Montana Environmental Policy Act Workgroup

Recommendations and Strategies to Improve MEPA Implementation

June 2024

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This report was prepared by the Montana Department of Environmental Quality (DEQ) on behalf of the 2024 MEPA Workgroup. Recommendations and opinions contained herein represent the views of the MEPA Workgroup and its individual members, not DEQ. Inclusion of recommendations in this report does not indicate that the recommendations had full support of all members of the MEPA Workgroup. Effort was made to include dissenting opinions where present.

MESSAGE FROM DIRECTOR DORRINGTON

Dear Reader,

In late-September 2023, the Montana Department of Environmental Quality (DEQ) kicked off an effort to thoughtfully engage with the public and stakeholders to review implementation of the Montana Environmental Policy Act, or MEPA. Over several months, we held listening sessions around the state and solicited public comments on MEPA. Montanans heard the call and shared their perspectives with DEQ. While reviewing those comments, I established a diverse workgroup to continue the MEPA conversation in a transparent manner.

At the workgroup's first meeting, I proposed three primary subtask groups based on comments received during the listening sessions: Climate Analysis, Process and Applicability, and Public Engagement & Education. While each individual subtask group focused on a specific area of interest to the public, common themes were discussed to raise the awareness of both the workgroup members and the public participants who chose to join the meetings. Among the more complex research topics taken up by the workgroup were MEPA-related litigation history, greenhouse gas assessment and the social cost of carbon, the connection between the constitutional "Clean and Healthful" provision and MEPA implementation, and appropriate levels of public participation.

The robust conversations, public engagement, and open discussions led to the discovery of common MEPA challenges and in every case, recommended solutions to those challenges. The workgroup focused on generating a report that identifies the greatest challenges and strongest recommendations, but these in no way represent the full breadth of the challenges or possible solutions. In identifying challenges, the group attempted to call out any barriers to addressing them, provided a brief rationale describing how the recommendation would address the challenge(s) and/or barriers and why the group selected the recommendation, and described key strategies and next steps to move the recommendation forward, including any expertise, coordination, resources, or training that may be necessary. The final recommendations represent hours of research, conversation, listening, and learning. They were not without dissent, and differing perspectives are shared throughout this report.

My appreciation goes out to all those that made this endeavor possible. I thank my staff who kept us on track and moving forward, as well as the Workgroup members who provided cohesive deliberation on a subject with many diverse perspectives and possible outcomes. I know the conversations were not easy and they will not end with the publication of this final report.

In closing, I offer my utmost thanks to the members of the public who took time to voice their concerns but who remained open to educate themselves on a challenging body of law.

Sincerely,

Christopher Dorrington, Director
Montana Department of Environmental Quality

PURPOSE, SCOPE, AND INTENT

INTRODUCTION

The Montana Environmental Policy Act (MEPA) was adopted in 1971 to create a framework for achieving a harmonious balance between human activities and the environment. It aims to safeguard the right to use and enjoy private property without undue governmental interference, promote initiatives to prevent or minimize environmental harm, and advance the knowledge of ecological systems and vital natural resources within the state (75-1-102(2), MCA).

MEPA is modeled after the National Environmental Policy Act (NEPA) and consists of three main parts. Part 1 establishes and declares Montana's environmental policy, recognizing the impact of human activity on the environment and requiring state government to coordinate plans, functions, and resources to achieve environmental, economic, and social goals. Part 1 guides the interpretation and application of the statutes. Part 2 requires state agencies to implement the policies outlined in Part 1 "through a systematic, interdisciplinary analysis of state actions that have an impact on Montana's human environment," through the drafting of an intentional, written environmental review.[1] Finally, Part 3 establishes the Environmental Quality Council of the Montana Legislature and its role and authority.

Today, executive branch agencies implement the provisions of MEPA through model administrative rules drafted by the state legislature in 1988 and adopted by each agency through its own rulemaking process. These rules outline the general requirements of the environmental review process, the contents of environmental review documents, criteria for determining the significance of environmental impacts, and requirements for public participation in the review process, among other things. The MEPA model rules have not been reviewed in full or amended since the late-1980s.

