Subtask Group Recommendation Template

for the Final Report

May 13, 2024

Subtask Group: Process and Applicability

Initial Challenge Identified:

There are inconsistencies between Montana Environmental Policy Act (MEPA) timelines and individual permitting timelines.

Instances occur where the differing timelines create challenges in implementing both statutorily required permitting requirements and the procedural aspects of MEPA. Throughout statute there are also inconsistencies in the terms: complete application, determination of acceptability, and receipt of application, which serve as triggers for timelines. The variations in terminology can add to misunderstandings about timelines for development of environmental reviews as well as public participation.

75-1-208, MCA. Environmental review procedure.

(4) (a) Subject to the requirements of subsection (5), to ensure a timely completion of the environmental review process, an agency is subject to the time limits listed in this subsection (4) unless other time limits are provided by law. All time limits are measured from the date the agency receives a complete application. An agency has:

(i) 60 days to complete a public scoping process, if any;

(ii) 90 days to complete an environmental review unless a detailed statement pursuant to 75-1-201(1)(b)(iv) or 75-1-205(4) is required; and

(iii) 180 days to complete a detailed statement pursuant to 75-1-201(1)(b)(iv).

(b) The period of time between the request for a review by a board and the completion of a review by a board under 75-1-201(9) or subsection (10) of this section may not be included for the purposes of determining compliance with the time limits established for conducting an environmental review under this subsection or the time limits established for permitting in 75-2-211, 75-2-218, 75-20-216, 75-20-231, 76-4-114, 82-4-122, 82-4-231, 82-4-337, and 82-4-432.

(5) An agency may extend the time limits in subsection (4) by notifying the project sponsor in writing that an extension is necessary and stating the basis for the extension. The agency may extend the time limit one time, and the extension may not exceed 50% of the original time period as listed in subsection (4). After one extension, the agency may not extend the time limit unless the agency and the project sponsor mutually agree to the extension.

(6) If the project sponsor disagrees with the need for the extension, the project sponsor may request that the appropriate board, if any, conduct a review of the agency's decision to extend the time period. The appropriate board may, at its discretion, submit an advisory recommendation to the agency regarding the issue.

Barrier(s):

Most timelines established in statute and rule for permitting actions are unique and were established after careful contemplation and input from stakeholders. MEPA also is not the controlling statute for timelines. The work group identified 13 permitting actions within the DEQ that were shorter than the MEPA timelines in 75-1-208, MCA. An additional five permitting actions did not include deadlines and are administered using MEPA timelines.

The level of environmental review required also is a critical component when evaluating proper deadlines. MEPA specifies three different levels of environmental review, based on the significance of the potential impacts. The levels are categorical exclusion, environmental assessment (EA), and environmental impact

statement (EIS). Within those levels, the MEPA Model Rules also provide for additional types of review – including programmatic reviews and supplemental reviews.

DEQ has the option of defining, through either rulemaking or a programmatic environmental review, the types of actions that seldom, if ever, cause significant impacts. If DEQ is contemplating a series of agency-initiated actions, programs, or policies that in part or in total may significantly impact the human environment, the agency often prepares a programmatic review that discusses the impacts of the series of actions. Examples include:

- Underground Storage Tanks – for existing tanks repairs/modifications and closures
- Abandoned Mine Land projects
- Solid Waste Program for recycling and composting facilities
- MPDES General Permit for Storm Water Discharges Associated with Municipal Separate Storm Sewer Systems (MS4)

While opportunities to pursue programmatic reviews provide an opportunity to better sync up permitting and MEPA timelines, development of programmatic reviews is driven by DEQ staff and time. There are limited resources to dedicate to these efforts, while there are likely permitting actions that likely are better suited to a programmatic EA, rather than a full EA process.

It will take time and resources to not only identify permitting areas where defensible MEPA documents can be completed through a programmatic EA but also to develop those programmatic resources.

Recommendation:

Legislation should be brought forward in 2025 to provide one time only funds to hire a contractor to develop programmatic EA's for:

- All asbestos permits;
- High and dry open cut permits;
- Hard rock exploration, under some circumstances; and
- Motor vehicle wrecking facilities.

The legislation should prioritize development of the new programmatic EA's and require that all programmatic EA's be reevaluated every five (5) years from the date of adoption and provide an initial schedule to allow for a rolling timeline so reevaluation is staggered.

Rationale:

The disparity of timelines between permitting statutes and MEPA creates confusion and unnecessary challenges to the implementation of a defensible MEPA analysis. Providing a Programmatic EA for permitted activities that are consistent regardless of the applicant is a reasonable approach to providing clear direction and expectations for permit applicants, the public, and the DEQ.

Key Strategies:

It will be critical to articulate the process and public engagement that DEQ will employ to draft programmatic EAs. Information noting that programmatic EAs can be supplemented in the future,

particularly for site specific needs, is also imperative. DEQ will also need to be clear in articulating triggers for amendments, for example, in the hard rock program, that would be excluded from a Programmatic EA.

Possible Challenges:

There may be disagreement on the appropriateness of programmatic EA and selection of appropriate permitting actions, as outlined above. The work group was thoughtful in its approach and permit selection. Permits that had timelines and logically could be adequately addressed through programmatic review were selected. There also will be limitations on DEQ staffs' capacity to assist a contractor in developing programmatic EAs absent funding to hire a contractor. It is also possible that there could be future litigation regarding the appropriateness and/or content of programmatic EA.

Possible Outcomes:

This recommendation will result in a more efficient permitting experience for applicants, the public, and DEQ. The proposal also provides for a more consistent application across all programmatic EA's. With programmatic EAs in place there is also a more realistic expectation of the permitting process across all stakeholders.

#END#

Subtask Group Recommendation Template

for the Final Report

May 13, 2024

Subtask Group: Process and Applicability

Initial Challenge Identified: Lack of understanding of, or agreement upon the core intent of MEPA

The Process and Applicability Subtask Group believes it is important that the Legislature confirm the importance of MEPA as a valuable tool in providing good information to the public, decision-makers and lawmakers as each strives to uphold their Constitutional obligation to "maintain and improve a clean and healthful environment in Montana." As much as MEPA is a tool to provide information, it is also important that the Legislature clarify that the statute was never intended to be used to force particular outcomes or decisions, or to be leveraged as a weapon against development or impacts of any sort or measure.

The question of whether MEPA is procedural or substantive is one of ongoing and seemingly nuanced debate. This Subtask Group finds that MEPA, by its own proclamation, is a procedural statute intended to foster more informed decision-making on state actions involving potentially significant environmental impacts. It is important to understand that "state action" in this context refers to the issuance of a permit or approval stemming from a separate, substantive statute granting an agency specific regulatory authority. Some public perceptions and even recent District Court decisions indicate confusion between the procedural nature of MEPA and the substantive nature of regulatory statutes such as the Clean Air Act, the Clean Water Act, the Metal Mine Reclamation Act and many others. That confusion, and possibly the perception by some that the legislature has failed to provide adequate protection of the state's critical resources, has prompted attempts to establish substantive regulatory authority under MEPA.

