

9-29-2021

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Recommended Citation

Seymour, Holly (2021) "Park County Environmental Council v. Montana Department of Environmental Quality, 477 P.3d 288 (Mont. 2020)," *Public Land & Resources Law Review*: Vol. 0 , Article 6.
Available at: <https://scholarworks.umt.edu/plrlr/vol0/iss15/6>

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**Park County Environmental Council v. Montana Department of
Environmental Quality, 477 P.3d 288 (Mont. 2020)**
*A comment on the preventative protection standard this case sets in
Montana*

Holly A. Seymour

The Montana Supreme Court held in 2020 that loopholes in the Montana Environmental Procedure Act ("MEPA") review process violate Montana's constitutional right to a clean and healthful environment. The holding sets a strong precedent requiring statutory protections to prevent harm to the environment before it occurs.

I. INTRODUCTION

In *Park County Environmental Council v. Montana Department of Environmental Quality* ("Lucky Minerals")¹, the Montana Supreme Court held that state environmental permitting processes fail to fulfill Montana's right to a "clean and healthful environment" if they do not include anticipatory and preventative mechanisms in their legal frameworks. Plaintiffs specifically challenged a 2011 MEPA amendment that prevented plaintiffs from seeking an injunction when challenging an action that allegedly violates MEPA. In a prior 1999 landmark decision, *Montana Environmental Information Center v. Dept. of Environmental Quality* ("MEIC")², the Court held that statutory exclusions from environmental review are subject to strict scrutiny due to the constitutional right to a "clean and healthful environment." Taken together, these holdings instruct Montana's environmental permitting processes to anticipate and prevent environmental degradation before such degradation occurs to comply with the Montana constitution.

This comment argues that, in light of the *Lucky Minerals* and *MEIC* holdings, the legislature must better ensure anticipatory and preventative mechanisms in environmental permitting processes. By way of illustration, this comment considers three permitting processes in Montana that create loopholes for avoiding anticipatory and preventative analysis of environmental harm: (1) the exemption of "minor subdivisions" from environmental review; (2) the MEPA exemption for non-state-sponsored projects; and (3) the statutory requirement for counties to allow sand and gravel mining activities.

II. FACTS AND LEGAL BACKGROUND

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1. Park Cty. Env'tl Council v. Mont. Dept. of Env'tl Quality, 477 P.3d 288, 292 (Mont. 2020) [hereinafter *Lucky Minerals*].
 2. Mont. Env'tl. Info. Ctr. v. Dep't of Env'tl. Quality, 988 P.2d 1236 (Mont. 1999) [hereinafter *MEIC*].

To illustrate the anticipatory and preventative mechanisms the Court describes in *Lucky Minerals*, this section will address the background of the case, applicable MEPA review processes, and an overview of the environmental provisions of the Montana Constitution. Together with other environmental constitutional cases, this section demonstrates the standard by which the Montana Supreme Court interprets Montana's constitutional guarantee of a clean and healthful environment.

A. *Lucky Minerals*

Lucky Minerals involved a challenge to a mining permit in Emigrant Gulch, just north of Yellowstone National Park in southwest Montana.³ The area contains critical habitat for numerous species, including grizzly bear, lynx, sheep, elk, deer, moose, coyotes, black bears, and wolves.⁴ It is part of the Yellowstone River watershed, contributing to a world-renowned trout fishery that supports water recreation and Montana's tourism economy.⁵

In 2015, Lucky Minerals, Inc. (“Applicants”) sought authorization under the Metal Mine Reclamation Act to conduct exploration activities in Emigrant Gulch on its privately owned property.⁶ The proposed activities included drilling up to forty-six holes one to two-thousand feet deep.⁷ In response to Applicant’s proposal, the Montana Department of Environmental Quality (“MTDEQ”) prepared a draft Environmental Assessment in 2016 pursuant to MEPA. It concluded that the proposed exploration would not result in significant environmental impacts.⁸ Despite thousands of public comments raising concerns about wildlife disturbance, increased road access for hunters and trappers, and negative effects on wolverine and grizzly bear populations, MTDEQ maintained its finding of no significant impact and declined to prepare a more in-depth Environmental Impact Statement (“EIS”). The agency released the final environmental assessment (“Final EA”) in 2017.⁹

The Final EA included MTDEQ’s groundwater impacts analysis. MTDEQ tested multiple sites in the area Applicants sought to explore and concluded that the geologic material of the proposed site is “potentially reactive and may produce acid rock drainage or mobilize metals under near-neutral pH conditions.”¹⁰ Regarding flow rates, MTDEQ collected samples from existing boreholes drilled by past property owners between 1971 and 1973 and concluded that the Applicant’s proposed boreholes similarly would have little to no impact on water quantity in the drainage.¹¹

3. *Lucky Minerals*, 477 P.3d at 292.