Since its adoption, MEPA has been the subject of legislation and litigation that have shaped its current framing and implementation. In 2023, a District Court decision in the *Held v. State of Montana* (*Held v. State*) case put a national spotlight on MEPA and what it means for Montanans to have a constitutional guarantee to a healthy environment.[2] The ensuing discussion about MEPA's intent and purpose provided an opportunity for the Montana Department of Environmental Quality (DEQ) to launch a public process seeking input about whether and how its implementation of the act might be improved or modernized.

THE MEPA WORKGROUP

In September 2023, DEQ initiated a statewide effort to foster meaningful public and stakeholder engagement on the topic of MEPA implementation today and into the future. DEQ held a series of public listening sessions to gather input on the MEPA process, implementation, intent, and potential need for

[1] Legislative Environmental Policy Office, Environmental Quality Council, *A Guide to the Montana Environmental Policy Act* (2021), https://leg.mt.gov/content/Publications/Environmental/2021-mepa-handbook.pdf (accessed June 2, 2024).

[2] In March 2020, a group of sixteen Montana youths sued the state, claiming that the state's support of fossil fuels violates the constitutional rights of its residents, infringing on their rights to a clean and healthful environment, among other rights. Most relevant here, the lawsuit specifically targeted a provision in MEPA prohibiting the state from analyzing greenhouse gas emissions and their impacts to the climate. Montana's First Judicial District Court found in favor of the youth plaintiffs in August 2023. As of the date of this report, the state's appeal of the decision is pending before the Montana Supreme Court.

updates to the statutes or implementing rules. These sessions accompanied an open public comment opportunity. The response from Montanans was overwhelming, with participants from diverse backgrounds sharing valuable insights during listening sessions and through written comments. The information and questions gathered formed the foundation for a dedicated working group to continue a dialogue about MEPA implementation.

In January 2024, DEQ Director Christopher Dorrington announced the formation of the MEPA Workgroup. DEQ asked 20 members of the public to join the workgroup, with an intentional focus on bringing together individuals with diverse affiliations and perspectives. Workgroup members were identified based on their experience with MEPA, either through implementation or policymaking, as well as their interest and participation in DEQ's public listening sessions and comment period. Members included private citizens, industry representatives, representatives from higher education and non-governmental organizations, state legislators, and youth.

Based on input gathered through public comment and listening sessions, DEQ proposed three focus areas to guide the workgroup's discussions and established three subtask groups, one for each focus area. Two members of the workgroup were assigned to each subtask group as co-leads responsible for convening meetings, facilitating discussion, and developing recommendations based on member input. Each subtask group had a core membership of interested workgroup members, but members were invited to attend any or all subtask group meetings. The three subtask groups were:

- **Climate Analysis** – focusing on the assessment and disclosure of greenhouse gas emissions and climate impacts under MEPA, including, when appropriate, identification of assessment methodology for analyzing impacts and disclosure of impacts in a clear way.
- **Public Engagement, Outreach and Education** – focusing on public involvement in the decision-making process, including effective public notice, accessibility of MEPA-related documents and information, public comment periods, public meetings, and other aspects that comprise MEPA delivery and transparency. This group also tackled the topic of improved education about what MEPA does and does not require, what parts of MEPA are commonly misunderstood, what types of educational materials are needed, how to provide effective education, the audiences in need of education and outreach, and who is responsible for MEPA education.
- **Process and Applicability** – focusing on clarity, consistency, and procedural continuity, including how MEPA aligns with permitting statutes, how the agency determines significance of impacts, appropriate reference materials, discretion, and other items that contribute to thorough and defensible, appropriately sized MEPA review.

Over the course of five months, these groups met to identify challenges and opportunities in the implementation of MEPA, and draft clear and concise recommendations for consideration by future state policymakers. Each subtask group was asked to bring up to five recommendations forward for discussion with the full workgroup. This report presents the recommendations and strategies that rose to the top, organized by subtask group.