However frustrated some jurists and members of the public may be, the Montana Constitution clearly assigns the Legislature with the responsibility to administer and enforce a system of laws to protect the environment against unreasonable degradation. Article IX, Section 1 of the Constitution states:

> (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 natural resources. *(emphasis added)*

Nowhere in the Constitution did the people of Montana give the courts the authority to regulate the condition of the environment. This duty resides exclusively with the Legislature which has enacted over a dozen substantive statutes intended to provide constitutional protections of the environment. The Legislature is clear in their purpose and intent with each of these individual environmental protection statutes, and the explicit language in those statutes ties directly back to the authority and responsibility outlined in the Constitution. These statutes provide for the establishment of specific standards and enforcement authority, and to provide "adequate remedies" for the protection of the environment and prevention of unreasonable depletion and degradation of the subject resource.

MEPA, neither in its original construction nor through amendment was ever intended to provide the substantive protections guaranteed in the Constitution; but rather to provide a transparent public process in which to analyze and disclose potential threats to the human environment.

Barrier(s):

Barriers to arriving at a consensus on the core intent of MEPA can largely be found in the litigation history surrounding MEPA, and recent District Court decisions that tip the public's understanding of MEPA in a new direction. The five barriers described below explore conflicts between legislative intent and various judicial interpretations of MEPA, and the extent to which MEPA is intended to provide a balanced and/or comprehensive review of state actions.

(1) Montana Courts have been nuanced in their interpretation of MEPA as a procedural statute:

A clear reading of the statutes themselves provides a distinction between the substantive environmental protection laws and the comprehensive review process outlined in MEPA. In *Kadillak v Anaconda Company (1979)*, the Supreme Court determined that MEPA was not intended to implement the Constitutional guarantees of "clean and healthful" because MEPA's adoption occurred prior to the adoption of the new Constitution. The Court found that, "if the Legislature had intended to give an EIS constitutional status they could have done so after 1972. It is not the function of this Court to insert into a statute "what has been omitted." *Security Bank v. Connors (1976)*. The ordinary rules of statutory construction apply."

In *Park Cnty. Envtl. Council v. Mont. Dep't of Envtl. Quality (2020)*, the Supreme Court reiterated that "The Court's focus is on the administrative decision-making *process* rather than the decision itself." *(emphasis added);* and "We agree that MEPA's role in fulfilling the Legislature's constitutional mandate is essentially *procedural*." *(emphasis added).* The Court continued to state that:

> 'Procedural,' of course does not mean "unimportant." The Montana Constitution guarantees that certain environmental harms shall be prevented, and prevention depends on forethought. MEPA's procedural mechanisms help bring the Montana Constitution's lofty goals into reality by enabling fully informed and considered decision making, thereby minimizing the risk of irreversible mistakes depriving Montanans of a clean and healthful environment.

While the Supreme Court continuously affirms that MEPA is procedural, recent District Court opinions drift into territory that sets up MEPA as a backstop to what they may view as a failure of the Legislature to provide adequate provision for the Constitutional guarantees of a "clean and healthful" environment. These District Court decisions have relied largely on *Park County,* wherein the Supreme Court referenced *Kadillak* but found that "Subsequent MEPA amendments made clear that the Legislature has shaped MEPA as a vehicle for pursuing its constitutional mandate."

In *Held v. Montana (2023)*, the District Court found that:

> [DEQ] can alleviate the harmful environmental effects of Montana's fossil fuel activities through the lawful exercise of their authority if they are allowed to consider GHG emissions and climate change during MEPA review, which would provide the clear information needed to conform their decision-making to the best science and their constitutional duties and constraints, and give them the necessary information to deny permits for fossil fuel activities when inconsistent with protecting Plaintiff's constitutional rights.

The District Court asserts that MEPA empowers DEQ with specific regulatory authority when it states that "through the lawful exercise of their authority . . . during MEPA" the Department could gather information to deny permits. This would be true if the Court meant that MEPA analysis disclosed a violation of a substantive statutory regulation or agency rule. Both of those violations would likely warrant denial of the subject permit. If the Court meant that MEPA alone could be used to deny a permit, the Court would be treading into policy-making rather than interpretation of existing law. Stretching MEPA to deny permits in this manner ignores the fact that air quality issues are regulated by the Montana Clean Air Act – not MEPA, and the Legislature has not yet developed the policy to outline analytical methods or scientifically-based thresholds over which greenhouse gas emissions would constitute a violation of the Constitutional "clean and healthful" provision.

Both the "vehicle" language in *Park County* and the District Court's assertion of regulatory authority in *Held* mark a shift in interpretation of MEPA as a substantive statute with the ability to provide remedies including the denial of permits – in clear contradiction to the letter of the law.

(2) The Courts view amendments to MEPA as a legislative change in purpose:

Amendments by the Legislature in 2003 may have in fact given rise to clouded interpretations of MEPA's intent. Mirroring language in the substantive environmental protection statutes, the amendments in HB 437 contained the reference to constitutional obligations as seen in the first amended clause below. The reference to Article IX of the Constitution may have opened the door for litigants and the courts to suggest that the Legislature intended MEPA to serve in a similar fashion as the substantive environmental permitting statutes as they all contain the same language. Viewed in isolation, that could be an easy argument to make. The amendments in HB 437, however, continued on in the second clause to explicitly state that MEPA was procedural, and the amendments omitted language with regard to remedies as found in the substantive environmental statutes. The text of the final, amended bill read as follows:

> "**75-1-102. ~~Purpose Findings~~ INTENT -- purpose**. (1) The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Montana Environmental Policy Act. ~~The legislature finds that compliance with the requirements of parts 1 through 3 of this chapter and the rules adopted to implement parts 1 through 3 of this chapter constitutes compliance with the constitution. IT~~THE MONTANA ENVIRONMENTAL POLICY ACT IS PROCEDURAL, AND IT IS THE LEGISLATURE'S INTENT THAT THE REQUIREMENTS OF PARTS 1 THROUGH 3 OF THIS CHAPTER PROVIDE FOR THE ADEQUATE ~~REMEDIES FOR THE PROTECTION OF THE ENVIRONMENTAL LIFE SUPPORT SYSTEM FROM DEGRADATION AND PROVIDE ADEQUATE REMEDIES TO PREVENT UNREASONABLE DEPLETION AND DEGRADATION OF NATURAL RESOURCES~~ REVIEW OF STATE ACTIONS IN ORDER TO ENSURE THAT ENVIRONMENTAL ATTRIBUTES ARE FULLY CONSIDERED.

The language in §102 was added after considerable debate and amendment during the Legislative process. HB 437 also amended §103 as follows:

> (3) The legislature recognizes that each person is entitled to a healthful environment, that each person is entitled to use and enjoy that person's private property free of undue government regulation, that each person has the right to pursue life's basic necessities, and that each person has a responsibility to contribute to the preservation and enhancement of the environment. The implementation of these rights requires the balancing of the competing interests associated with the rights, BY THE LEGISLATURE ~~AND THE COURTS~~, in order to protect the public health, safety, and welfare."

Collectively, the Legislature could not have been more clear in spelling out the *procedural* nature of MEPA in these amendments, and that the intent is to "consider" impacts before decisions are made.