4. *Id.*

5. *Id.* at 293.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 293–94.

11. *Id.* at 294.

MTDEQ further concluded that Applicant would effectively mitigate potential impacts on groundwater flow rates in the region by implementing artesian flow containment procedures prior to drilling.¹²

Local nonprofit environmental groups Greater Yellowstone Coalition and Park County Environmental Council (collectively “Plaintiffs”) filed suit in September 2017, arguing that MTDEQ’s finding of no significant impact in its Final EA did not comply with MEPA.¹³ The Park County District Court agreed, finding that the Final EA fell short of MEPA requirements because MTDEQ submitted an incomplete water quality analysis that selectively relied upon more favorable borehole data (including the previously used boreholes), among other shortcomings.¹⁴

As such, the District Court granted Plaintiff’s motion for vacatur of the Applicant’s drilling license. Importantly, the District Court also found that certain 2011 amendments made to the MEPA review process (“2011 Amendments”) violated Montana’s constitutional right to a clean and healthful environment¹⁵ by stripping the judiciary of any remedy for a MEPA violation other than remanding to the agency.¹⁶ By limiting the remedy for failure to comply or inadequate compliance with environmental review process required by MEPA, the District Court held that the 2011 Amendments prevented the injunctive relief necessary to stop harm to the environment until the applicant party comes into compliance, as required by the Montana Constitution.¹⁷ The 2011 Amendments also “prohibited a permit, license, lease, or other authorization issued by an agency from being enjoined, voided, nullified, revoked, modified, or suspended pending the completion of an environmental review that may be remanded by a court.”¹⁸ Based on MTDEQ’s Final EA and exploratory drilling permit, Applicants were permitted to continue their exploratory operation without complete information on the environmental impacts of their activities. Together, the District Court concluded these limitations fail to provide “adequate remedies to prevent unreasonable depletion and degradation of natural resources.”¹⁹

B. MEPA

12. *Id.*

13. *Id.*

14. *Id.*

15. MONT. CONST. art. XI § 1.

16. *Lucky Minerals*, 477 P.3d at 295.

17. A Guide to the Montana Environmental Policy Act, Legislative Environmental Policy Office, ENVIRONMENTAL QUALITY COUNCIL, 13, revised 2019; MONT. CODE ANN. § 75-1-201(6)(c) (2019).

18. A Guide to the Montana Environmental Policy Act, Legislative Environmental Policy Office, ENVIRONMENTAL QUALITY COUNCIL, 13, revised 2019.

19. *Lucky Minerals*, 477 P.3d at 302.

MEPA requires environmental review prior to government actions that may significantly affect the human environment.²⁰ The statute is a supplement to any specific statutory permitting criteria for a project, such as a mining, water use, or dredge and fill permit. An agency action which significantly affects the quality of the human environment requires the agency to produce an EIS, unless a preliminary Environmental Assessment determines that an agency's actions will not impact the environment to a significant degree.²¹ MEPA's goal is to facilitate a relationship between the state and the environment that holds the state accountable as a trustee of the environment; assures safe, healthful, productive, and aesthetically and culturally pleasing surroundings; and attains the widest range of beneficial uses of the environment without degradation.²² Montana enacted MEPA one year prior to the 1972 Montana Constitutional Convention, which resulted in Montana's environmental constitutional provisions and is discussed below.²³ At the time of its enactment, MEPA's stated purpose affirmed MEPA would "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man, and to enrich the understanding of the ecological systems and natural resources important to the state."²⁴

Since MEPA's enactment, the Montana legislature has modified its language and scope a number of times. In particular, the 2011 Amendments imposed significant limitations on the MEPA review process, as the court describes in *Lucky Minerals*.²⁵ The legislature during the 2011 Montana Legislative Session further clarified that the purpose of an Environmental Assessment or EIS under MEPA is to "assist the legislature in determining whether laws are adequate to address impacts to Montana's environment and to inform the public and public officials of potential impacts resulting from decisions made by state agencies."²⁶ In a clear attempt to narrow MEPA's scope, legislators also limited its geographic scope to "within Montana's borders," rather than considering regional, national, or global impacts of an agency's actions.²⁷