Public Participation Process

Building on the public listening sessions held in October and November of 2023, the MEPA Workgroup held open meetings and encouraged the public to continue sharing questions, comments, and suggestions. To facilitate transparency in the process, DEQ hosted a dedicated web page

(https://deq.mt.gov/about/MEPA) that identified MEPA Workgroup members and their affiliations, advertised the schedule of meetings, shared meeting recordings, and provided access to educational materials. Also on the page, DEQ provided a public comment portal where Montanans familiar with MEPA or interested in the process could submit and view written comments, creative suggestions, and feedback. These comments informed the ongoing conversations and development of recommendations.

As of the close of public comment, over 325 individual comments had been received through the online portal. Comments came primarily from individuals located in Montana, over 70% of whom identified themselves as Montana residents for 15 or more years. About 90% of commenters indicated they are at least somewhat familiar with the MEPA process. The comment portal provided an interactive map viewer, shown below, to identify where commenters live by ZIP code and allow the public and workgroup members alike to review comments and suggestions submitted to the MEPA Workgroup. Additional comments were submitted via email and posted online for review.

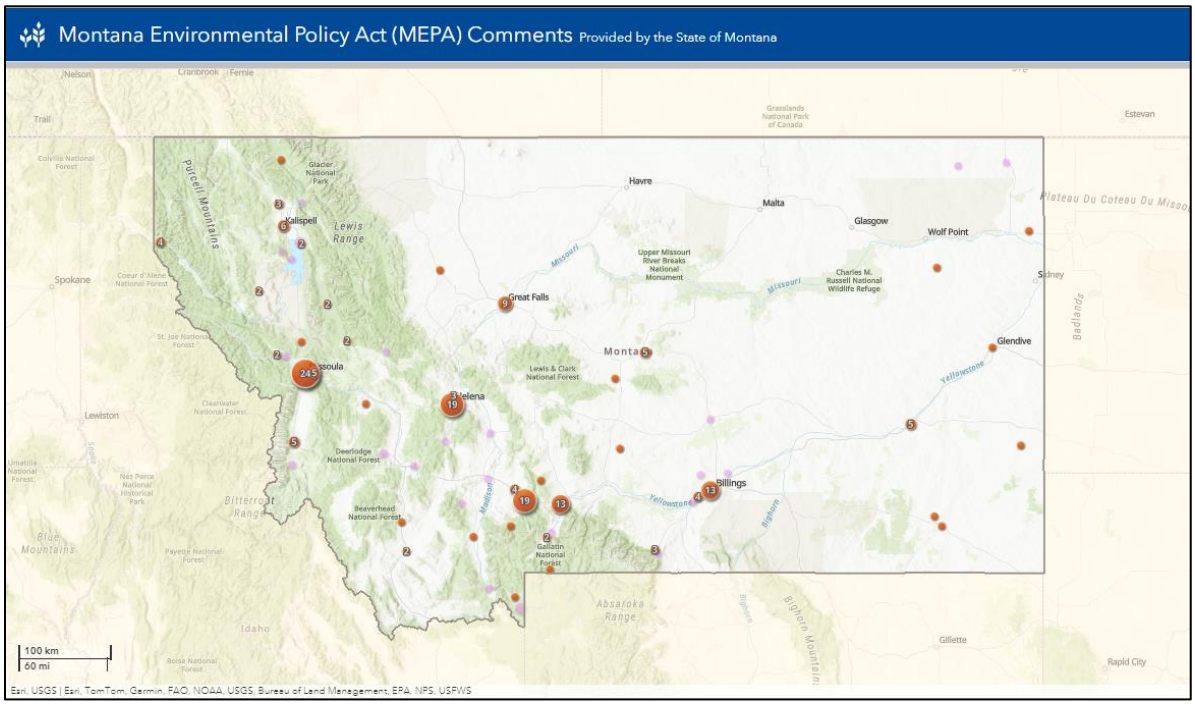

Figure 1. Screenshot of the online mapping tool DEQ used to document and share public comment.[3]

All meetings of the MEPA Workgroup and its subtask groups were open to the public and included time on the agenda designated for public comment. Meetings were publicly noticed on DEQ's website on the MEPA page as well as on the public participation hub and notices were sent via email to over 300 subscribers who signed up to receive updates about the MEPA Workgroup or DEQ public meetings and comment opportunities. Members of the public regularly attended the meetings, primarily via Zoom, and sometimes offered comments for the record. All comments were considered with equal weight throughout workgroup discussions and in the development of the recommendations in this report.