In its original and amended form, there is no reference to environmental standards, enforcement authority or an intent to provide remedies under MEPA, and §§ 102(3)(b) and 102(4) articulate that MEPA does not confer any additional regulatory authority beyond that already afforded under substantive regulatory statutes. Those subsections state:

> Except to the extent that an applicant agrees to the incorporation of measures in a permit pursuant to 75-1-201(4)(b), it is not the purpose of parts 1 through 3 of this chapter to provide for regulatory authority, beyond authority explicitly provided for in existing statute, to a state agency.

and

> The agency may not withhold, deny, or impose conditions on any permit or other authority to act based on parts 1 through 3 of this chapter. (b) Nothing in this subsection (4) prevents a project sponsor and an agency from mutually developing measures that may, at the request of a project sponsor, be incorporated into a permit or other authority to act. (c) Parts 1 through 3 of this chapter do not confer authority to an agency that is a project sponsor to modify a proposed project or action.

Despite the plain statutory language and legislative history, the Court in *Park County* inexplicably describes the Legislative intent of MEPA to serve as a "vehicle for pursuing its constitutional mandate" and further stated that "the Legislature cannot fulfill its constitutional obligation to prevent proscribed environmental harms without some legal framework in place that mirrors the uniquely "anticipatory and preventative" mechanisms found in the original MEPA." The Court makes this statement in ignorance of the fact that the Legislature has enacted "a comprehensive set of laws" to accomplish the goals of the Constitution, and HB 437 cited 18 separate statutes enacted to do so – including MEPA. As one among the many cited, the Legislature in no way provided any indication that MEPA was intended to be a final stopgap, or to serve as a regulatory umbrella above and beyond the other listed statutes. The statutory language is clear that MEPA has no independent regulatory authority and the Courts have no basis to manipulate the law to serve in a manner that was not intended.

(3) Some fear that clarification of the procedural nature of MEPA will render the statute a meaningless paper exercise:

In its decision in *Park County*, the Court found that:

> Without a mechanism to prevent a project from going forward until a MEPA violation has been addressed, MEPA's role in meeting the State's "anticipatory and preventative" constitutional obligations is negated. Whatever interest might be served by a statute that instructs an agency to forecast and consider the environmental implications of a project that is already underway – perhaps analogous to a mandatory aircraft inspection after takeoff – the constitutional obligation to prevent certain environmental harms from arising is certainly not one of them.

In its argument and analogy, the Court relied on concerns expressed at the 1972 Constitutional Convention that "a remedy implemented only after a violation is a hollow vindication of constitutional rights if a potentially irreversible harm has already occurred." This may have been a valid concern in 1972, but maintaining this logic today ignores the myriad of substantive environmental regulations now in place that provide the very "anticipatory and preventative" measures contemplated during the Convention. That regulatory structure exists outside of and wholly apart from MEPA, and with or without MEPA analysis, individual permits cannot be issued when a violation of the underlying statutory standard is forecast to occur.

Proper clarification of MEPA's procedural nature could elevate the importance of taking a "hard look" and highlight MEPA's reflective appraisal of our substantive statutes for use by the Legislature. As outlined in §102(3)(a), "The purpose of requiring an [EA or EIS] . . . 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." *(emphasis added)* This clearly distinguishes MEPA as an important information-gathering exercise to ensure that lawmakers are fully aware of the effectiveness of existing regulations, and to share that information with the public. It also points to the substantive regulatory statutes that were specifically enacted to provide scientific review and analysis of impacts relative to adopted standards prior to issuing permits and approvals. The plain language of the statute in no way suggests that findings under MEPA would rise to a level of creating new or separate standards from those established by the Legislature through regulatory statutes.

As further stated in the Legislature's "*A Guide to the Montana Environmental Policy Act*":

> MEPA is not an act that controls or sets regulations for any specific land or resource use. It is not a preservation, wilderness, or antidevelopment act. It is not a device for preventing industrial or agricultural development. If implemented correctly and efficiently, MEPA should encourage and foster economic development that is environmentally and socially sound. By taking the time to identify the environmental impacts of a state decision before the decision is made and including the public in the process, MEPA is intended to foster better decision making for people and the environment.

MEPA is not a mere paper exercise, but rather a valuable tool intended to afford decision makers with the time to make fully informed decisions, and to allow the public the opportunity to participate in and better understand the rationale behind those state permitting decisions.

(4) Some fear that lack of remedies under MEPA would allow unchecked environmental impacts:

In briefs filed in the *Park County* case, the Attorney General pointed to the MMRA and other substantive environmental laws as evidence that the Legislature has met its burden of providing "adequate remedies," even absent remedies under MEPA. HB 437 from the 2003 legislative session specifically outlined the following substantive statues that regulate environmental impacts:

- Montana Clean Indoor Air Act of 1979, Title 50, chapter 40, part 1, MCA
- Clean Air Act of Montana, Title 75, chapter 2, parts 1 through 4, MCA
- Water Quality, Title 75, chapter 5, MCA
- The Natural Streambed and Land Preservation Act of 1975, Title 75, chapter 7, part 1, MCA
- The Montana Solid Waste Management Act, Title 75, chapter 10, part 2, MCA
- Montana Hazardous Waste Act, Title 75, chapter 10, part 4, MCA
- Comprehensive Environmental Cleanup and Responsibility Act, Title 75, chapter 10, part 7, MCA
- Montana Megalandfill Siting Act, sections 75-10-901 through 75-10-945, MCA
- Montana Underground Storage Tank Installer and Inspector Licensing and Permitting Act, Title 75, chapter 11, part 2, MCA
- Montana Underground Storage Tank Act, Title 75, chapter 11, part 5, MCA
- Montana Major Facility Siting Act, Title 75, chapter 20, MCA
- Open-Space Land and Voluntary Conservation Easement Act, Title 76, chapter 6, MCA
- Environmental Control Easement Act, Title 76, chapter 7, MCA
- Strip and Underground Mine Siting Act, Title 82, chapter 4, part 1, MCA
- Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA
- Opencut Mining Act, Title 82, chapter 4, part 4, MCA
- Nongame and Endangered Species Conservation Act, Title 87, chapter 5, part 1, MCA

Despite this body of law and additional protections provided since 2003, the Court found that "These cumulative efforts to meet the Legislature's constitutional obligations, however, fail to show that MEPA is redundant within Montana's ecosystem of environmental protections. MEPA is unique in its ability to avert potential environmental harms through informed decision making."

What this decision failed to recognize is that each of these independent statutes relies on scientific analysis and informed permitting decisions. Granted, the public engagement requirements may differ, but to suggest that MEPA is the only safeguard to avert impacts is misguided. Again, it is the Legislature's responsibility to ensure that the body of laws they have enacted ensure that there are no unchecked impacts that would violate the constitutional rights of Montana citizens. The permissibility of those impacts is not determined by MEPA, but by the regulatory authority granted under the substantive environmental statutes. For instance, MEPA could be used as the vehicle to examine a range of impacts as an applicant sought a water discharge permit. MEPA does not establish the water quality or quantity thresholds over which a water discharge permit can be issued, rather, it simply provides the open public process in which to disclose the analysis that would be conducted under the Clean Water Act for a discharge permit. That detailed scientific analysis for the water discharge permitting decision would occur with or without MEPA.

In the *Park County* decision, the Court found that the District Court overstepped its authority and substituted its judgment for that of the regulatory authority in some instances, but also properly found deficiencies in some analyses. The difference between *Park County* and other recent District Court decisions is that both the original District Court and Supreme Court decisions in *Park County* were based on the identification of deficiencies in compliance with substantive statutory requirements or administrative rules. They did not stretch MEPA to cover unregulated issues.

