

The template on the following page is intended to facilitate integration of the work products from three subtask groups. All recommendations should be documented using a standard template. As you respond to the directions below, please include sufficient detail to reflect your group's specific knowledge and experience, as well as any public comment received. This will help differentiate your recommendations from those in the other subtask groups.

Following the identification of challenges and potential solutions, your recommendation(s) should:

- Identify the **challenges(s)** addressed and any **current barriers** to addressing them;
- Include a brief **rationale** describing how the recommendation would address the challenge(s) and/or barriers and why the group selected the recommendation;
- Describe the **key strategies** and next steps to move the recommendation forward, including any expertise, coordination, resources, or training that may be necessary; and
- Identify the potential **challenges and outcomes** that may result from implementation.

Please prioritize your work and limit your final recommendations to no more than five (5) per subtask group. These should be the top items the group wants to see move forward and should be the focus of your final discussions as a group. We recognize that your conversations may result in more challenges and potential solutions than can be captured in just five recommendations or analyzed in the limited time we have together. The final report will include an appendix to capture additional challenges and solutions and ensure all ideas are acknowledged and documented for potential future work.

Templates should be returned to DEQ staff contacts **by 5pm on May 17, 2024**. This will allow time for us to compile a draft report for discussion at the work group meeting on **May 29, 2024**.

Subtask Group Recommendation Template

Gordon Criswell

for the Final Report
May 2024

Subtask Group: Climate Analysis

Initial Challenge Identified:

Climate analysis in the MEPA process has been prohibited by state statute since 2011. As a result of recent court decisions that struck down the statutory prohibition, DEQ will be conducting a 'hard look' at climate change in the short term as the Montana Supreme Court reviews the lower court decisions. DEQ and other state agencies need to develop a short-term framework for climate analysis in the MEPA process for public input.

Barrier(s):

Analysis across other government entities has varying levels of what triggers a "hard look" at climate impacts; analysis across other government entities has different depths of analysis (scoping) once an analysis is triggered; analysis across other government entities use different models of analysis.

Recommendation:

MDEQ develop a draft interim study that describes the steps to be taken to conduct a climate analysis under MEPA, to be sent to EQC for review and to Legislators for rulemaking. The process shall also identify guidelines MDEQ will use to establish threshold levels under which a climate analysis needs to be conducted. When climate analysis is needed, it should include Scope 1 or Direct emissions. If the process includes a social cost of GHG analysis, MDEQ should clearly explain the assumptions used and consider a range of cost analysis assumptions to provide sideboards of potential climate analysis costs. For example - geographic scope should identify State and National impacts; and a range of discount factors (i.e., 2% and 7%) could be considered.

Rationale:

Scope 1 (Direct) emissions calculations are straightforward and good guidance exists describing how this should be done. Scope 2 & 3 (Indirect) emissions calculations are difficult to quantify and likely result in double counting of emissions. The MEPA process is intended to evaluate and identify impacts to Montana, so geographic scope should include a State analysis. A National analysis could also be conducted considering the nature of climate impacts.

Key Strategies:

The short-term strategy is for MDEQ to develop a draft climate analysis process that clearly describes the steps to be taken to conduct a climate analysis under MEPA. This draft process should be sent to EQC for review and to Legislators for rulemaking. The overall review/rulemaking process should provide for public review and comment. The long-term strategy would be for MDEQ to monitor developments in the climate analysis arena and incorporate as appropriate for MEPA.

Possible Challenges and Outcomes:

A single Climate Analysis process is not widely agreed upon and while the CEQ NEPA Interim Guidance provides a process, there have been many comments challenging the process, the assumptions used, and the inherent uncertainties in the process. This current situation provides for opportunities to challenge the process, which could likely result in legal action.

Proposed Recommendation on Climate Analysis

Initial Challenge Identified: Climate analysis in the MEPA process has been prohibited by state statute since 2011. If the Montana Supreme Court upholds climate analysis requirements in the MEPA process ahead of the 2025 session, state agencies do not yet have clear direction and funding from the Montana Legislature to adequately consider climate impacts. The lack of statutory guidance creates an unpredictable regulatory environment for Montana businesses.