C. Montana Constitution

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20. MONT. CODE ANN. § 75-1-201.
 21. *Bitterrooters for Planning, Inc. v. Mont. Dept' Envntl. Quality*, 401 P.3d 712, 719 (Mont. 2017).
 22. MONT. CODE ANN. § 75-1-103(2).
 23. A Guide to the Montana Environmental Policy Act, *supra* note 15, at 2.
 24. MONT. CODE ANN. § 75-1-102 (1971).
 25. *Lucky Minerals*, 477 P.3d 288, 302 (Mont. 2020).
 26. A Guide to the Montana Environmental Policy Act, *supra* note 15, at 1–2; MONT. CODE ANN. § 75-1-201(6)(c) (2019).
 27. A Guide to the Montana Environmental Policy Act, *supra* note 15, at 12.

The Montana Constitution guarantees the people of Montana the right to a clean and healthful environment.²⁸ It further provides corresponding duties that state and local governments must fulfill:

- (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
- (2) The legislature shall provide for the administration and enforcement of this duty.
- (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of environmental resources.²⁹

Taken together, these "clean and healthful" provisions ("Constitutional provisions") provide the "strongest environmental protection provision found in any state constitution."³⁰ Furthermore, the 1972 Montana Constitutional Convention delegates intended that the two provisions "complement each other and be applied in tandem."³¹ The Court has concluded that they are to be "interrelated and interdependent and that state or private action which implicates either must be scrutinized consistently."³² Strict scrutiny therefore applies to any state or private action which implicates either constitutional provision.³³

The delegates chose to place these provisions in the Constitution because they believed statutes are vulnerable to amendment.³⁴ *Lucky Minerals* and the 2011 Amendments highlight this vulnerability. The descriptors "clean" and "healthful" were deliberately chosen to emphasize the intention to both prohibit degradation of the current environment, and affirmatively require its enhancement.³⁵

D. Case Law Illuminating the Preventative Standard

In *MEIC*, environmental groups sued the State of Montana and a mining operator, alleging that discharge from water wells which degrade a water body violated Article II, Section 3 and Article IV, Section 1 of the Montana Constitution.³⁶ At the time, the Montana Legislature had

28. MONT. CONST. art. II, § 3.

29. MONT. CONST. art. IX, § 1.

30. *MEIC*, 988 P.2d at 1246.

31. *Id.*

32. *Id.*

33. *Id.*

34. Montana Constitutional Convention Verbatim Transcript, Vol. IV, 1205 (1972).

35. *MEIC*, 988 P.2d at 1246.; Montana Constitutional Convention, Vol. IV at 1205 (March 1, 1972).

36. *MEIC*, 988 P.2d at 1237; MONT. CODE ANN. § 75-5-303(3) (2019).

exempted those kinds of discharges from Montana's nondegradation review process because they were associated with exploratory mining.³⁷ Plaintiffs contended that this statutory exemption violated the Constitutional provisions.³⁸ As such, plaintiffs sought to enjoin an exploratory license granted by the state to Seven-Up Pete Joint Venture that allowed pump testing and subsequent discharges of polluted water into the Blackfoot and Landers Fork rivers in pursuit of operating an open-pit gold mine in the Blackfoot Valley.³⁹

The Court considered whether the statute permitting these discharges without review was void under the Montana Constitution.⁴⁰ Applying strict scrutiny, the Court concluded the constitutional provisions are anticipatory and preventative in their intent and, somewhat famously, do "not require that dead fish float on the surface of our state's rivers and streams" before Montana's constitutional environmental protections be invoked.⁴¹ The intention of the constitutional provisions, the Court continued, was not only to protect against environmental degradation that is "conclusively linked to ill health or physical endangerment,"⁴² but also to prevent unreasonable degradation to the environment and provide adequate remedies for the degradation of our environmental life support system.⁴³

In contrast, in *Northern Plains Resource Council, Inc. v. Montana Board of Land Commissioners* ("*Northern Plains*"), environmental groups unsuccessfully challenged the state Board of Land Commissioners' failure to perform environmental review under MEPA for a proposed coal mining operation in southeastern Montana.⁴⁴ There, the Court stated that the right to a clean and healthful environment is a fundamental right that may not be infringed upon except as permissible under strict constitutional scrutiny.⁴⁵ The Court nonetheless held that the statute governing state land leases, which provides a categorical environmental review exemption, did not violate the clean and healthful environment provisions of the Montana Constitution.⁴⁶ The Court reasoned that because subsequent mining was independently subject to MEPA review under applicable state and federal laws, it was not a failure of the legislature to provide advance environmental review in this situation.⁴⁷

In *Lucky Minerals*, the Court cites *Northern Plains* to reaffirm that environmental review must occur prior to making decisions and taking

37. *MEIC*, 988 P.2d at 1238.