In the specific case of the Laurel Gas Plant, in Yellowstone County, the District Court reaches a tortured decision in which it determines that MEPA analysis for the EA was not required for a specific water quality permit necessary for the project, while also finding that analysis was required for two unregulated issues. The District Court said DEQ was correct in omitting analysis and disclosure of impacts related to construction of a natural gas line feeding the plant noting that the State Land Board had the authority to site the gas line and would conduct their own, separate MEPA analysis. Alternatively, the District Court found that DEQ erred in not providing analysis of impacts from lighting or from greenhouse gases – neither of which are regulated at all by the state of Montana. Based solely on these two alleged deficiencies, the District Court remanded the EA and vacated the air quality permit. This appears to be in contradiction to the Supreme Court's standard in *Bitterrooters*, in which is stated, "an agency action is a legal cause of an environmental effect only if the agency can prevent the effect through the lawful exercise of its independent authority." The District Court found no violation of any regulatory standard, nor did it establish that DEQ had the independent authority to prevent visual impacts or a contribution of greenhouse gases to the environment. They vacated an air quality permit because of a lack of analysis on concerns that the Legislature never directed DEQ to undertake, and issued no authority to regulate.

Substantive protections are provided by individual permit requirements which include anticipatory analysis and preventative measures to avoid or minimize impacts. The Courts have not demonstrated that MEPA is necessary as a stopgap behind these regulations, but have rather stretched MEPA to require analysis and remedy for alleged impacts that the state has not recognized as harmful to the environment or a threat to constitutional guarantees. Legislative inaction on these issues does not give the courts the authority to reimagine the purpose of MEPA to be a regulatory catchall.

(5) Some industries believe the current application of MEPA lacks appropriate balance:

The Legislature contemplated several environmental policy bills during the 1971 legislative session. The MEPA Handbook provides the following account of the passage of MEPA over another bills:

> One of the companion bills—the Montana Environmental Protection Act—would have declared that a public trust exists in the natural resources of this state and that those natural resources should be protected from pollution, impairment, or destruction. To enforce this trust, the Protection Act would have allowed anyone, including nonresidents, to sue the state for failure to perform any legal duty concerning the protection of the air, water, soil and biota, and other natural resources from pollution, impairment, or destruction. The Protection Act generated much public controversy. The votes both in committee and on the floor mirrored the political realities that each bill endured. The Protection Act received an adverse committee report with a 6 to 5 do not pass vote. When brought up on second reading in the House, the Protection Act died on a 49 to 48 vote. In contrast to the Protection Act's much-contested demise, MEPA sailed through third and final readings in both the Republican House, 101 to 0, and the Democratic Senate, 51 to 1. The House accepted the Senate's amendments with a final vote of 99 to 0.

This legislative history confirms again the intent that MEPA serve in a procedural review role – not substantive enforcement. Details of the legislative debate are reportedly sparce, but records indicate the following principal statements and positions held by legislators at that time:

- A major conservation challenge today is to achieve needed development and use of our natural resources while concurrently protecting and enhancing the quality of our environment.
- MEPA seeks that often elusive middle ground between purely preservationist philosophy and purely exploitive philosophy, and indeed we must soon find that middle ground.
- As we guide Montana's development, we must use all of the scientific, technological, and sociological expertise available to us.
- MEPA is a master plan for the enhancement of our environment and promulgation of our economic productivity.
- MEPA says that Montana should continue to be a wonderful place to live and that development of its resources should be done in such a manner that quality of life will be assured to those who follow.

What has been lost in recent debates around the purpose of MEPA, and judicial interpretations of MEPA's role in environmental permitting decisions, is the notion that these anticipated impacts were to be viewed on balance with the positive and negative social and economic impacts as well. Even during development of the MEPA amendments in 2003, the Legislature noted that they reviewed the intent of the framers of the 1972 Montana Constitution and found "no indication that one enumerated inalienable right is intended to supersede other inalienable rights."

MEPA itself outlines the need for a balanced approach in stating that the consideration of environmental impacts must be done in a "manner calculated to foster and promote the general welfare," and specifically notes the call to:

- create and maintain conditions under which humans and nature can coexist in productive harmony,
- recognize the right to use and enjoy private property free of undue government regulation, and
- fulfill the social, economic, and other requirements of present and future generations of Montanans.

Elsewhere MEPA notes that the state needs to coordinate efforts to:

- *attain the widest range of beneficial uses* of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences
- *achieve a balance between population and resource use* that will permit high standards of living and a wide sharing of life's amenities

(emphasis added)

Further, MEPA explicitly points out the right to pursue life's basic necessities, the right of enjoying individual life and liberty, and the right to seek individual health and happiness in all lawful ways. The implementation of these rights requires the balancing of the competing interests associated with the rights by the legislature in order to protect the public health, safety, and welfare. HB 437 noted that "the constitutionally enumerated rights are by their very nature bound to result in competing interests in specific fact situations."

The historical record and the language of the law are clear that balance is required in MEPA analyses. In that pursuit, instructions for the preparation of an EIS contained in 75-1-201, MCA include the following specific direction:

> the details of the beneficial aspects of the proposed project, both short-term and long-term, and the economic advantages and disadvantages of the proposal.

Further instructions for alternatives analyses require tests of reasonableness, and that they be technologically achievable and economically feasible, and specifically require the No Action alternative to "include the projected beneficial and adverse environmental, social, and economic impact of the project's noncompletion." ARM 17.4.609(3)(b) further states that an EA must include,

> a description of the benefits and purpose of the proposed action. If the agency prepares a cost/benefit analysis before completion of the EA, the EA must contain the cost/ benefit analysis or a reference to it.

MEPA also provides direction to the EQC to "develop and recommend to the governor and the legislature state policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the state."

Finally, the Supreme Court in *Friends of the Wild Swan v. Dept. of Natural Resources and Conservation (2000)* found that a substantial change in projected economic impacts from a project provided justification for preparation of a supplemental EIS. This would indicate that socio-economic impacts from a project – both positive and negative – carry equal weight to environmental impacts under a MEPA review.

There can be no doubt that socio-economic impacts are intended to be considered alongside the environmental impacts associated with development, and that neither the constitution nor the legislature through MEPA has identified a prioritization of one over the other.

Recommendation:

The Legislature should re-organize and restate statutory language to clarify the legislative intent that MEPA is procedural, and distinctly different from the substantive statutes that regulate environmental impacts. Legislation could consolidate the language in statute that clearly limits the ability of procedural challenges to hold up permits that could otherwise be issued based on technical analysis conducted for those individual permits. Language also could reiterate that a balanced view of social, economic, and environmental impacts must be presented in MEPA analyses. And finally, review the duties of EQC outlined in 75-1-324, MCA to determine if improvements need to be made in how information, conditions

and trends in the application of Montana's environmental laws are being conveyed to the Legislature and the Governor.

Rationale:

The history of MEPA and NEPA litigation provides an overview of both interpretation and implementation challenges. Clear legislative intent would provide the Courts with unambiguous direction and allow Supreme Court challenges to take up questions distinctly on whether there are procedural MEPA deficiencies, or violations of specific regulatory statues and/or administrative rules.