Barriers: Court decisions regarding climate analysis are not final and do not provide a clear roadmap for addressing climate impacts in the MEPA process; the Legislature has not provided statutory direction to DEQ on climate impacts in the MEPA process and will not meet and be able to pass legislation for roughly 8-10 months; the Legislature has not provided funding and FTE to DEQ to analyze climate impacts in the MEPA process and will not be able to do so for 8-10 months.

Draft Recommendation: DEQ should draft an interim study bill that would task the Environmental Quality Council to look at different climate analysis model, economic impacts, and a predictable Montana statutory framework that can be compatible with any direction given by the Montana Supreme Court.

Rationale: Montana is the first state in the country where a court has ordered climate analysis rather than the mandate coming from the legislative or executive branch. In the event climate analysis is a requirement following a final disposition in the *Held* case, the Montana Supreme Court is unlikely to spell out what that climate analysis must look like within the context of MEPA. An interim study will allow the policy-making branch – the Montana Legislature – to weigh the pro/cons, costs/benefits of certain processes, balance constitutional rights, provide funding and FTE as needed, and generally put this on a path of predictability for Montana businesses and permittees. While the Legislature will undoubtedly contemplate other MEPA legislation in 2025, this interim study can encourage legislators from both sides of the aisle to have an open mind and thoughtfully weigh the pros and cons to certain approaches on climate analysis.

Key Strategies: The DEQ director and staff would develop language for the EQC interim study that defines the scope of council's work, including studying *de minimus* limits, scoping of climate analysis, and mitigating economic or permitting impacts in selection of a climate analysis framework. The DEQ should solicit input from MEPA workgroup members and the public on deliverables for the study.

Possible Challenges and Outcomes: DEQ would still need to adopt short term policies around climate analysis until such point that *Held* is upheld, reversed, or some other disposition. There are strong feelings in the legislative branch on climate analysis, and a study bill may be difficult to pass if people are too anxious to get everything they want without a thorough look. A broad coalition of stakeholders would need to support such an interim study. The hope would be a balanced approach to climate analysis in the MEPA process that would be predictable, non-substantive, and compatible with Montana's constitution.

Subtask Group Recommendation Template

for the Final Report

May 2024

Recommendations of MEIC / Derf Johnson

Subtask Group: Climate Analysis – Derf Johnson

Initial Challenge Identified:

The Montana Department of Environmental Quality (DEQ) is constitutionally obligated to consider and address the impacts to the climate in its decision-making and as part of its analyses under the Montana Environmental Policy Act (MEPA). Specifically, “the right to a clean and healthful environment[.]” Mont. Const. Art. II, § 3. To guarantee this right, the Constitution directs that “[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations” and further requires Montana’s Legislature to “provide adequate remedies for the protection of the environmental life support system from degradation” and “to prevent unreasonable depletion and degradation of natural resources.” Id. Art. IX, § 1(1), (3).

Barrier(s):

Establishing a “threshold” for minor vs. major (EA vs. EIS) climate analysis

The differentiation between small scale projects with a smaller quantity of emissions versus large-scale projects that involve the permitting and extraction of fossil fuels for combustion. Because of different emissions levels, these projects should likely require different levels of analysis to better allocate agency resources and ensure that projects with major impacts are fully and completely evaluated. While the agency initially may consider something minor, the public may provide information that shows that it could have a major impact and require a more detailed review.

Characterizing the Emissions from Agency Actions

Simply listing the emissions from a project does not satisfy the requirements under MEPA to take a “hard look” and to fully evaluate a projects impact. DEQ must characterize the emissions from projects and place it in the context of other projects as well as emissions goals or other parameters.

Scoping & Tiering

No one project considered under MEPA has the same set of considerations when considering its impacts to our climate. As an example, the permitting of a gravel pit will primarily have on-site emissions, while a coal mine or oil well will have on site emissions as well as emissions when the final product is combusted (which often dwarf the on-site emissions).

Substantive Considerations of Climate in a MEPA Analysis

Political considerations and a complicated statutory scheme present potential barriers to DEQ’s constitutional obligation to prevent the avoidable impacts of climate change. These complexities do not negate state agencies’ constitutional obligation.