38. *Id.* at 1243.

39. *Id.* at 1238.

40. *Id.*

41. *Id.* at 1249.

42. *Id.*

43. *Id.*

44. *N. Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs*, 288 P.3d 169, 171 (Mont. 2012).

45. *Id.* at 174.

46. *Id.*

47. *Id.*

actions that cause environmental harm.⁴⁸ Environmental review may not, therefore, occur after the project has begun, or prior to review of all information necessary to make an informed decision.⁴⁹

Even more recently, the Court clarified when the *Lucky Minerals* precautionary standards are applicable in *Clark Fork Coalition v. Montana Department of Natural Resources & Conservation*, ("*RC Resources*").⁵⁰ Plaintiffs challenged a statutory exemption from nondegradation review for water rights use permits.⁵¹ Applicant *RC Resources* proposed a mine in the Cabinet Mountains that required diversion and use of groundwater hydrologically connected to a stream designated as an Outstanding Resource Water ("*ORW*").⁵² Environmental groups challenged the mining company's failure to consider their proposal's compliance with Montana's nondegradation regulations under the Montana Water Quality Act governing management of *ORWs*.⁵³ The Court cited *Lucky Minerals* in its constitutional analysis: "[A]ny failure by the Legislature to provide adequate remedies for *advance* environmental review and protection before government approval of activities with potential for significant environmental degradation is a violation of the fundamental right to a clean and healthful environment."⁵⁴ Again, like in *MEIC*, categorical environmental review exemption by statute does not violate the constitutional provisions because the subsequent use of the land for mining would be independently subject to MEPA review later.⁵⁵ Were that not the case, however, failure to consider the degradation to an *ORW* would violate the constitutional provisions for failing to be anticipatory and preventative in protecting the waterbody.⁵⁶

III. HOLDING AND COURT'S ANALYSIS

Six issues were discussed on appeal in *Lucky Minerals*. Issue one addressed Plaintiffs' standing to challenge the Applicant's exploration permit. The Court held that the Plaintiffs' organizational members did have standing to sue.⁵⁷ Issue two discussed whether the District Court erred in holding that MTDEQ was required to evaluate the environmental

48. *Lucky Minerals*, 477 P.3d 288, 307 (Mont. 2020).

49. *Id.* at 308.

50. *Clark Fork Coal. v. Mont. Dep't of Nat. Res. & Conservation*, 481 P.3d 198 (Mont. 2021) [hereinafter *RC Resources*].

51. *Id.*; MONT. CODE ANN. § 85-2-311(1)(g), (2) (2019).

52. *RC Resources*, 481 P.3d at 221; *see* MONT. CODE ANN. § 75-5-315 (2019) ("[c]ertain state waters are of such environmental, ecological, or economic value that the state should, upon a showing of necessity, prohibit, to the greatest extent practicable, changes to the existing water quality of those waters. Outstanding resource waters must be afforded the greatest protection feasible under state law . . .").

53. *RC Resources*, 481 P.3d at 245.

54. *Lucky Minerals*, 477 P.3d at 310 (emphasis added).

55. *RC Resources*, 481 P.3d at 217.

56. *Id.* at 223.

57. *Lucky Minerals*, 477 P.3d at 296.

impacts of mining on federal land. The Court held the MTDEQ was only required to do so when Applicants applied for a full-scale mining permit, but not when Applicants applied for an exploratory permit.⁵⁸ Issue three considered whether the District Court erred in holding that the MTDEQ did not adequately analyze the impacts of expected road improvements. The Court affirmed that the agency failed to take a hard look at the impacts of road improvements on grizzly bears and wolverines and remanded the issue to the MTDEQ for additional analysis.⁵⁹ Issue four considered whether the MTDEQ failed to take a hard look at the water quality issues associated with the proposed exploratory mining operations. The Court held MTDEQ over-relied on old groundwater flow data performed by past owners of the property in their analysis and remanded the issue for supplemental review.⁶⁰ Issue five analyzed whether MTDEQ failed to sufficiently analyze alternatives to exploration as required by MEPA. The Court held that MEPA did not require MTDEQ to define an applicant's objectives and raise alternatives to a proposed exploration project.⁶¹ When a project is not state-sponsored, an applicant *may* propose an alternative but is not required to do so.⁶²

