Montana Environmental Policy Act Work Group

(convened by the Montana Department of Environmental Quality)

<u>Draft</u> Recommendations for DEQ and the Montana Legislature

May 20, 2024

The following draft recommendations represent the opinions of the MEPA Work Group and its members. The recommendations have been developed through presentations, discussion, and public comment that have taken place through a series of public meetings that began in late-January 2024.

Inclusion of recommendations in this draft does not indicate that the recommendations had the support of all members of the work group. Not all differing viewpoints and dissenting opinions are included in this compilation of draft recommendations. The Work Group is interested in hearing feedback on the recommendations in advance of its next meeting on May 29. Comments may be submitted using the public comment portal on DEQ's website (https://deq.mt.gov/about/mepa) or may be provided verbally at the May 29 meeting. After the meeting, DEQ will seek to incorporate final comments and discussion into a complete report that will be released for a final public review in early June.

We look forward to hearing from you!

5/20/2024 - FINAL DRAFT for public review and discussion

Subtask Group Recommendation 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. Following a 2023 *Held vs. State of Montana* district court decision, the Montana Department of Environmental Quality (MDEQ) is taking steps to consider the impacts to the climate in its decision-making and as part of its analyses under the Montana Environmental Policy Act (MEPA). 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 from the Montana Legislature to adequately analyze climate impacts. The lack of statutory guidance creates an unpredictable regulatory environment for Montana businesses. While the Montana Supreme Court reviews the lower court decisions, MDEQ and other state agencies need to develop a short-term framework for climate analysis in the MEPA process for public input.

Barriers:
The Montana Supreme Court has not yet issued a decision regarding climate analysis so state agencies do not have a clear roadmap for addressing climate impacts in the MEPA process; the Legislature has not provided statutory direction to MDEQ 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 FTEs to MDEQ to internally analyze climate impacts in the MEPA process and will not be able to do so for 10-12 months. Additional Barriers for developing Climate Analysis in MDEQ reviews include:

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.

Recommendations:
1. MDEQ should draft an interim study bill that would task the Environmental Quality Council to look at different climate analysis models, economic impacts, and a predictable Montana statutory framework that will be compatible with any direction given by the Montana Supreme Court.

2. DEQ climate analysis in the short term should be as robust as its resources, expertise, scientific underpinnings, and obligations under existing law requires, and that can also ensure predictability for permit applicants and the public's right to know/participate. In the timeframe before the Supreme Court completes its review and the next Legislature can provide direct policy statutes, the MDEQ should consider taking the following steps when analyzing a proposed action's climate effects under MEPA:

(a) Quantify the reasonably foreseeable GHG emissions of a proposed action, the no action alternative, and any reasonable alternatives;

(b) Disclose and provide context for the public for the anticipated GHG emissions and climate impacts associated with a proposed action and alternatives, explaining clearly the assumptions and ranges of uncertainty reflected in any analysis methods employed;

(c) Analyze reasonable alternatives, and identify available mitigation measures to avoid, minimize, or compensate for GHG effects.

In addition, DEQ should proceed in the short term assuming that some or all of the *Held* case will be upheld by the Montana Supreme Court and use the time before the session to estimate costs, FTE needs, and changes to MEPA that allow for a range of climate analyses. It should also develop some in-house expertise on how climate analyses are done in other jurisdictions.

Rationale:
For incorporating Climate Analysis in the Interim Period: Many models exist to (1) analyze foreseeable GHG emissions of a proposed action; (2) disclose and provide context for public understanding of a proposed actions impact on the climate, and the human and natural environment; (3) analyze reasonable alternatives and identify mitigation measures. In the interim period before the legislature can provide further policy input, MDEQ should identify and implement analysis methods that are adapted to the Montana context and fulfill its constitutional obligation to incorporate climate analysis in its review process, using its expertise, credible science, and "rule of reason" for guidance.

For the Interim study by EQC**:** 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 pros/cons, costs/benefits of certain processes, balance constitutional rights, engage the Montana public, provide funding and FTEs as needed, and generally put this on a path of predictability for Montana businesses, permittees, and the public. While the Legislature will likely 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. DEQ will continue to conduct lawful MEPA analyses as required by judicial order and/or directives from the Legislature regardless of whether the EQC accepts or completes this study proposal.