Recommendation:

There are several recommendations that DEQ could adopt to successfully implement a climate analysis and climate pollution mitigation strategy.

- *Threshold – Based upon the complexity of different projects that require a MEPA analysis, as well as agency resources, the “threshold” in which MEPA requires a detailed climate analysis should be left*

as a qualified discretionary decision on the part of DEQ. The Agency must consider certain factors when exercising its discretion (e.g. level of emissions, emissions of connected actions, emissions of similar emission sources, life-cycle emissions, CO₂e of emissions, increasing severity of climate change over time). Agency discretion is already imbedded within MEPA and administrative law and would not require any specific rulemaking or legislative changes. In addition, this would reflect the federal guidance on Social Cost of Carbon and the “Rule of Reason” in agency decision-making. Some projects that have low CO₂e emissions may be eligible for tiering to a more comprehensive programmatic EIS that is periodically updated to address new information that has been collected over time.

- *Analysis Tools to Characterize Pollution – The Social Cost of Carbon (SCC) is the most used, readily available, and scientifically supported tool to characterize and describe pollution from projects and should be utilized by DEQ in its MEPA processes. It is used by numerous federal agencies, several states, and has a robust and growing amount of case law on its efficacy and sideboards. However, SCC has its limitations in terms of its assumptions. Notably, it doesn’t consider certain impacts that will occur in Montana from a warming climate, such as increased wildfire risk and in-migration. These impacts should also be recognized and considered in MEPA analyses.*
- *Scoping / Tiering - DEQ must take into consideration the full life cycle of emissions from an agency action, including emissions from fossil fuel projects with products that are burned, such as coal, oil and gas. Making the determination about when to conduct a detailed analysis of the life cycle of emissions should be a qualified discretionary decision on the part of the agency, subject to constitutional requirements to fully evaluate impacts (anticipatory and preventative) and MEPA requirements to conduct a “hard look.”*
- *Substantive Decision-making on MEPA Concerning Climate – Because DEQ has a constitutional obligation to prevent climate impacts through its actions, it must look to its statutory authority to consider implementation of mitigation or prevention measures. Notably, DEQ has broad statutory authority to address polluting activities, including under the Clean Air Act, MFSA, Clean Water Act, MSUMRA, etc. Notably, the legislature has designated these as an essential component of meetings DEQ’s obligations under the constitution.*

Rationale:

In order to comply with constitutional requirements, DEQ must have a robust climate analysis for projects that implicate impacts on our climate. Such an analysis would fully consider the range of impacts, adequately characterize them, and mitigate or eliminate them.

Key Strategies:

At this time, DEQ has the statutory authority to fully evaluate the impacts of, and mitigate for, climate change in its MEPA analyses, and should do so immediately. However, in assuring that the process is comprehensive, and that the public fully understands the process, DEQ should consider a rulemaking process that would concretely lay out the steps in which DEQ would consider climate as part of an EIS.

Possible Challenges and Outcomes:

<Briefly describe any identified obstacles to implementing the recommendation, including explanation of any dissenting viewpoints.>

**Subtask Group Recommendation Template
for the Final Report
May 2024**

Subtask Group: Climate Analysis – Draft by Dan Spencer, 4.17.24

Initial Challenge Identified:

Climate analysis in the MEPA process has been prohibited by state statute since 2011. Under the 2023 *Held vs. State of Montana* decision, the courts have ruled that the Montana Department of Environmental Quality (DEQ) is constitutionally obligated to consider and address the impacts to the climate in its decision-making and as part of its analyses under the Montana Environmental Policy Act (MEPA). Specifically, “the right to a clean and healthful environment[.]” Mont. Const. Art. II, § 3. To guarantee this right, the Constitution directs that “[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations” and further requires Montana’s Legislature to “provide adequate remedies for the protection of the environmental life support system from degradation” and “to prevent unreasonable depletion and degradation of natural resources.” Id. Art. IX, § 1(1), (3). While the Montana Supreme Court reviews the lower court decisions, DEQ and other state agencies will need to develop a short-term framework for climate analysis in the MEPA process for public input.