Most noteworthy and relevant here is issue six: whether the District Court erred in determining that the 2011 Amendments violate the right to a clean and healthful environment.⁶³ The Court ordered MTDEQ to bring the Final EA into compliance with MEPA's environmental review process.⁶⁴ Applicants conceded to this ruling, but contested the Court's vacatur of the exploration license by the District Court under the 2011 Amendments prohibiting such relief.⁶⁵

In its analysis, the Court considered standard procedure to remedy improperly issued permits by state agencies that are outside of the scope of MEPA: to set the permit aside.⁶⁶ The 2011 Amendments stripped the judiciary of that remedy.⁶⁷ However, the Court found a denial of equitable relief to Plaintiffs violated the Constitution's clean and healthful provisions.⁶⁸ Without the ability to halt a project while proper environmental review is conducted, a project could move forward in spite of the risk of harm to the environment and create constitutionally prohibited environmental harm.

Additionally, the Court considered whether the 2011 Amendments implicated the constitutional provisions outlined above.

58. *Id.* at 297.

59. *Id.* at 299.

60. *Id.* at 300.

61. *Id.* at 301.

62. *Id.*

63. *Id.*

64. *Id.* at 302.

65. *Id.*

66. *Id.*

67. A Guide to the Montana Environmental Policy Act, *supra* note 15, at 13.

68. *Lucky Minerals*, 477 P.3d at 311.

Citing *MEIC*, the Court reiterated that the constitutional provisions unambiguously rely on preventative measures to protect Montana's environment and secure those constitutional rights for future generations: "This forward looking and preventative language clearly indicates that Montanans have a right not only to reactive measures after a constitutionally-proscribed environmental harm has occurred, but to *be free of its occurrence in the first place*."⁶⁹ This imposes on the State of Montana the affirmative duty to actively ensure this right.

Second, the Court considered adequate remedies for the issue. The Court found that equitable remedies, unlike money damages or remanding the Final EA, can avert imminent harm. Therefore, the Court reasoned, equitable relief must be an option to fulfill the constitutional directive to provide adequate remedies to prevent environmental degradation.⁷⁰ Absent this remedy, Applicants could proceed to commence mining activity under the challenged permit and potentially cause unconstitutional harm to Montana's environment.

Third, the Court considered MEPA's role in fulfilling the mandate of the constitutional provisions. MTDEQ and Applicants unsuccessfully argued MEPA is unrelated to the legislature's constitutional obligations by citing *Kadillak v. Anaconda Co.*,⁷¹ a case in which the Court held that an EIS was not constitutionally required in all instances, such as here, when the timeframe for the agency to prepare an EIS was prohibitively short.⁷² Here, the Court distinguished *Kadillak* because subsequent amendments to MEPA clearly indicate legislative intent to use MEPA to fulfill the legislature's constitutional mandate.⁷³ Therefore, the Court concluded that MEPA fulfills the constitutional mandate to a clean and healthful environment.⁷⁴ It cited its own precedent in *Northern Plains*, which held, "[o]ne of the ways that the Legislature has implemented Article IX, Section 1 is by enacting MEPA."⁷⁵ The Court reasoned that MEPA must have been influential on the minds of the Constitution's framers in describing the state's role in preventing environmental degradation.⁷⁶

Prior to the 2011 Amendments, MEPA contained anticipatory and preventative mechanisms which enabled fully informed and considered decision-making prior to major actions which "minimiz[e] the risk of irreversible mistakes depriving Montanans of a clean and healthful environment."⁷⁷ Among these mechanisms were important remedies for unconstitutional environmental actions. These mechanisms, the Court held, are an essential element of the legislature's fulfillment of its

69. *Id.* at 304 (emphasis added).

70. *Id.*

71. 602 P.2d 147, 153 (Mont. 1979).

72. *Lucky Minerals*, 477 P.3d at 306; *Kadillak*, 602 P.2d at 153.

73. *Lucky Minerals*, 477 P.3d at 305.