The workgroup's draft recommendations were posted online on May 20 and a draft of this final report was posted on June 12. Over 170 written comments were received on the drafts. Comments came from

[3] DEQ, *Montana Environmental Policy Act (MEPA) Comments*, https://gis.mtdeq.us/portal/apps/dashboards/e53969785a6745c39f1be5ff1d1b8e8d (accessed June 27, 2024).

individuals, educators, state legislators, and health care professionals, as well as organizations and businesses such as the Northern Plains Resource Council, the Frontier Institute, the Montana Environmental Information Center, Climate Smart Missoula, the Montana Coal Council, Gallatin Wildlife Association, and Calumet Montana Refining/Montana Renewables.

The comments shared several key themes, including the constitutional right to a clean and healthful environment, climate change, and public participation. The majority of commenters stressed that MEPA is foundational to environmental protection in Montana and is an important public engagement tool that should be maintained or strengthened. Many commenters disagreed that MEPA is procedural and were generally opposed to any recommendations perceived as weakening MEPA. Some explained that efforts to streamline MEPA or lessen its ability to pause an action until adequate review is complete, limit the public's ability to participate and be heard in the process.

On the topic of climate, most comments contained support for inclusion of impacts on the climate in environmental reviews. Some stated that the recommendations on climate analysis, while a good start, will ultimately be inadequate and many commenters encouraged DEQ to use the existing social cost of greenhouse gases analysis tool to characterize impacts from the full scope / full lifecycle of emissions. A few commenters questioned the wisdom of considering emissions beyond what may be produced on site due to the complexities of such analyses and concern about double-counting. Some cautioned against implementing a tool that has been subject to litigation at the federal level. Others commented that DEQ must clearly define the applicability, scope, and methodology of any climate analysis and ensure the requirements are well understood to reduce legal risk. Several commenters specifically voiced support for the further study of climate analysis models and tools by the Legislature's Environmental Quality Council, while others urged DEQ to use its discretion where possible.

Some commenters suggested that DEQ should expand its analysis of impacts beyond the immediate vicinity of a project, explaining that including downstream and downwind areas would provide a more comprehensive analysis. Others suggested that certain areas of the state should be removed from the possibility of development because of their value to larger environmental systems.

RECOMMENDATIONS

EXECUTIVE SUMMARY

The workgroup developed **12 detailed recommendations** in three key focus areas aligned with the subtask groups described in the previous chapter. The recommendations are intended to provide state policymakers with potential solutions to some of the biggest perceived challenges associated with implementation of the Montana Environmental Policy Act (MEPA). Though the workgroup focused most of its attention on DEQ and DEQ's implementation of MEPA, these recommendations may apply to multiple state agencies.

Each subtask group followed a deliberate process to develop recommendations. They began by discussing key challenges and the existing real or perceived barriers to addressing those challenges. After identifying the key challenges, each subtask group then analyzed possible solutions and developed recommendations for state policymakers to consider.

Throughout the discussions, Department of Environmental Quality (DEQ) staff shared technical expertise from the perspective of one state agency responsible for implementing MEPA. DEQ subject matter experts presented information about current processes and procedures, best practices, and the specific challenges they have experienced implementing MEPA for a variety of agency actions. While DEQ participated in discussions and had an interest in how the workgroup process unfolded, DEQ's role was to present technical information, provide administrative support as needed, and facilitate neutral and transparent information-sharing through which members could share expertise and learn together about the MEPA process.

The recommendations included in this report do not reflect full consensus from the workgroup. Where members disagreed, the differing opinions and opposing viewpoints they shared are documented throughout this report. Final recommendations were authored by the co-leads of each subtask group and shared with DEQ for inclusion in the final report. DEQ provided light editing to ensure consistent format, tone, and style but did not alter the intent behind any recommendation advanced through the subtask groups. This section provides an overview of the key challenges tackled by each subtask group as well as a list of recommendations. Recommendations are presented in more detail in the next section.