Barrier(s):

1. Indeterminate Threshold Levels for Climate Analysis
2. Unclear Guidance for Levels of Scoping
3. Lack of Consensus on Analysis Models to be used
4. MDEQ must act before the MT Supreme Court completes its review of *Held vs. State of Montana* and before the 2025 Legislature convenes to give policy direction.

Recommendation: In the interim period before the Supreme Court completes its review and the next Legislature can provide direct policy statutes, the MDEQ should follow in broad outline the guidance currently proposed by the Council on Environmental Council’s “National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change,”¹ adapting the guidance as necessary to fit the Montana statutory context.

This guidance is intended to assist the MDEQ in disclosing and considering the effects of GHG emissions and climate change. This guidance does not establish any particular quantity of GHG emissions as “significantly” affecting the quality of the human environment. However, quantifying a proposed action’s reasonably foreseeable GHG emissions whenever possible, and placing those emissions in appropriate context are important components of analyzing a proposed action’s reasonably foreseeable climate change effects.

For comprehensive climate analysis, the MDEQ should take the following steps when analyzing a proposed action’s climate change effects under MEPA:

- (1) Quantify the reasonably foreseeable GHG emissions (where possible, including direct and indirect emissions) of a proposed action, the no action alternative, and any reasonable alternatives.
- (2) Disclose and provide context for the GHG emissions and climate impacts associated with a proposed action and alternatives, including by, as relevant, monetizing climate damages using estimates of the social costs of Greenhouse Gas Emissions (SC-GHG), placing emissions in the context of relevant climate action goals and

commitments, and providing common equivalents. MDEQ should explain clearly the assumptions and ranges of uncertainty reflected in any models employed for calculating the SC-GHG, and reasons for adopting the model.

(3) Analyze reasonable alternatives, including those that would reduce GHG emissions relative to baseline conditions, and identify available mitigation measures to avoid, minimize, or compensate for climate effects.

Rationale:

MEPA is modeled after NEPA, and federal and state agencies often work together on environmental impact analyses where there are joint federal and state interests. The federal Interagency Working Group (IWG) has worked since 2009 “to develop a range of Social Cost of Carbon (SCC) values using a defensible set of input assumptions that are grounded in the existing literature.”² The 2023 CEQ’s National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change³ brings together fifteen years of scientific expertise and research leading to the development of increasingly more precise climate modeling and SCC calculation to provide guidance for federal agencies with similar missions to MDEQ, and is the most widely adopted set of guidelines and models for calculating GHG emissions and their social and environmental cost. Rather than trying to reinvent the wheel during this interim period, MDEQ should adopt these guidelines and adapt them to the Montana context, using its expertise and “rule of reason” for guidance.

Key Strategies:

The short-term (interim) strategy is for MDEQ to develop and implement a draft climate analysis process that clearly describes the steps to be taken to conduct a climate analysis under MEPA. While being implemented immediately within MDEQ’s rulemaking authority to comply with court orders, ultimately this draft process should be reviewed by EQC and the Legislature. The overall review/rulemaking process should provide for public review and comment. The long-term strategy would be for MDEQ to monitor developments in the climate analysis arena and incorporate as appropriate for MEPA, reflecting both court mandates and legislative policy statutes.

Possible Challenges and Outcomes:

While the CEQ NEPA Interim Guidance provides the most thoroughly researched and widely accepted process for climate analysis, critics express concerns about the assumptions used in modeling and the uncertainties inherent in any climate analysis and modeling. Disagreements with models and analyses employed by MDEQ in response to court mandates, as well as permitting decisions that employ those analyses, could result in legal actions.

¹ <https://www.federalregister.gov/documents/2023/01/09/2023-00158/national-environmental-policy-act-guidance-on-consideration-of-greenhouse-gas-emissions-and-climate>

² Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866; https://www.epa.gov/sites/default/files/2016-12/documents/scc_tsd_2010.pdf

³ <https://www.federalregister.gov/documents/2023/01/09/2023-00158/national-environmental-policy-act-guidance-on-consideration-of-greenhouse-gas-emissions-and-climate>