74. *Id.*

75. *Id.*; *N. Plains Res. Council v. Mont. Bd. of Land Comm'rs*, 288 P.3d 169, 173 (Mont. 2012).

76. *Lucky Minerals*, 477 P.3d at 305.

77. *Id.* at 306.

constitutional obligations.⁷⁸ The 2011 Amendments negate MEPA's role in these obligations, particularly in the case at hand, where "the need for fully informed and considered decision-making could hardly be more pressing."⁷⁹ Uninformed decision-making in this case would result in permanently altered landscape and wildlife habitat without a full understanding of the risks jeopardizing Montana's natural environment.⁸⁰ The Court thus concluded that the legislature did not meet its constitutional mandate to provide adequate remedies to prevent environmental harm when it removed the anticipatory and preventative mechanisms from MEPA review.⁸¹

IV. APPLICATION TO OTHER STATUTORY REVIEW PROCESSES

Together, *MEIC* and *Lucky Minerals* suggest that Montana's permitting processes must include anticipatory and preventative mechanisms in their legal frameworks. Three areas of Montana law currently fail to uphold this standard: the exemption of minor subdivisions from environmental review, the diminished environmental review applicable to non-state-sponsored projects, and the statutory requirement for counties to allow sand and gravel mining activities.

A. Subdivision Exemption

Under Montana law, the first minor subdivision from a tract of record is exempt from submitting an environmental assessment in the permitting process.⁸² A first minor subdivision is a subdivision that creates five or fewer lots from a tract of record.⁸³ Without an exemption, subdivision review requires an environmental assessment distinct to the Montana Subdivision and Platting Act. This assessment includes:

- 1) a description of every body or stream of surface water that may be affected by the proposed subdivision, together with available ground water information, and a description of the topography, vegetation, and wildlife use within the area of the proposed subdivision;
- 2) a summary of the probable impacts of the proposed subdivision based on the criteria described in Mont. Code Ann. 76-3-608;
- 3) a community impact report containing a statement of anticipated needs of the proposed subdivision for local services, including education and busing; roads and

78. *Id.*

79. *Id.*

80. *Id.* at 307.

81. *Id.* at 308.

82. MONT. CODE ANN. § 76-3-609(2)(d)(i) (2019).

83. MONT. CODE ANN. § 76-3-103.

maintenance; water, sewage, and solid waste facilities; and fire and police protection; and
 4) additional relevant and reasonable information related to the applicable regulatory criteria adopted under Mont. Code Ann. 76-3-501 as may be required by the governing body.⁸⁴

The summary of probable impacts required by this statute must include the impact on agriculture, agricultural water user facilities, local services, the natural environment, wildlife, wildlife habitat, and public health and safety.⁸⁵

This statutory exemption fails to meet the “anticipatory and preventative framework” from *Lucky Minerals* and *MEIC* because the exemption creates a significant loophole in the environmental review process for minor subdivisions. The purpose of subdivision regulation is to protect the health, safety, and welfare of the public. An Environmental Assessment serves that goal by requiring governing bodies to consider a proposed subdivision’s impacts on “agriculture, agricultural water facilities, local services, the natural environment, wildlife and wildlife habitat, and public health and safety.”⁸⁶

In *Aspen Trails Ranch, LLC v. Simmons*⁸⁷, the Court described the significance of environmental review. Although the issue in *Aspen Trails Ranch* turned on the adequacy of an Environmental Assessment for a major subdivision, its lesson is instructive. In that case, a developer filed a subdivision application for a plot adjacent to a creek.⁸⁸ Ultimately, the Court found the applicant's failure to provide sufficient information on groundwater in a subdivision project area fails to adequately protect ground and surface water.⁸⁹ Without knowing groundwater depth, for example, a developer could “conceivably place sewer pipes directly in the groundwater.”⁹⁰ Without information on ground and surface water, together with topography, vegetation and wildlife, a local zoning commission has no means of making an informed decision on a subdivision application, or condition subdivision approval to ensure health, safety, and welfare of the public.

For instance, imagine a scenario where a five-lot subdivision is similarly located near an important water body that serves as a drinking water supply and habitat for a fishery, or is within an important wildlife corridor. Just as in *Aspen Trails*, concerned adjacent landowners have no means of ensuring the zoning commission can adequately address their

84. MONT. CODE ANN. § 76-3-603(a)(i)–(iv).

85. MONT. CODE ANN. § 76-3-608(3)(a).

86. *Aspen Trails Ranch, LLC v. Simmons*, 230 P.3d 808, 820 (Mont. 2010); *Citizens for Responsible Dev. v. Bd. of Cty. Comm’rs*, 208 P.3d 876, 881 (Mont. 2009).