Climate Analysis Subtask Group

Following a 2023 district court decision in *Held v. State*, state agencies are no longer statutorily precluded from evaluating greenhouse gas emissions and impacts to climate change in their MEPA analyses if they find that the impacts may affect the quality of the human environment. In the case, the district court found that an existing statutory prohibition on analyzing climate impacts under MEPA violates the right to a clean and healthful environment in Montana's Constitution. As a result, DEQ is taking steps forward to consider greenhouse gas emissions as part of its analyses under MEPA. However, the ruling is under appeal before the Montana Supreme Court and state agencies do not yet have clear direction from the Montana Legislature to appropriately assess greenhouse gas emissions or impacts to the climate. The lack of statutory direction creates an unpredictable regulatory environment for regulators, businesses, and the public.

The Climate Analysis Subtask Group was tasked with evaluating potential next steps for greenhouse gas assessment and/or climate analysis under MEPA, should the district court decision be upheld ahead of the 2025 legislative session. The group discussed the applicability and scope of potential greenhouse gas emissions inventory and disclosure, or climate impact analyses, performed as part of the MEPA process. The group developed three (3) recommendations to address the challenge DEQ faces in the absence of legislative direction as they decide how to move forward following a court decision that permits analysis of climate impacts under MEPA, but that is still under appeal before the Montana Supreme Court.

Public Engagement, Education, and Outreach Subtask Group

Montana's Constitution affords all citizens robust rights to be informed of and participate in their government's decision-making. The public processes required under MEPA are an avenue through which those constitutional rights are afforded. The subtask group acknowledged that while much progress has been made to improve the availability and accessibility of information, better is possible in how the public is educated about MEPA, informed about proposed actions, and included in the decision-making process.

One of the main challenges that influenced discussions of the Public Engagement, Education, and Outreach Subtask Group was the lack of clear responsibility when it comes to public education about MEPA. MEPA established the Environmental Quality Council (EQC) as the entity responsible for tracking MEPA's implementation and providing necessary oversight as well as trainings, public education, and outreach about the law. In the decades since MEPA was adopted, 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. In the absence of central oversight, agencies have provided their own training and education. This can leave gaps in public and legislative understanding of MEPA, add to the capacity challenges of public agencies, and lead to inconsistencies in implementation across agencies.

The subtask group also identified a need for clear guidance on how meetings and public comments are used to inform the decision-making process. For example, public meetings are a challenging component of MEPA's implementation because they mean something different to each person. MEPA gives agencies discretion in most situations to determine whether to hold a public meeting and agencies themselves take different approaches to public meetings – sometimes pursuing formal "hearings" for the purpose of taking public comment for the record, and sometimes holding information sessions, open houses, or some combination of these and other strategies. As a result, there is lack of clarity about whether a public meeting will be held during the MEPA process and if so, at what point and in what format.

Similarly, there is a lack of clarity in what types of comments are most meaningful in the MEPA process. Use of the term "substantive comments" can be especially confusing when conversations about MEPA continually stress its procedural nature. The public participation requirements of MEPA are not merely procedural but can strongly benefit the agency and the product of the MEPA analysis. The workgroup put

forward two recommendations related to improving education about how public meetings and public comments fit into the MEPA process.

Process and Applicability Subtask Group

MEPA applies to a variety of projects and decisions with differing degrees of potential to impact the human environment, differing complexities, and differing levels of public interest. Tight timelines and limited resources, along with increasing development and heightened interest in environmental impacts, add to the challenges faced by those responsible for implementing MEPA.

The Process and Applicability subtask group was asked to investigate potential improvements in MEPA process, clarity, consistency, and procedural continuity. The group discussed how MEPA aligns with permitting statutes, levels of environmental review and how agencies determine significance of impacts, the clarity of key definitions within statutes and rules, and barriers preventing broad agreement about the core intent of MEPA. The purpose of recommendations was to identify ways to improve how DEQ should go about developing thorough and defensible, appropriately sized MEPA review.

