statute.

(c) The cost of any items specified in subpart (a) incurred by an agency during the EIS scoping process are part of the reasonable costs of compiling an EIS.

This template may not entirely eliminate the possibility of problems arising in calculating a maximum applicant EIS compilation fee. It does, however, eliminate the troublesome "any estimated cost" phrase currently found in MCA § 75-1-203(2) and provide state agencies with a more workable method for calculating the fee. In sum, the offered solution would instill at least some legal certainty into an otherwise hopelessly ambiguous and potentially invalid law.
Statutes basing the maximum applicant fee on the cost of preparing an EIS are generally straightforward and to the point. A prime example is the language used by the following New York statute:

An agency may charge a fee to an applicant in order to recover the costs incurred in preparing or causing to be prepared or reviewing a draft environmental impact statement or an environmental impact statement on the action which the applicant requests from the agency; provided, however, that an applicant may not be charged a separate fee for both the preparation and review of such statements.\textsuperscript{119}

Wisconsin's statute is somewhat more specific:

The amount of the environmental impact statement fee shall equal the full cost of the preparation of the environmental impact statement and the full cost of any preapplication services if the department enters into a preapplication service agreement. These costs shall include the cost of authorized consultant services and the costs of printing and postage.\textsuperscript{120}

Wisconsin's Department of Natural Resources rules are even more specific:

1. Actual salary costs, based upon a rate burdened for leave time and calculated on a quarterly basis plus fringe benefits calculated at the previous year actual rate, for time spent by department staff for: preapplication services; coordination, problem identification and data collection leading to the submittal of an EIR [Environmental Impact Report] by the applicant, if required; review of the applicant's EIR, if required; data collection and analysis leading to and including the preparation of the EIS or if prepared, EIS revisions or supplements; and the public hearings on the EIS.

2. Actual expenses for travel and supplies used in conjunction

\textsuperscript{119} N.Y. ENVTL. CONSERv. LAW § 8-0109.7.a (McKinney 1997).

\textsuperscript{120} WIS. STAT. § 23.40(3)(b) (1998).
with activities specified in subd. 1.

3. The cost of distributing the EIS or if prepared, EIS revisions or supplements to those parties or locations specified in s. NR 150.22.

4. The full cost of any consultant retained by the department to perform preapplication services, collect or analyze data, or prepare draft portions of the EIS for department use in developing the EIS.

5. Administrative indirect costs calculated at the current approved department rate based on total direct salaries, wages and related fringe benefits.

\[
\text{(i) The department may not include in the EIS fee costs associated with the following:}
\]

1. Non-EIS related consultation and review of permit applications or plans for department approval, and associated public hearings.

2. EIS related department activities up to the amount of permit or plan review fees, if any, reimbursed by the applicant under another statute.

3. Department staff time spent on EIS related activities that are reimbursed by the federal government.\(^{121}\)

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A Minnesota statute provides that the maximum EIS applicant fee is limited to what is “reasonable.” Minnesota’s Environmental Quality Board is responsible for determining what is “reasonable.” Consequently, the Board set forth these guidelines:

Subpart 1. EIS cost inclusions. In determining the reasonable cost of preparing and distributing an EIS, the following items shall be included:

A. the cost of the RGU’s [Responsible Government Unit] staff time including direct salary and fringe benefit costs;
B. the cost of consultants hired by the RGU;
C. other direct costs of the RGU for the collection and analysis of information or data necessary for the preparation of the EIS;
D. indirect costs of the RGU not to exceed the RGU’s normal operating overhead rate;
E. the cost of printing and distributing the scoping EAW and draft scoping decision document, draft EIS and the final EIS and of public notices of the availability of the documents; and
F. the cost of any public hearings or public meetings held in conjunction with the preparation of the EIS.

Subpart 2. EIS cost exclusions. The following items shall not be included in the cost assessed to the project proposer for the preparation and distribution of an EIS:

A. the cost of collecting and analyzing information and data incurred before the final determination has been made that an EIS will be prepared, unless the information and data were obtained for the purpose of being included in the EIS;
B. costs incurred by a private person other than the proposer or a governmental unit other than the RGU, unless the costs are incurred at the direction of the RGU for the preparation of material to be included in the EIS; and
C. the capital costs of equipment purchased by the RGU or its consultants for the purpose of establishing a data collection program, unless the proposer agrees to include such costs.

Subp. 3. EIS scoping costs. The cost of any items specified in subpart 1 incurred by the RGU during the scoping of an EIS are part of the reasonable costs of preparing and distributing an EIS.

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123. See id.
and are to be assessed to the project proposer by the RGU.\textsuperscript{124}