87. *Aspen Trails Ranch, LLC*, 356 Mont. at 59.

88. *Id.*

89. *Id.* at 60.

90. *Id.*

environmental concerns. Poorly placed sewer systems could contaminate their water supply. Leakage could degrade water quality, destroying fish habitat and endangering wildlife.

The constitutional obligations on Montana demand a more thorough review. Cumulative impacts of unregulated subdivision development can result in the very irreversible mistakes the constitutional provisions aim to prevent. If the loophole negates the legislature's ability to uphold its constitutional obligations, it is neither anticipatory nor preventative. Subdivisions effect a community's water, wastewater, storm drainage, and solid waste systems. For example, high-capacity wells withdraw water from nearby waterbodies, decrease groundwater recharge, and contaminate groundwater with sodium, nitrate, and phosphorus.⁹¹ Additionally, unregulated subdivisions detrimentally affect wildlife habitat, habitat connectivity, and migration patterns, as are the many natural resource amenities that add such aesthetic and recreational value to Montana communities. Particularly with the rapid population growth in Montana, subdivision developments are increasing, resulting in greater cumulative effects on communities.

Application of the frameworks provided by *MEIC* and *Lucky Minerals* is prudent for this heavily-used loophole in an area where environmental review is critical to protect the state's resources. To build on these legal frameworks, the Montana legislature should consider an "as applied" option, meaning the body should outline situations in which a developer cannot be exempt from environmental review. For example, subdivisions within certain proximity to navigable waters, important wildlife habitat, or geographically or culturally significant areas should be excluded from the exemption for minor subdivision review based on the potential for significant environmental impacts.

B. Non-State-Sponsored Project Exemption

In 2011, the Montana legislature made additional MEPA modifications that are potentially unconstitutional. Certain provisions of the MEPA review process no longer apply to non-state-sponsored projects after the legislature changed the definition of state sponsored under Mont. Code Ann. § 75-1-220(8)(a)–(b). "State sponsored" means a project directly undertaken or financially supported by a state agency, or a project authorized by a state agency acting in a land management capacity for a lease, easement, or license.⁹² Non-state-sponsored projects include activities conducted by private entities that require agency authorization through permits, leases, licenses, loans, grants, or easements issued, such

91. Scott J. McGrane, *Impacts of urbanisation on hydrological and water quality dynamics, and urban water management: a review*, 60 HYDROLOGICAL SCIENCES JOURNAL 13, 2295, 2301–03 (2016).

92. MONT. CODE ANN. § 75-1-220(8)(a) (2019).

as those issued by the MTDEQ, Fish Wildlife and Parks, Board of Oil and Gas, and Department of Natural Resource Conservation.⁹³

Under these changes, non-state-sponsored projects are exempted from certain aspects of MEPA environmental analysis, including identifying and developing methods and procedures that will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making under Mont. Code Ann. § 75-1-201(b)(ii).⁹⁴ These projects are also carved out of MEPA's mandate of taking an interdisciplinary approach to projects to ensure the "integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making that may have an impact on Montana's human environment."⁹⁵ Additionally, non-state-sponsored projects require a more limited alternatives analysis.⁹⁶ Notably, the analysis cannot include an alternative facility or an alternative project.⁹⁷ As the Court noted in *Lucky Minerals*, while a sponsor may volunteer to implement an alternative, neither the alternatives nor the agency recommendations that follow are binding.⁹⁸

While there is no former or pending litigation on this exemption, it is worth analyzing whether this loophole contains deficiencies similar to those in the invalidated provisions in *Lucky Minerals* or *MEIC*. This change to MEPA occurred in the same 2011 legislative session on the same bill as the amendments at issue in *Lucky Minerals*. It is clear the 2011 bill was designed to limit the scope and efficacy of MEPA where possible. This exemption could prove particularly problematic in meeting the precautionary measures required by *MEIC* and *Lucky Minerals*.