Inconsistencies between MEPA timelines and individual permitting timelines was one of the key challenges discussed by the group. In some instances, differing decision timelines create challenges to implementing both statutorily required permitting requirements and the appropriate environmental review required by MEPA. The workgroup identified a possible avenue for streamlining the MEPA process where appropriate to help better align timelines. The group also analyzed the most commonly misunderstood terms used in MEPA statutes and rules and identified a lack of clarity in some definitions of these terms. For instance, some important terms are undefined, and others don't always align across statute and rule.

Similarly, the group identified a lack of understanding of what kinds of projects are subject to MEPA and at what level of review. The lack of clarity has played out in litigation with the workgroup's research showing that between 1971 and June of 2021 nearly 35 cases questioned whether an Environmental Impact Statement (EIS) should have been required rather than the lower-level review, an Environmental Assessment (EA). In about one-third of the cases, the courts determined that an EIS was indeed required as the appropriate level of review. The number of cases and the comparison of wins and losses for the state suggest that clarification is needed about what level of environmental review and public engagement are required for state actions of varying scope and scale.

Finally, the group took a hard look at the core intent of MEPA, a topic that has been the subject of significant debate, legislation, and litigation over the years. Members discussed whether MEPA is procedural or substantive, and what challenges are presented by a lack of clarity on that topic. While

there were significant differences of opinion, most members agreed with a broad characterization of MEPA as an important process-focused statute intended to foster informed decision-making on state actions involving potentially significant environmental impacts, and to inform the legislature as well as the public about those potential impacts.

CLIMATE ANALYSIS SUBTASK GROUP

1A Develop a short-term framework for climate analysis

DEQ should develop a short-term framework for climate analysis in the MEPA process for public input. The climate analysis in the short term should be as robust as required given existing resources, expertise, scientific underpinnings, and obligations and limitations under existing law. It should also ensure predictability for permit applicants and uphold the public's right to know and participate.

In the timeframe before the Montana Supreme Court completes its review and the next Legislature can provide policy direction, DEQ should consider taking the following steps when analyzing a proposed action's climate effects under MEPA:

(a) Quantify the anticipated greenhouse gas (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.

RATIONALE:

DEQ will need to adopt short term policies around climate analysis until *Held* is upheld, reversed, or some other disposition is reached. Many models exist to (1) analyze foreseeable GHG emissions of a proposed action; (2) disclose and provide context for public understanding of a proposed action's 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, DEQ should identify and implement methods that are adapted to the Montana context and incorporate climate analysis in its review process, using its expertise, credible science, and "rule of reason" for guidance.

BARRIERS ADDRESSED:

The Montana Supreme Court has not yet issued a decision regarding climate analysis so state agencies do not have clear direction on the need to address climate impacts in the MEPA process. The Legislature has not provided new statutory direction on climate impacts in the MEPA process following the *Held* decision and will not meet and be able to pass legislation for roughly 8-10 months. DEQ must act before the Montana Supreme Court completes its review of *Held* and before the 2025 Legislature convenes to give policy direction.

A single climate analysis process is not widely agreed upon. While the Council on Environmental Quality's (CEQ) interim National Environmental Policy Act (NEPA) Guidance on Consideration of Greenhouse Gas Emissions and Climate Change provides a process, there have been many comments

challenging the process, the assumptions used, and the inherent uncertainties in the process.[4] The interim guidance was issued in January 2023 and has not yet been finalized. Without a single clear example, there are indeterminate threshold levels for climate analysis, unclear guidance for levels of scoping, and lack of consensus on analysis models to be used.

KEY STRATEGIES:

In the short term, DEQ should 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 decisions, ultimately this draft process should be reviewed by EQC and the Legislature. The overall review/rulemaking process should provide for public review and comment.

POSSIBLE CHALLENGES AND OUTCOMES:

Challenges to implementing this recommendation include legal risk for DEQ. Disagreements with models and analyses employed by DEQ in response to court mandates, as well as permitting decisions that employ those analyses, could result in legal actions.

Differing opinions about whether or how human activities affect climate change will make it challenging for DEQ to inform and educate the public about not only the potential quantity of GHG emissions resulting from a proposed action, but the related impact of those emissions on the climate.