Key Strategies:
The short-term 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 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 constitutional and legislative requirements.

Possible Challenges and Outcomes:

- 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.

- 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.
- MDEQ will need to adopt short term policies around climate analysis until *Held* is upheld, reversed, or some other disposition is reached.
- There are strong feelings in the legislative branch on climate analysis. 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 and compatible with Montana's constitution.

Subtask Group Recommendations for the Final Report
May 2024

Subtask Group: Public Engagement, Education and Outreach

(#1) Initial Challenge Identified:

Public meetings are a challenging component of MEPA's implementation because they mean something different to each person. The PE subgroup specifically explored involved the public's expectations about the engagement strategies used by the Department. We believe that in many cases members of the public are not well versed in whether or not public meetings will occur during a MEPA analysis, when in the project timeline the meeting will occur, and what the purpose of the meeting is (i.e. is it to share more information about the proposed project, to scope an analysis, to share official public comments, etc.). Because of these unclear expectations, when public meetings do happen they can often turn into a perceived vote reading/counting exercise which does not result in new substantive information that benefits the agency in completing the analysis, and at times lead to contention and public conflict.

Our subgroup attempted to disaggregate some of the above issues into smaller parts. One of the initial challenges regarding public meetings is the lack of clarity about whether or not there will be a public meeting (of any type) for a proposal. We learned more about the discretion on the part of the agency for when to have a public meeting as well as what the meeting is structured like. There is no clear trigger currently, which we felt helped promote flexibility and adaptability for the agency to tailor facts and circumstances to the needs of the community and the analysis. However, we felt like the discretion can also create confusion and unclear expectations for members of the public in a community where a project is proposed. That can lead to distrust of the agency from the public.

Barrier(s):

Lack of clarity and defined expectations: members of the public are not always clear of when or if a public meeting is going to be held in the MEPA process. Further, they do not necessarily understand the different types of public meetings that the agency may hold and what their purpose always is. While we believe that discretion to the agency is a beneficial thing, it is a barrier for mutual understanding and shared expectations. In fact, it can at times lead to a situation where the unintentional first fight about whether or not to have a public meeting.

Recommendation:

DEQ's public guidance during the MEPA process should more clearly identify when, what type, and how (structure) public meetings shall occur for proposed projects, regardless of the analysis type. Essentially a disclosure about how the agency will use its discretion related to this topic. That guidance should be included as a boilerplate (prewritten disclaimer) statement in every scoping or public notice document for each MEPA process that has such documents (i.e. the agency should not have to do scoping or public notice if it isn't already planning on doing so because of this recommendations). The statement should help the public better understand what type of public engagement process there will be, how it is determined, who makes those decisions, when it will happen, how the agency uses its discretion on the matter, etc. That language should also be included in the DEQ's MEPA website to provide more global guidance to the public. The goal is to make the public meeting (and engagement broadly) component of the MEPA process more certain and predictable by setting clearly communicated expectations for both project sponsors and members of the public.

Rationale:

Our identified goal for public meetings in the subtask group was to have meetings that increase shared learning, facilitate more substantive comments to the agency, and decrease public debates and fights. It seems like one way to reduce conflict (recognizing that this is not a silver bullet to resolve all conflict because some of it is unavoidable) is to reduce confusion up front in the analysis process about whether or not there will be a public meeting, what the public meeting will look like, what its goals are, and when it will occur. Providing clear guidance to the public before the MEPA process starts can help set expectations appropriately.

Key Strategies:

- DEQ should work internally to draft language to be included in all scoping/public notice documents. As part of that process, the agency should solicit public feedback from key stakeholders to help strengthen the language. This subgroup would be an excellent group of stakeholders to use in that review.
- Once completed, DEQ should post to DEQ's MEPA website.
- Moving forward, the agency should include the language in all scoping/public notice documents when such documents are part of the review process.