Key Strategies:

It will be important to stress that this is a clarification of existing laws and to cross reference all clarifications. This is an opportunity to educate the public and policymakers alike, to ensure that there is a better understanding of why MEPA is important, but also why it is not a tool for modifying or denying permits outside of the regulatory confines of existing statute.

Possible Challenges:

There is disagreement amongst the Process and Applicability subgroup about the need for further clarification on the intent of MEPA as some believe the law is already clear. Some may also prefer to rely on recent judicial interpretation.

Some subgroup members also disagree with the recommendation to allow permits to be issued when there may be a pending challenge under MEPA, even though the challenge is over procedure rather than substance. The point of the recommendation is to avoid situations where MEPA analysis is conducted for a simple air quality permit, and while no air quality issues are identified a permit may currently be held up due to a litigant's concerns over whether appropriate consideration was given to an unregulated issue raised by the public which would have no effect on the air quality analysis.

Litigation is also always a risk whenever MEPA is revised.

Possible Outcomes:

Statutory change will provide more clarity, consistency and predictability for those who are subject to MEPA, those who participate in the MEPA process, and those who write the MEPA documents.

#END#

Subtask Group Recommendation Template

for the Final Report

May 13, 2024

Subtask Group: Process and Applicability

Initial Challenge Identified: Lack of clarity on the Definition of Key Terms used in MEPA

There is a lack of clarity in some definitions within MEPA. For example, there are some terms that are undefined and other where portions of the definitions in rule or statute don't always align.

75-1-220. Definitions. For the purposes of this part, the following definitions apply:

(1) "Alternatives analysis" means an evaluation of different parameters, mitigation measures, or control measures that would accomplish the same objectives as those included in the proposed action by the applicant. For a project that is not a state-sponsored project, it does not include an alternative facility or an alternative to the proposed project itself. The term includes alternatives required pursuant to Title 75, chapter 20.

(2) "Appropriate board" means, for administrative actions taken under this part by the:

(a) department of environmental quality, the board of environmental review, as provided for in 2-15-3502;

(b) department of fish, wildlife, and parks, the fish and wildlife commission, as provided for in 2-15-3402, and the state parks and recreation board, as provided for in 2-15-3406;

(c) department of transportation, the transportation commission, as provided for in 2-15-2502;

(d) department of natural resources and conservation for state trust land issues, the board of land commissioners, as provided for in Article X, section 4, of the Montana constitution;

(e) department of natural resources and conservation for oil and gas issues, the board of oil and gas conservation, as provided for in 2-15-3303; and

(f) department of livestock, the board of livestock, as provided for in 2-15-3102.

(3) "Complete application" means, for the purpose of complying with this part, an application for a permit, license, or other authorization that contains all data, studies, plans, information, forms, fees, and signatures required to be included with the application sufficient for the agency to approve the application under the applicable statutes and rules.

(4) "Cumulative impacts" means the collective impacts on the human environment within the borders of Montana of the proposed action when considered in conjunction with other past, present, and future actions related to the proposed action by location or generic type.

(5) "Environmental review" means any environmental assessment, environmental impact statement, or other written analysis required under this part by a state agency of a proposed action to determine, examine, or document the effects and impacts of the proposed action on the quality of the human and physical environment within the borders of Montana as required under this part.

(6) "Project sponsor" means any applicant, owner, operator, agency, or other entity that is proposing an action that requires an environmental review. If the action involves state agency-initiated actions on state trust lands, the term also includes each institutional beneficiary of any trust as described in The Enabling Act of Congress, approved February 22, 1899, 25 Stat. 676, as amended, the Morrill Act of 1862, 7 U.S.C. 301 through 308, and the Morrill Act of 1890, 7 U.S.C. 321 through 329.

(7) "Public scoping process" means any process to determine the scope of an environmental review.

(8) (a) "State-sponsored project" means:

(i) a project, program, or activity initiated and directly undertaken by a state agency;

(ii) except as provided in subsection (8)(b)(i), a project or activity supported through a contract, grant, subsidy, loan, or other form of funding assistance from a state agency, either singly or in combination with one or more other state agencies; or
(iii) except as provided in subsection (8)(b)(i), a project or activity authorized by a state agency acting in a land management capacity for a lease, easement, license, or other authorization to act.
(b) The term does not include:
(i) a project or activity undertaken by a private entity that is made possible by the issuance of permits, licenses, leases, easements, grants, loans, or other authorizations to act by the:
(A) department of environmental quality pursuant to Titles 75, 76, or 82;
(B) department of fish, wildlife, and parks pursuant to Title 87, chapter 4, part 4;
(C) board of oil and gas conservation pursuant to Title 82, chapter 11; or
(D) department of natural resources and conservation or the board of land commissioners pursuant to Titles 76, 77, 82, and 85; or
(ii) a project or activity involving the issuance of a permit, license, certificate, or other entitlement for permission to act by another agency acting in a regulatory capacity, either singly or in combination with other state agencies.

Additional definitions are included in the *MEPA Model Rules and DEQ's ARM 17.4.603 Definitions.*

Barrier(s):

Instances occur where the definitions are not consistent or not present in MEPA statue and/or rules which create ambiguity in the interpretation for regulators, applicant, and the public. This ambiguity allows space for legal challenges which may require courts to rely on federal NEPA definitions or interpretations in NEPA case law. In general, MEPA mirrors NEPA in its standard for environmental review, however, the State has limited the extents of its environmental review in certain circumstances.

The attached "MEPA Definitions Consistency Review" table compares the terms defined in 75-1-220, MCA and DEQ's ARM 17.4.603 (also MEPA Model Rules). The terms have been cross referenced to identify any inconsistencies or ambiguities. The table identifies terms that may benefit from further clarification and which terms are not present.

Recommendation:

State agencies should review the Attachment 1 (MEPA Definitions Consistency Review Table) to determine whether any ambiguity or inconsistency creates a challenge for the MEPA practitioners preparing the environmental review and whether these terms create a risk for legal challenge. If terms are identified, we recommend state agencies consider revising the Model Rules or presenting legislation in the 2025 Legislative session that would further clarify these terms.

Rationale:

The definition of certain terms in Statue and Rule or lack thereof, gives space for unnecessary challenges to the implementation of a defensible MEPA analysis. Clarifying these definitions would provide more certainty for decisionmaker, MEPA practitioners, the applicant, and the public and reduce the need for the courts to rely on NEPA definitions or case law.

Key Strategies:

If terms are identified, we recommend state agencies consider revising the Model Rules or presenting legislation in the 2025 Legislative session that would further clarify these terms.

Possible Challenges:

There may be disagreement on how terminology should be defined, and introducing new legislation or revised rules opens the door to controversy. Some suggest simply relying on judicial precedent. There could also be litigation regarding the new or revised definition.

Possible Outcomes

These recommendations will result in a more consistent permitting experience for applicants, public, and state agencies. They provide for more consistent application across state agencies in environmental reviews and increased certainty in environmental reviews. This proposal provides for a clearer understanding of terms for all stakeholders.