DISSENTING OPINIONS:

- Workgroup members disagreed about the use of terminology in the way the group's recommendations are characterized. Some stated that the term "analysis" is too subjective and should be replaced with the more objective "assessment" for all recommendations. Some workgroup members additionally disagreed about recommending "climate analysis," which they saw as unclear and subject to debate over appropriate content, rather than a more defined process of assessing and disclosing quantified GHG emissions. Others specifically voiced their support for the broader concept of climate analysis.
- There was disagreement about what exactly the *Held* decision means for agency MEPA reviews. Some members characterized the decision as requiring or mandating that agencies analyze GHG emissions and climate impacts under MEPA. Others stated that the court does not have the authority to require agencies to do anything but rather the decision opened the possibility of agencies analyzing GHG emissions and climate impacts under MEPA, if appropriate. They say it is inaccurate to state that DEQ has been directed by the court to conduct a GHG assessment or climate analysis.
- Some workgroup members cautioned against overcommitting to a process that could be time consuming and expensive when it is unclear as to how the Montana Supreme Court will rule on the climate issue.

[4] U.S. Council on Environmental Quality, "National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change," https://ceq.doe.gov/guidance/ceq_guidance_nepa-ghg.html (accessed June 2, 2024).

- Others urged the workgroup to be more direct in centering climate in conversations and not try to tiptoe around the issue to please everyone. They argued that the recommendation is to conduct as robust a climate analysis as possible, regardless of whether that approach is expected to be supported by lawmakers.
- Members disagreed about the urgency of including climate analysis in MEPA reviews. Some have said that the agency must not wait because the district court made it clear that the existing statutory prohibition is unconstitutional and climate impacts are impacts to the human environment that must be analyzed under MEPA. Others stated that the Legislature is the policy-making branch of government and must be allowed to provide direction before DEQ decides how to move forward. Members urged DEQ to work with the Legislature to develop procedures to assess positive and negative effects of projects, keeping balance in mind.
- There was disagreement with the recommendation that DEQ "identify available mitigation measures to avoid, minimize, or compensate for GHG effects." Some members argued that this recommendation is counter to the procedural nature of MEPA, which does not give agencies authority to "withhold, deny, or impose conditions on any permit" based on the findings of its review.[5] The Clean Air Act of Montana would be the appropriate place to regulate GHG emissions and set standards or thresholds for mitigating or avoiding emissions, not MEPA.
- There was significant discussion about which GHG emissions should be included in MEPA review. The U.S. Environmental Protection Agency (EPA) defines analysis levels using Scope 1, Scope 2, and Scope 3 to refer to emissions resulting from different parts of a proposed action.[6]
    - Some workgroup members felt strongly that Scope 1 emissions, limited to direct onsite emissions from mobile and stationary sources as well as fugitive emissions, are most closely aligned with the way MEPA analyses are currently framed. They expressed concern that indirect emissions in Scopes 2 and 3 are difficult to quantify and including them may increase the potential for double counting of direct and indirect emissions across various projects.
    - Others felt that MEPA reviews should account for the full suite of emissions, including indirect (Scope 2 and 3) emissions, potentially resulting from a proposed action in order to present the public with a complete understanding of potential impacts. They argued that this approach would be consistent with MEPA's requirement that agencies consider the full suite of impacts, including downstream impacts, resulting from projects within its regulatory authority. In this case, they said, the Clean Air Act of Montana puts regulation of GHG emissions within DEQ's broad authority to regulate pollutants.
- The workgroup discussed various analysis methodologies and ways to contextualize GHG emissions. Members of the workgroup shared their research of different existing climate analysis methods. The Social Cost of Carbon model was presented and discussed as a possible methodology but was not ultimately advanced as part of the recommendation.

[5] §75-1-201(4)(a), Montana Code Annotated (2023), https://leg.mt.gov/bills/mca/title_0750/chapter_0010/part_0020/section_0010/0750-0010-0020-0010.html (accessed June 2, 2024).

[6] U.S. Environmental Protection Agency, Center for Corporate Climate Leadership, "Scopes 1, 2 and 3 Emissions Inventorying and Guidance," https://www.epa.gov/climateleadership/scopes-1-2-and-3-emissions-inventorying-and-guidance (accessed June 2, 2024).