Possible Challenges and Outcomes:

- In developing this recommendation, our subgroup recognized that conflict is often times unavoidable on difficult projects. Further disclosure will not totally eliminate conflict, but we believe that it may help right size expectations.
- We recognized as well that one prewritten disclaimer may be too broad for all situations, and we would encourage the agency to be adaptive from project to project as well as over time to revise the statement as needed.
- A key component of this process is the broader education and outreach around MEPA with members of the public. We hope that the following recommendations may help assist in that. Our concern is that even with a prewritten disclaimer that some members of the public may not read or understand the language. We will have to work towards increasing public understanding of the law through other education strategies.
- SAVE SPACE FOR DISSENTING OPINIONS

(#2) Initial Challenge Identified:

The subgroups of public engagement and education and outreach were combined early in this process because of the similar challenges and issues encountered. As such, our combined subgroup tried to untangle both topics through our review. Through that exploration, we believe that there are a few challenges within the bucket of education and outreach that should be acknowledged individually:

- Uniform training of agency staff in how to implement the law effectively and consistently,
- Education of members of the public about the purpose of MEPA and the roles afforded to them in the public process components of the law's implementation,
- Education and trainings of members of the legislature about the legislative history of the law, the purported purpose and intent of the statute, role of other permitting statutes, and emerging issues and policy questions,
- Consistent application of the law and sharing of information and best practices between entities of state government, and
- General tracking of the implementation of the law (75-1-324, MCA).

Barrier(s):

Originally, the MEPA statute (Title 75, chapter 1, part 3, MCA) created the Environmental Quality Council (EQC) and contemplated that entity as being responsible for tracking MEPA's implementation and providing necessary oversight as well as trainings, public education, and outreach about the law. In the years that have passed, the EQC, whose budget and staffing are managed by the legislature itself through the Legislative Council, has struggled to continue that role given competing priorities, staffing turnover, and diminishing capacity of its talented, but small, staff. The result has been twofold: (1) that it has largely fallen on public agencies to do their own oversight, training, and education internally, and (2) members of the public and of the legislature are on their own to access previously created training and resource material. From our investigation, it is unclear who is fulfilling the role of tracking implementation.

Capacity: generally, the capacity of both the EQC and agencies is the primary barrier to resolve the above-mentioned challenges more effectively. If the capacity of EQC is the primary challenge (which through the subgroup's investigation seems to be true), we suggest that there is consideration made to increasing the capacity of EQC to fill the void in education, outreach, and oversight of consistent implementation across the executive and legislative branches, as well as made available to the public.

It is important to note a disclaimer that we discovered in our investigation. At the agency level, the current DEQ staff (we did not explore other agencies) are doing great in their internal training protocols and programs. It can serve as a model to build from to help provide more uniform application of the law across the executive. However, doing more with the current model is not possible without additional staff and resources from the legislature. Likewise, at the EQC the current staff is doing tremendous work given the amount of capacity they have to fulfill the obligations. Neither recommendation is meant to be an indictment to what existing staff and resources are accomplishing.

Recommendation:

The Environmental Quality Council (EQC) should complete an analysis of available resources and staffing within the Legislative Environmental Policy Office (LEPO) and complete and assessment of the needs associated with MEPA and its statutory duties. That analysis and recommendations should then be reported to the Legislative Council for consideration. As part of that review, the EQC should complete a

more thorough review of Title 75, Chapter 1, Part 3 to assess if there are statutory revisions necessary to articulate the role of the Council more clearly in today's landscape.

The goal is to increase the capacity of the EQC, and thereby the LEPO, by at least one FTE (full time equivalent), or other appropriate measure, who has a primary workplan dedicated to the oversight of implementation, training, outreach, and education of MEPA across state government. The deliverables of the position should include trainings, educational materials, a database of current legal challenges and outcomes, technology solutions to MEPA education and outreach, and prioritization of major issues affecting implementation over time (generally the tasks associated with the Council's obligations under 75-1-324, MCA). The person should report to the EQC and provide additional staffing resources to the Council, and legislature more broadly.

Rationale:

Our subgroup considered various options to increase the resources around education and outreach. In the end, we believe that the best fit is with the legislature itself, specifically the EQC. The major barrier that we found in our discussion was current capacity of the Council. Additionally, it makes the most sense to retain that statutory role at this point. Given that, if it is the role of the EQC to provide education, outreach, training, and tracking of implementation of the law, it will be necessary to give them the resources to do that. We believe that the best step forward is to have the Council complete an assessment of their current capacity, the statutes (Title 75, chapter 1, Part 3), and complete a needs assessment.