#END#

Attachment 1:
MEPA Definitions Consistency Review Table

MEPA Definitions Consistency Review				
75-1-220, MCA	**Definition**	**ARM 17.4.603**	**Definition**	**Notes**
		(1) "Action"	means a project, program or activity directly undertaken by the agency; a project or activity supported through a contract, grant, subsidy, loan or other form of funding assistance from the agency, either singly or in combination with 1 or more other state agencies; or a project or activity involving the issuance of a lease, permit, license, certificate, or other entitlement for use or permission to act by the agency, either singly or in combination with other state agencies.	Although not defined in statue, there may be sufficient coverage in 75-1-201, MCA to support the definition in rule. The state agencies should work together to determine if this term needs to be included in MCA definitions.
		(2)"Alternative" means:	(a) means: (i) an alternate approach or course of action that would appreciably accomplish the same objectives or results as the proposed action; (ii) design parameters, mitigation, or controls other than those incorporated into a proposed action by an applicant or by an agency prior to preparation of an EA or draft EIS; (iii) no action or denial; and (iv) for agency-initiated actions, a different program or series of activities that would accomplish other objectives or a different use of resources than the proposed program or series of activities. (b) The agency is required to consider only alternatives that are realistic, technologically available, and that represent a course of action that bears a logical relationship to the proposal being evaluated.	"Alternative" is not specifically defined in statue, however, "alternatives analysis" is included in 75-1-201(1), MCA. There is also sufficient use of both terms in other provisions of statue and rule to provide consistency and clarity. The state agencies should work together to determine if this term needs to be included in MCA definitions.
		(3) "The agency"	means the department of environmental quality and the board of environmental review.	Although "agency" is not included in statue, there is sufficient coverage in statue to interpret the meaning. In addition, this definition is included in the model rules which specifies an "agency adopting rule." DEQ is identified as the "agency" in 17.4.603. The state agencies should work together to determine if this term needs to be included in MCA definitions.
(1) "Alternatives analysis"	means an evaluation of different parameters, mitigation measures, or control measures that would accomplish the same objectives as those included in the proposed action by the applicant. For a project that is not a state-sponsored project, it does not include an alternative facility or an alternative to the proposed project itself. The term includes alternatives required pursuant to Title 75, chapter 20.			"Alternative analysis" is not specifically defined in rule, however, "alternative" is included in ARM 17.4.603(2). There is also sufficient use of both terms in other provisions of statue and rule to provide consistency and clarity. The state agencies should work together to determine if this term needs to be included in rule definitions.

		(4) "Applicant	means a person or any other entity who applies to the agency for a grant, loan, subsidy, or other funding assistance, or for a lease, permit, license, certificate, or other entitlement for use or permission to act.	Although “applicant” is not defined in statue, the term “private entity” is included in the definition of “state-sponsored project.” (75-1-220(8), MCA). It is also implied in a similar manner in 75-1-201 (1)(b)(v), MCA: “If the alternatives analysis is conducted for a project that is **not a state-sponsored** project and alternatives are recommended, the project sponsor may volunteer to implement the alternative. The term applicant is used in the description of the appeal process in 75-1-201 (6)(c)(ii)(C), MCA. The state agencies should work together to determine if this term needs to be included in MCA definitions.
(2) "Appropriate board"	means, for administrative actions taken under this part by the: (a) department of environmental quality, the board of environmental review, as provided for in **2-15-3502**; (b) department of fish, wildlife, and parks, the fish and wildlife commission, as provided for in **2-15-3402**, and the state parks and recreation board, as provided for in **2-15-3406**; (c) department of transportation, the transportation commission, as provided for in **2-15-2502**; (d) department of natural resources and conservation for state trust land issues, the board of land commissioners, as provided for in Article X, section 4, of the Montana constitution; (e) department of natural resources and conservation for oil and gas issues, the board of oil and gas conservation, as provided for in **2-15-3303**; and (f) department of livestock, the board of livestock, as provided for in **2-15-3102**.			The state agencies should work together to determine if this term needs to be included in rule definitions.
		(5) "Categorical exclusion"	refers to a type of action which does not individually, collectively, or cumulatively require an EA or EIS, as determined by rulemaking or programmatic review adopted by the agency, unless extraordinary circumstances, as defined by rulemaking or programmatic review, occur.	The term categorical exclusion is not defined in MCA, nor is even mentioned. There are inferences to exclusions in 75-1-220 (5) and 75-1-220 and 75-1-220 (8) (b), MCA: (5) "Environmental review" means any environmental assessment, environmental impact statement, or other written analysis required under this part by a state agency of a proposed action to determine, examine, or document the effects and impacts of the proposed action on the quality of the human and physical environment within the borders of Montana as required under this part. 75-1-220 (8): State-sponsored project

				(b) The term does not include: (i) a project or activity undertaken by a private entity that is made possible by the issuance of permits, licenses, leases, easements, grants, loans, or other authorizations to act by the: (A) department of environmental quality pursuant to Titles 75, 76, or 82; (B) department of fish, wildlife, and parks pursuant to Title 87, chapter 4, part 4; (C) board of oil and gas conservation pursuant to Title 82, chapter 11; or (D) department of natural resources and conservation or the board of land commissioners pursuant to Titles 76, 77, 82, and 85; or (ii) a project or activity involving the issuance of a permit, license, certificate, or other entitlement for permission to act by another agency acting in a regulatory capacity, either singly or in combination with other state agencies. The state agencies should work together to determine if this term needs to be included in MCA definitions.
		(6) "Compensation"	means the replacement or provision of substitute resources or environments to offset an impact on the quality of the human environment. The agency may not consider compensation for purposes of determining the significance of impacts (see ARM 17.4.607(4)) .	Compensation is not defined in MCA. The term is defined in rule to address means to mitigate impact. Mitigation is also not defined in MCA, although the term is used in 75-1-220 (1) "Alternatives Analysis." The state agencies should work together to determine if this term needs to be included in MCA definitions.
(3) "Complete application"	means, for the purpose of complying with this part, an application for a permit, license, or other authorization that contains all data, studies, plans, information, forms, fees, and signatures required to be included with the application sufficient for the agency to approve the application under the applicable statutes and rules.			The term complete application is not defined in rule. This term is likely defined in the underlying permitting statue and rule. The state agencies should work together to determine if this term needs to be included in rule definitions.
(4) "Cumulative impacts"	means the collective impacts on the human environment within the borders of Montana of the proposed action when considered in conjunction with other past, present, and future actions related to the proposed action by location or generic type.	(7) "Cumulative impact"	means the collective impacts on the human environment of the proposed action when considered in conjunction with other past and present actions related to the proposed action by location or generic type. Related future actions must also be considered when these actions	Defined in both MCA and rule.