For example, consider a mining proposal like that in *RC Resources*, arising on private lands, which poses a risk of significant environmental impacts such as water quality degradation, deforestation, and soil contamination. Such a proposal will receive a lesser level of environmental review for meeting the definition of a non-state-sponsored project. The review to be undertaken by MTDEQ may not require a robust alternatives analysis that includes alternatives to the proposed project. This could mean that, without ever having considered the impacts on the

93. MONT. CODE ANN. § 75-1-220(8)(b) (when those agencies are not acting in a land-management capacity).

94. A Guide to the Montana Environmental Policy Act, *supra* note 15, at 13.

95. MONT. CODE ANN. § 75-1-201(b)(i)(A) (applying only to state-sponsored projects).

96. An alternatives analysis is a list of proposed alternatives to a project. The proposed alternatives list must be reasonable, achievable, and economically feasible, and it must include a meaningful no-action alternative that analyzes the projected beneficial and adverse environmental, social, and economic impacts of the project's noncompletion. *See* MONT. CODE ANN. § 75-1-201(1)(b)(iv)(C)(I)–(III).

97. A Guide to the Montana Environmental Policy Act, *supra* note 15, at 13.

98. MONT. CODE ANN. § 75-1-201(b)(v).

environment, MTDEQ could approve a site without requiring the applicants to consider a less harmful location or an alternative method of water use. Compare this to a project on state-managed lands, where the state is likely to consider and adopt alternatives in the interest of fulfilling its constitutional duty.

The Montana Constitution applies equally to state and private parties and does not draw a distinction based on the category of actor or location of the activity. This diminished level of review for non-state-sponsored projects fails to meet the “anticipatory and preventative framework” of *Lucky Minerals* and *MEIC* by building in an arbitrary distinction between state-sponsored and non-state-sponsored. A major action with a significant effect on the environment should trigger complete environmental review. Changing the alternatives analysis limits the efficacy of a thorough review by failing to include measures that could limit or prevent a project's impact.

C. Sand and Gravel Mining

Mont. Code Ann. § 76-2-209 requires counties to allow mining activities in their jurisdictions.⁹⁹ Certain enumerated mining activities (i.e., sand and gravel mining, concrete mixing, and asphalt batching) may be “reasonably conditioned” but cannot be outright prohibited unless they are proposed in a residential zone.¹⁰⁰ The statute is silent concerning whether counties can condition other unenumerated forms of mining such as those occurring in *Lucky Minerals* or *RC Resources*. In *Merlin Meyers Revocable Trust v. Yellowstone County*¹⁰¹, the county denied a permit to mine gravel near an elementary school, despite the mandate of Mont. Code Ann. § 76-2-209.¹⁰² There, a landowner adjacent to a school applied for a gravel mining permit on land zoned for agricultural use.¹⁰³ County commissioners cited a violation of the constitutional rights of the students at the school, who were entitled to a clean, healthful, and safe environment.¹⁰⁴ The Court held that the gravel pit was permitted under the plain language of the statute.¹⁰⁵ The Court ultimately did not rule on the constitutionality of the statute because the county failed to raise the issue in its pleadings below and the Court does not “rule on the constitutionality of a legislative act if [the Court] is able to decide the case without

99. MONT. CODE ANN. § 76-2-209 (2019) (allowing counties to condition “an operation that mines sand and gravel or an operation that mixes concrete or batches asphalt” and even prohibit such operations in areas zoned residential).

100. *Id.*

101. *Merlin Meyers Revocable Tr. v. Yellowstone Cty.*, 53 P.3d 1268 (Mont. 2002).

102. *Id.*

103. *Id.* at 1269–70.

104. *Id.*

105. *Id.* at 1271–72.

reaching constitutional considerations."¹⁰⁶ However, in dissent, Justice Nelson said the case could have potentially violated the Constitutional provisions had the issue been properly raised in District Court.

This sand and gravel mining statute enables scenarios that could impact a local government's ability to prevent environmental harm and protect its people. Even with restrictive protective conditions in place, there are similar situations such as proximity to homes and schools where there should not be any such uses and a prohibition is more appropriate.

V. CONCLUSION

Together, *MEIC* and *Lucky Minerals* provide a legal framework for building in anticipatory and preventative mechanisms in Montana's environmental permitting process. The Montana legislature has a constitutional obligation to ensure Montanans have access to clean air and clean water. Environmental review loopholes or diminished levels of review, whether in MEPA or other areas of Montana law, should be analyzed and revised under the standard these cases provide to ensure appropriate measures are taken before environmental harm can occur. These cases provide the teeth for future litigation on potentially unconstitutional statutory loopholes if the statutes are not legislatively revised.

106. *Id.* at 1272.