Key Strategies:

- The EQC would need to complete its own internal assessment and develop recommendations for additional capacity specifically related to MEPA and forward those to the Legislative Council for its review and concurrence or not.
    - That assessment should include: (1) current capacity assessment for the Council generally, and specifically regarding current available resources for those duties outlined in 75-1-324, MCA, (2) a review of the statutory obligations of the Council provided for in 75-1-324, MCA, including suggested revisions to reflect the current needs (3) a needs assessment of what the Council is not able to do with their current staffing capacity.
- The Legislative Council, and future Legislatures, would decide about its available resources and its commitment to the review completed by the EQC given other priorities.
- The EQC should solicit feedback from stakeholders, including the public agencies that implement the law, in their review of Title 75, chapter 1, part 3, MCA.

Possible Challenges and Outcomes:

- It could be challenging to compel the agencies, beyond DEQ, to participate in the review and to complete the recommendations.
- These recommendations are one of many in a competing world of funding with the legislature. Some questions - Would the legislature fund this? Would they continue to fund it over the long term?
- What would the source of funding be?
- SAVE SPACE FOR DISSENTING OPINIONS

(#3) Initial Challenge Identified:

One of the persistent challenges identified throughout this broader MEPA review, and the subgroup as well, is the lack of general understanding in the public between the role of the MEPA process and the MEPA produced documents versus the permitting processes, laws, and documents. That has been embodied most simply in the "procedural versus substantive" paradigm. We agree that the role of MEPA is to take a hard look at the environment and actions proposed by completing a procedural analysis whereas the role of the permitting statutes is to authorize or condition an action. However, in the context of our subgroup's focus on public engagement the paradigm can create some confusion and misguided expectations about the role of the public in the MEPA procedural process. Most basically, it can lead the public feeling confused as to what their role is in a procedural exercise.

We believe that robust public engagement in a procedural MEPA process and their substantive feedback strongly benefits the agency and the product of the MEPA analysis. Further, we believe strongly that all members of the public, regardless of their view about an action, have something to bring to the MEPA process. The challenge is how implementers of the law can more accurately and effectively communicate what sorts of feedback, contextual information, and comments are in fact useful to the process.

Barrier(s):

Clarity of roles and expectations: members of the public are not immediately clear what the agency is seeking by their participation. The lack of clarity as to what the agency is seeking challenges members of the public to understand what their role is in the process and what the agency hopes to get from them being involved. One of those specific challenges is in the lack of a definition or real understanding of what a substantive comment is, given that it is in the eye of the beholder. Most members of the public are not actively engaged in the world of MEPA, so simply asking for "substantive comments" isn't something that is readily understandable to them.

Recommendation:

DEQ should work with a set of key stakeholders to characterize the term "substantive or meaningful comment" in the agency's internal guidance and/or communication strategies. The key audience for that characterization are members of the public participating in a MEPA process, with a goal being to better enumerate what types of feedback and comments the agency is seeking. By clearly articulating in guidance and communications what the agency is seeking, it can help clarify and set expectations for the public. That guidance could be included in similar boiler plate (prewritten disclaimer) language to recommendation #1 that goes out with every public notice/scoping document, when one is required or completed. It should also be posted to the general MEPA website, similar to recommendation #1.

To that end, we identified some themes that could be included in the language. Members of the public may need additional tools to help them understand that while MEPA's procedural role is not to impose conditions on or deny or modify project permits; it is critical to laying the groundwork for those decisions to be made. MEPA plays a highly meaningful role in partnership with the substantive permitting statutes by providing the broadest understanding of what the impacts of a proposed activities may be. Public input can bring to light information that can make a difference in what issues are evaluated in the project analysis and to what depth. That is further enhanced by their ability to share local knowledge that can benefit the agency's analysis and help avoid unintended consequences from a proposed action.

DEQ should develop fact sheets and examples that illustrate what is commonly considered a "substantive or meaningful" comment that would be useful in evaluating a project. Members of the public are always entitled to voice their opinion, but they may want to play a more useful and informative role in the process if they better understand what information the agency needs and how they can help.

Rationale:

The goal is to attempt to make the participants feel like they were heard and the agency to get actual substantive comments that improve the durability of the decisions made and make the analysis of projects richer and more informed. We believe that providing better guidance about what the agency is seeking through the public's engagement can help provide clarity of expectations. We also believe that it will lead to better analyses.