			are under concurrent consideration by any state agency through preimpact statement studies, separate impact statement evaluation, or permit processing procedures.	
		(8) "Emergency actions"	include, but are not limited to: (a) projects undertaken, carried out, or approved by the agency to repair or restore property or facilities damaged or destroyed as a result of a disaster when a disaster has been declared by the governor or other appropriate government entity; (b) emergency repairs to public service facilities necessary to maintain service; and (c) projects, whether public or private, undertaken to prevent or mitigate immediate threats to public health, safety, welfare, or the environment.	Emergency actions are not defined in MCA. The state agencies should work together to determine if this term needs to be included in MCA definitions.
		(9) "Environmental assessment"	means a written analysis of a proposed action to determine whether an EIS is required or to serve 1 or more of the other purposes described in ARM 17.4.607(2) .	Referenced in 75-1-220 (5), MCA, but not specifically defined. The state agencies should work together to determine if this term needs to be included in MCA definitions.
		(10) "Environmental impact statement" (EIS)	means the detailed written statement required by 75-1-201, MCA, which may take several forms: (a) "draft environmental impact statement" means a detailed written statement prepared to the fullest extent possible in accordance with 75-1-201(1) (b) (iii) , MCA, and these rules; (b) "final environmental impact statement" means a written statement prepared to the fullest extent possible in accordance with 75-1-201, MCA, and ARM 17.4.618 or 17.4.619 and which responds to substantive comments received on the draft environmental impact statement; (c) "joint environmental impact statement" means an EIS prepared jointly by more than one agency, either state or federal, when the agencies are involved in the same or a closely related proposed action.	Referenced in 75-1-220 (5), MCA, but not specifically defined. The state agencies should work together to determine if this term needs to be included in MCA definitions.
(5) "Environmental review"	means any environmental assessment, environmental impact statement, or other written analysis required under this part by a state agency of a proposed action to determine, examine, or document the effects and impacts of the proposed action on the quality of the human and physical environment within the borders of Montana as required under this part.			Although not specifically defined in ARM 17.4.603, there is an entire section of rule that covers “environmental review” in ARM 17.4.607 “General Requirements of the Environmental Review Process. The state agencies should work together to determine if this term needs to be included in rule definitions.
		(11) "Environmental quality council" (EQC)	means the council established pursuant to Title 75, chapter 1, MCA, and 5-16-101, MCA.	Although this term is not defined in 75-1-220, MCA, Part 3 of MEPA is dedicated to the EQC.

				The state agencies should work together to determine if this term needs to be included in MCA definitions.
		(12) "Human environment"	includes, but is not limited to biological, physical, social, economic, cultural, and aesthetic factors that interrelate to form the environment. As the term applies to the agency's determination of whether an EIS is necessary (see ARM 17.4.607(1)) , economic and social impacts do not by themselves require an EIS. However, whenever an EIS is prepared, economic and social impacts and their relationship to biological, physical, cultural and aesthetic impacts must be discussed.	Although this term is not defined in 75-1-220, MCA, Part 1 of MEPA describe the "intent" of MEPA as: (2) The purpose of parts 1 through 3 of this chapter is to declare a state policy that will encourage productive and enjoyable harmony between humans and their environment, to protect the right to use and enjoy private property free of undue government regulation, to promote efforts that will prevent, mitigate, or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans, to enrich the understanding of the ecological systems and natural resources important to the state, and to establish an environmental quality council. The state agencies should work together to determine if this term needs to be included in MCA definitions.
		(13) "Lead agency"	means the state agency that has primary authority for committing the government to a course of action or the agency designated by the governor to supervise the preparation of a joint environmental impact statement or environmental assessment.	The state agencies should work together to determine if this term needs to be included in MCA definitions.
		(14) "Mitigation"	means: (a) avoiding an impact by not taking a certain action or parts of an action; (b) minimizing impacts by limiting the degree or magnitude of an action and its implementation; (c) rectifying an impact by repairing, rehabilitating, or restoring the affected environment; or (d) reducing or eliminating an impact over time by preservation and maintenance operations during the life of an action or the time period thereafter that an impact continues.	Referenced in 75-1-607 (4), MCA, the rule definition further clarifies the meaning. 75-1-607(4), MCA: "The agency may, as an alternative to preparing an EIS, prepare an EA whenever the action is one that might normally require an EIS, but effects which might otherwise be deemed significant appear to be mitigable below the level of significance through design, or enforceable controls or stipulations or both imposed by the agency or other government agencies. For an EA to suffice in this instance, the agency must determine that all of the impacts of the proposed action have been accurately identified, that they will be mitigated below the level of significance, and that no significant impact is likely to occur. The agency may not consider compensation for purposes of determining that impacts have been mitigated below the level of significance."

				The state agencies should work together to determine if this term needs to be included in MCA definitions.
		(15) "Programmatic review"	means an analysis (EIS or EA) of the impacts on the quality of the human environment of related actions, programs, or policies	The state agencies should work together to determine if this term needs to be included in MCA definitions.
(6) "Project sponsor"	means any applicant, owner, operator, agency, or other entity that is proposing an action that requires an environmental review. If the action involves state agency-initiated actions on state trust lands, the term also includes each institutional beneficiary of any trust as described in The Enabling Act of Congress, approved February 22, 1899, 25 Stat. 676, as amended, the Morrill Act of 1862, 7 U.S.C. 301 through 308, and the Morrill Act of 1890, 7 U.S.C. 321 through 329.			Although “project sponsor” is not defined in rule, the term “applicant” is included in the definitions. The state agencies should work together to determine if this term needs to be included in rule definitions.
(7) "Public scoping process"	means any process to determine the scope of an environmental review.			Not defined in rule, but public scoping is addressed in ARM 17.4.610 and 17.4.636. The state agencies should work together to determine if this term needs to be included in rule definitions.
		(16) "Residual impact"	means an impact that is not eliminated by mitigation.	The term “residual” is not mentioned in MCA. The state agencies should work together to determine if this term needs to be included in rule definitions.
		(17) "Scope"	means the range of reasonable alternatives, mitigation, issues, and potential impacts to be considered in an environmental assessment or an environmental impact statement.	Scope is defined in MCA in 75-1-220 (7) “Public Scoping Process.”
		(18) "Secondary impact"	means a further impact to the human environment that may be stimulated or induced by or otherwise result from a direct impact of the action.	Although “impact” is used broadly in MCA, it does not define a direct or secondary impact. MCA only defines “cumulative impacts.” Further, the term “secondary impact” defined in rule differs from an “indirect impact” defined in NEPA. State agencies use the terms interchangeably, but they are not the same. The state agencies should work together to determine if this term needs to be included in MCA definitions.
		(19) "State agency"	means an office, commission, committee, board, department, council, division, bureau, or section of the executive branch of state government	The state agencies should work together to determine if this term needs to be included in MCA definitions.
(8) "State-sponsored project"	(a) means:			The state agencies should work together to determine if this term needs to be included in rule definitions.