Key Strategies:

- Convene a small group of stakeholders to work with the agency to develop a characterization of substantive comments. DEQ should work internally to draft language to be included in all scoping/public notice documents. As part of that process, the agency should solicit public feedback from those key stakeholders to help strengthen the language. This subgroup would be an excellent group of stakeholders to use in that review.
- Once completed, DEQ should post to DEQ's MEPA website as well as develop fact sheets and materials that can be used to communicate with the public about their role.
- Moving forward, the agency should include the language in all scoping/public notice documents when such documents are part of the review process.

Possible Challenges and Outcomes:

- It can be a challenge to provide a clear definition of substantive/meaningful comment or to accurately characterize what those are in every context. It will be an adaptive and evolving process to refine.
- This effort will take resources from within the agency.
- One of the challenges, even in this subgroup, is to get outside of the informed echo chamber. Asking a bunch of people who regularly participate in or implement MEPA to characterize substantive/meaningful comments will lead to a very different outcome than folks that are not as versed in the process.
- We are going to need to adaptively implement this recommendation.
- SAVE SPACE FOR DISSENTING OPINIONS

(#4) Initial Challenge Identified:
Throughout this process, a common theme that came up was access to information. Generally speaking, that the information or documents needed to participate is available, transparent, and understandable to everyone. That is particularly true given that all participants in the MEPA process come to the table with different levels of knowledge about the MEPA process itself, the law, the roles of participants, as well as the information specifically relevant to the proposed project. As with nearly all state agency websites, it can be further challenging to access the needed documents that are beneficial to understanding both the process and the substance of a proposal because of the lack of a central landing page or portal. We recognize that the agency has done a lot to make their website more functional in regard to MEPA. However, we believe that better is possible to provide the notice of the process and proposal as well as to accessing the documents central to participating in those processes.

Of particular note, was the lack of accessible information or resources on the law itself and how to participate. There have been a number of background and training materials completed by entities in the past, namely the EQC, but it is nearly impossible to find them online. Having a central clearinghouse of these educational materials that have already been completed would be extremely beneficial.

Barrier(s):
Cost, changing demands, and understanding: the primary barriers related to this challenge are that websites are complex to maintain, the needs are everchanging, the technology is evolving, and there is still a barrier to the public that may not know how to use the websites or that they exist. We know that there has been significant investment into the DEQ website, and it is an ongoing effort to increase functionality for the public. We are unclear about how much intentionality there has been to compile the existing training and outreach materials that are available.

Recommendation:
Our recommendation offers two paths forward. First, DEQ should continue to improve the functionality of its website for hosting all MEPA participation guides, guidance, documents, and a project-by-project search function to unlock all related decision documents for the public to be able to access. It should also provide a better way to be noticed about specific projects and opportunities to participate. Second, in its review of the future role of EQC as it relates to education and outreach the Council should provide a central clearinghouse for materials about the law, how it is implemented, and training materials it has developed. Ideally the two websites would have some sort of connection between them.

Rationale:
We believe that more transparent, accessible, and understandable information will help facilitate more beneficial engagement by the public. The technology age presents many opportunities to increase the efficiency and access to the required materials and documents for the public, and we should be continuing to adaptively manage our technology plans to meet the demands from the public. We also think that our websites can serve as a critical component to any education and outreach efforts, so making sure that we have a clear landing page for those resources will improve the public's understanding of the law and its implementation.

Key Strategies:
- Complete a needs assessment of the current DEQ website regarding functionality for MEPA documents and resources. We suggest including members of the public in some way in the assessment.

- Task the EQC to consider explicit review of technology solutions to meeting its needs under recommendation #2, specifically how they can provide more accessible information on education and outreach of materials.
- Adaptively manage the needs of the public regarding information access.

Possible Challenges and Outcomes:

- Building new websites could be a costly investment, and it is unclear who's role it would be to maintain and update. The maintenance in and of itself could be challenging.
- The primary challenge with websites or technology solutions generally is that they will always be out of date or not complete.
- Splitting roles and responsibilities between the agency and the EQC could create gaps and confusion unless there is intentional coordination and clear delineation of expectations.
- SAVE SPACE FOR DISSENTING OPINIONS

Subtask Group Recommendations for the Final Report
May 2024

Subtask Group: Process and Applicability

Initial Challenge # 1:

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

Instances occur where the differing decision timelines create challenges in implementing both statutorily required permitting requirements and the procedural aspects of MEPA. (see attached table for comparison). 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. These discrepancies create confusion for the applicant and the public, and legal vulnerability for DEQ.

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 are <u>not</u> anticipated to 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. Further, the legislature generally maintains an interest in requiring date-certain MEPA reviews, but is less inclined to fully fund the necessary staffing.

Recommendation:

This subgroup recommends that legislation 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; 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.

This subgroup recommends the following statutory amendments:

75-1-208(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~~ consulting with the project sponsor in writing that an extension is necessary and stating the basis for the extension. The agency may extend the time limit for only as long as required to diligently complete the environmental review process, as mutually agreed by the agency and the applicant. ~~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.

(7) By November 1, 2025, an agency subject to this section shall establish a page on a state website that contains a review of every environmental analysis that the agency conducted, categorized by date and year that the applicant submitted a completed application. The review must include:

(i) The date a completed application was submitted to the agency;

(ii) The relevant deadline for the application;

(iii) Whether the application was subject to an extension and the timeline for the extension.

(~~7~~)(8) (a) Except as provided in subsection (7)(b), if an agency has not completed the environmental review by the expiration of the original or extended time period, the agency may not withhold a permit or other authority to act unless the agency makes a written finding that there is a likelihood that permit issuance or other approval to act would result in the violation of a statutory or regulatory requirement.

(b) Subsection (7)(a) does not apply to a permit granted under Title 75, chapter 2, or under Title 82, chapter 4, parts 1 and 2.

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.

The proposed statutory amendments provide for agency discretion in meeting deadlines, a process for alerting the applicant to a potential extension, and transparency with regard to the extension of reviews by establishing reasonable deadlines based on agency resources and publishing the information publicly.

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 that would be excluded from a Programmatic EA.

The proposed statutory amendments must be conducted through the normal legislative process; however, the recommendation regarding public transparency through the publication on a website will not require statutory changes and should be considered and evaluated by DEQ independent of its legislative agenda. Additionally, there has been extensive discussion regarding public transparency surrounding MEPA, and so a “deadline” page on a website would fall within potential agency actions on this item, with little additional resources.

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.

Applicants may not support a “consultation” requirement rather than a deadline.

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.

Montana Department of Environmental Quality - Timelines Associated with Regulatory Action

Created for the MEPA Work Group - 2/21/2024

State Action	Other Time Limits in Law?	Decision Deadline*	Triggering Event
Air Quality Oil and Gas Registration	Y	NA - Programmatic Review	Adoption of registration rules
Air Quality Portable Registration	Y	NA - Programmatic Review	Adoption of registration rules
Air Quality Permit	Y	115-130 days	Receipt of complete application
Air Quality Permit - EIS required	***N***	***MEPA time limits in 75-1-208, MCA, apply***	
Air Quality Permit - With MFSA certificate	Y	270 days	Determination of acceptibility
Coal Mine Permit / Reclamation Plan - New or Major Revision	Y	165 days (EIS must be issued 15 days before decision)	Receipt of administratively complete application
Coal Mine Permit / Reclamation Plan - Minor Revision	Y	60 days	Receipt of application and revised reclamation plan
Hard Rock Mine Exploration	***N***	***MEPA time limits in 75-1-208, MCA, apply***	
Hard Rock Mine Operating Permit - New or Major Amendment	Y	365 days	Determination of completeness and issuance of draft permit
Hard Rock Mine Operating Permit - Minor Revision or Minor Amendment	Y	30 days	Receipt of application
Opencut Mining Dryland Permit	Y	15 days	Receipt of complete application
Opencut Mining Standard Permit	Y	30-45 days	Receipt of complete application
Major Facility Siting Act Certificate	Y	270 days	Determination of acceptibility
Asbestos Demolition Notice	Y	10 working days	Receipt of application
Asbestos Project Permit	Y	10 working days	Receipt of application
Asbestos Project Permit - Cost of $3,000 or less	Y	7 calendar days	Receipt of complete application and fee
Asbestos Small Project Permit - As defined in 75-2-505, MCA	Y	5 working days	Receipt of complete application and fee
Hazardous Waste Permit	Y	90 days	Receipt of complete application
Motor Vehicle Wrecking Facility License	***N***	***MEPA time limits in 75-1-208, MCA, apply***	
Septic Tank Pumper Land Application	***N***	***MEPA time limits in 75-1-208, MCA, apply***	
Solid Waste Management Facility License	***N***	***MEPA time limits in 75-1-208, MCA, apply***	
Underground Storage Tanks - New Facility Permit	Y	30 days	Receipt of complete application
Certificate of Subdivision Approval - No MEPA, or as defined in 76-4-136, MCA	Y	40 days	Receipt of complete application
Certificate of Subdivision Approval - EA required	Y	130 days	Receipt of complete application
Certificate of Subdivision Approval - EIS required	Y	160 days	Receipt of complete application
Montana Ground Water Pollution Control System Permit	Y	60-90 days	Receipt of complete application
Montana Pollutant Discharge Elimination System General Permits	Y	NA - Programmatic Review	Renewal of general permit
Montana Pollutant Discharge Elimination System Individual Permit	Y	30 days	Receipt of complete application
Montana Pollutant Discharge Elimination System Storm Water General Permits	Y	NA - Programmatic Review	Renewal of general permit
Public Water Supply Systems	Y	60 days	Receipt of engineering documents
Water Quality Authorization to Degrade	Y	90 days	Notification of adequacy