	(i) a project, program, or activity initiated and directly undertaken by a state agency; (ii) except as provided in subsection (8)(b)(i), a project or activity supported through a contract, grant, subsidy, loan, or other form of funding assistance from a state agency, either singly or in combination with one or more other state agencies; or (iii) except as provided in subsection (8)(b)(i), a project or activity authorized by a state agency acting in a land management capacity for a lease, easement, license, or other authorization to act. (b) The term does not include: (i) a project or activity undertaken by a private entity that is made possible by the issuance of permits, licenses, leases, easements, grants, loans, or other authorizations to act by the: (A) department of environmental quality pursuant to Titles 75, 76, or 82; (B) department of fish, wildlife, and parks pursuant to Title 87, chapter 4, part 4; (C) board of oil and gas conservation pursuant to Title 82, chapter 11; or (D) department of natural resources and conservation or the board of land commissioners pursuant to Titles 76, 77, 82, and 85; or (ii) a project or activity involving the issuance of a permit, license, certificate, or other entitlement for permission to act by another agency acting in a regulatory capacity, either singly or in combination with other state agencies.			
Terms not defined in MCA or Rule				
Significant	The terms significant and significance are not included in MCA or Rule. Both words are used through MCA and has an entire section in Rule (ARM 17.4.608) that describes how to determine significance. Even though the language in ARM 17-4-608 is thorough, it still leaves room for wide interpretation. **17.4.608** DETERMINING THE SIGNIFICANCE OF IMPACTS (1) In order to implement 75-1-201, MCA, the agency shall determine the significance of impacts associated with a proposed action. This determination is the basis of the agency's decision concerning the need to prepare an EIS and also refers to the agency's evaluation of individual and cumulative impacts in either EAs or EISs. The agency shall consider the following criteria in determining the significance of each impact on the quality of the human environment: a) the severity, duration, geographic extent, and frequency of occurrence of the impact; (b) the probability that the impact will occur if the proposed action occurs; or conversely, reasonable assurance in keeping with the potential severity of an impact that the impact will not occur; (c) growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts; (d) the quantity and quality of each environmental resource or value that would be affected, including the uniqueness and fragility of those resources or values; (e) the importance to the state and to society of each environmental resource or value that would be affected; (f) any precedent that would be set as a result of an impact of the proposed action that would commit the department to future actions with significant impacts or a decision in principle about such future actions; and (g) potential conflict with local, state, or federal laws, requirements, or formal plans. (2) An impact may be adverse, beneficial, or both. If none of the adverse effects of the impact are significant, an EIS is not required. An EIS is required if an impact has a significant adverse effect, even if the agency believes that the effect on balance will be beneficial.			

	How many of the criterion need to be met in order for the determine the impact is significant? Example: If a project has the potential for a "long-term impact" under criterion (a) but the impact is minor, does that mean it's significant? The agencies (decisionmakers) may determine that it does not reach the level of significance, but the public and courts may interpret the level of significance differently. It may be beneficial for the state agencies to consider revising the language to provide better predictability for the applicant and public. Possible revision: (1) In order to implement 75-1-201, MCA, the agency shall determine the significance of impacts associated with a proposed action. This determination is the basis of the agency's decision concerning the need to prepare an EIS and also refers to the agency's evaluation of individual and cumulative impacts in either EAs or EISs. The agency shall consider the following criteria in determining the significance of each impact on the quality of the human environment. The agency has discretion to determine whether one singular criterion or a combination of criteria rises to the level of a significant impact.
Direct Impact	The term direct impact is not defined in MCA or Rule, nor is it used in the text with either. The only reference to a direct impact is in EQC's MEPA Handbook (2019). The state agencies should consider whether the term should be defined in MCA and Rule. https://leg.mt.gov/content/Committees/Interim/2019-2020/EQC/2019-mepa-handbook.pdf

Subtask Group Recommendation Template

for the Final Report

May 13, 2024

Subtask Group: Process and Applicability

Initial Challenge Identified: Lack of understanding of what kind of projects/actions are subject to MEPA review and at what level of analysis.

It appears to be unclear to the public – and sometimes an applicant – what type of actions qualify for Categorical Exclusion (CE/CatEx), Environmental Assessment (EA) or an Environmental Impact Statement (EIS); when a Programmatic Review with tiered analyses would be appropriate; or when a Supplemental versus new MEPA analysis is appropriate.

In reviewing the MEPA Litigation Summary compiled by EQC between 1971 and June of 2021, there have been nearly 35 cases that questioned whether an EIS should have been required for a state action. The courts found the state acted properly with an EA in just over half those cases, an EIS was required in one-third of the cases, and the remainder were dismissed.

The number of cases filed, and the win/loss ratio for the state suggests that improvements could be made in clarifying what level of environmental review and public engagement are required for state actions of varying scope and scale.

Barrier(s):

It is generally understood that as the significance and complexity of project impacts increase, the procedural requirements also increase, but the triggers between those levels of review are sometimes less apparent.

Current Statute and Rule are relatively complete in their description of the various review levels, but somewhat confusing in their presentation.

There is increasing pressure for a greater level of environmental review and/or more exhaustive public engagement in DEQ's review of state actions.

There is an apparent perception that the determination of "significance" under MEPA must consider public interest or level of controversy. It should be noted that often public interest and level of controversy are driven by a perception that the potential impacts would quality as "significant" and warrant an EIS. There is a need for more education related to "significance," and perhaps the Public Engagement & Education subgroup can discuss.

NEPA, for federal projects, does provide an opportunity to add a Public Hearing to the review process under an EA, but does not elevate the project to an EIS.

Regarding public participation, and whether the agency conducts the appropriate level of information sharing, the Engagement & Education subgroup should review ARM 17.4.610.

Recommendation(s):

- Consider a collaborative update to the EQC's *Guide to the Montana Environmental Policy Act* to provide a clearer, point-by-point explanation of the various levels of environmental review, and attending levels of public engagement. Once compiled, consider is Rule modifications are warranted.
- Review judicial decisions on MEPA challenges to identify instances where there have been questions of law, as opposed to questions of fact. This will help focus attention on real versus perceived issues.
- Potential cost-sharing agreements for more detailed environmental assessment documents, potentially at the discretion of the department or applicant.
- Collaborate with Public Education and Outreach Subtask Group on related recommendations on use of a single website for notices and clarifying language in notices.
- Review NEPA and its requirements/guidance for level of review related to controversy of a project.
- Conduct a review of litigation history to determine if there are trends on this issue that can be addressed through more clarity in Statute and/or Rule.

Rationale:

MEPA requirements and guidelines are somewhat scattered throughout Statute, Model Rules, agency rules, and CEQ documents. Applicants and members of the affected public would benefit from a consolidation of this information.

Drawing a clear connection between complexity of the agency decision and likelihood of significance of impacts to the level of environmental review will aid in overall understanding of the intent of MEPA and the role the public can play in informing agency decisions.

Need to address actual conflicts between legislative intent and judicial interpretation and not create more confusion with new amendments to statute or rule.

Key Strategies:

It may be key to provide a mapping of the progressive levels of environmental review. For instance:

<u>Categorical Exclusions</u>:

These <u>*types*</u> of actions/decisions, and these specifically-identified actions are exempt from MEPA review . . . compile the list from Model Rules, agency rules and the *Guide*.

<u>Environmental Assessments</u>:

Anything not exempted from review and may have a significant impact on the human environment. This review can take one of the following forms:

- *Checklist EA* – a routine action/decision with limited environmental impact
- *Standard EA* – need to define
- *Mitigated EA* – an action/decision with impacts that can be mitigated below the level of significance

- *Expedited EA* – driven by the need to comply with other statutory requirements/timelines
- *Programmatic EA* – which covers a series of actions, or a typical type of action/decision

Environmental Impact Statements:

Any action/decision that is expected to have significant impacts, or that was subject to an EA which determined the likelihood of significant impacts

Supplemental Reviews:

Need to define

Possible Challenges:

It will be impossible to imagine every scenario and provide conclusive guidance on what types of actions/decisions will *always* fall under a certain level of review, so it will be important to set appropriate expectations for the public.

Some may see no need for clarification and would prefer to rely on judicial interpretation.

Possible Outcomes

In coordination with the Public Education & Outreach subgroup, this effort may provide very useful information to affected members of the public on what level of analysis can be expected, and how they can anticipate being involved in the decision-making process. Setting these expectations early in the process can help avoid unnecessary litigation.

#END#