* For the purposes of this table, decision deadlines are the sum of all applicable time limits provided for environmental review and may include multiple consecutive steps in the review process.
The timelines in this document do not include time any time that may be allowed at the beginning of the process for completeness review and any associated deficiency process.
Red text indicates a timeline is shorter than the time limit MEPA allows for preparation of an environmental assessment.

Initial Challenge # 2:

There is a 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. For instance, an air quality permit should not be held up (modified, denied or enjoined) in the MEPA process as long as the technical analysis indicates that the action does not violate any substantive regulatory standard related to air quality. If the project still requires additional permits from the state, and the courts have identified deficiencies in the MEPA analysis related to other substantive requlatory standards related to those permits, the project itself may not proceed until all permits are approved. In the event that all other substantive regulatory requirements are met, or no other permits are required, the project may proceed while MEPA procedural analyses continue.

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.

Some feel that disagreement over MEPA's implementation and its legal ramifications do not require a "major overhaul of the process." Further, they believe that such changes have the potential to backfire for the applicants and the public by creating further confusion and risking constitutional violations that will add even more

unpredictability to the MEPA process. They point to large and small revisions to MEPA in order to "clarify" and "streamline" MEPA in the past, but feel the utility of these changes remains to be seen.

Some also point out that limiting the remedy of the public to seek redress under MEPA may risk legal challenge and point to two recent judicial decisions that state, "deny[ing] the people of Montana [] remedies, falls short of the constitutional guarantee and is therefore facially unconstitutional." Park County (2020). Limiting remedies has subsequently been found to be unconstitutional in the Held decision.

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.

Initial Challenge # 3:

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:

DEQ should review litigation history to see if there are certain terms that are particularly problematic, and possibly survey MEPA practitioners to determine if there are easily-identifiable concerns with the clarity of legal terms and terms of art under MEPA.

DEQ 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 that DEQ (as well as other 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.

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	Defined in both MCA and rule.

			future actions must also be considered when these actions 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: (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.			The state agencies should work together to determine if this term needs to be included in rule definitions.
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

Initial Challenge # 4:

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):

It is incumbent upon DEQ to consider the following:

- 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 upon the consent of both the department and the 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, as well as a list of all ongoing and past environmental reviews.
- Review NEPA and its requirements/guidance on opportunities for public engagement as related to level of public interest in 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.
- Take a look at areas to better communicate where specific MEPA reviews stand in the overall process.

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:

Categorical Exclusions:

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

Environmental Assessments:

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:

Supplemental EIS's are addressed in ARM 17.4.621. Do we need any additional clarification for EA's?

Publication on a website will also aid in public transparency and a clearer understanding for all participants in the process.

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 also believe that since no one project is the same, a universal set of categories for when a project / application belongs in a certain environmental review category will not be exact or necessarily useful. They believe that DEQ has developed an established pattern for making this determination, and so injecting new language into the process may cause uncertainty and/or unnecessary confusion. They believe that DEQ should maintain its discretion in making these specific determinations.

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.

More transparency on a public website may also lead to identification of issues that better inform the Legislature of necessary or helpful amendments to MEPA or the agency rules.

#END#