- Some members of the workgroup expressed strong support for DEQ using the Social Cost of Greenhouse Gas (SC-GHG) in appropriate environmental reviews.[7] Members urged DEQ to go beyond simple quantification to characterize GHG emissions and place them in context. They stated that the SC-GHG is the most widely accepted tool for doing so. Using the tool would allow DEQ and the public to better understand the social impact of GHG emissions as well as the potential social benefits of mitigating or avoiding them. They explained that SC-GHG is an accepted tool for conducting NEPA analyses that is currently being used by numerous state and federal agencies in their decision-making processes. Members recommended that DEQ rely on the established process rather than creating a new approach.
- Others felt strongly that the SC-GHG model is too complex and ambiguous and its use by other agencies is not yet settled. They expressed concern that the model introduces multiple potential sources of uncertainty such as inclusion of projections related to future population and economic growth, estimates of expected climate responses such as temperature rise, monetization of potential impacts and damages, selection of discount rates, and the geographic scope of the assessment. Additional decision-making regarding key variables in the model could result in a wide range of potential outputs. Members explained that over the last decade, the accepted Social Cost of Carbon has been variable, ranging between $5 per ton to $190 per ton based on how different assumptions in the model are applied. These members argued that it is not enough to say the tool must be used because it is the only one that is available or the one that other states or entities are using, and that Montana has time to put more thought into a reasonable path forward.
- Members who did not support use of the SC-GHG model were not universally opposed to potential alternative tools for characterizing and contextualizing GHG emissions.

1B Study the capacity necessary for long-term implementation of climate analysis

DEQ should proceed in the short term assuming that §75-1-201(2)(a), MCA, may be declared unconstitutional by the Montana Supreme Court. DEQ should use the time before the next legislative session to estimate costs, FTE needs, and changes to MEPA that allow for a range of climate analyses. DEQ should work to develop in-house expertise on how climate analyses are done in other jurisdictions.

RATIONALE:

The remaining interim period provides DEQ an opportunity to plan for a potential future in which the Montana Supreme Court upholds the district court decision in *Held v. State* declaring §75-1-201(2)(a), MCA unconstitutional. Such planning would allow DEQ to inform the Legislature about the associated capacity needs of potential policy decisions and enable the agency to justify associated funding or FTE requests. The topic of climate analysis is not new to states and much information can be gained from researching how the discussions have progressed in other jurisdictions. Developing in-house expertise will set the agency up for success if climate analysis becomes a necessary part of MEPA review.

[7] U.S. Environmental Protection Agency, "Report on the Social Cost of Greenhouse Gases: Estimates Incorporating Recent Scientific Advances," November 2023, https://www.epa.gov/environmental-economics/scghg (Accessed June 27, 2024).

BARRIERS ADDRESSED:

The Legislature has not provided funding or full time equivalent (FTE) positions to DEQ to internally analyze climate impacts in the MEPA process and will not be able to consider doing so for 10-12 months.

KEY STRATEGIES:

The long-term strategy is for DEQ to monitor developments in the climate analysis arena and incorporate as appropriate for MEPA, reflecting both court decisions and constitutional and legislative requirements.

POSSIBLE CHALLENGES AND OUTCOMES:

The Legislature may not approve funding or FTE requests from the agency or may take an approach to climate analysis under MEPA that would have different impacts than those studied.

The Montana Supreme Court may not uphold the *Held* decision upon appeal, potentially making this recommendation moot in the short term.

DISSENTING OPINIONS:

Similar to the above recommendation, some workgroup members cautioned against overcommitting to a process that could be time consuming and expensive when we do not yet know how the Montana Supreme Court will rule on the climate issue.

1C Draft an interim study bill for the Environmental Quality Council to consider developing a statutory framework for climate analysis

DEQ should draft an interim study bill that would task the Environmental Quality Council with looking at different climate analysis methodologies, economic impacts, and a predictable Montana statutory framework that will be compatible with any decision by the Montana Supreme Court.

RATIONALE:

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 climate analysis on a path of predictability for Montana businesses, permittees, and the public. While the Legislature will likely contemplate other MEPA legislation in 2025, an interim study may encourage legislators to have an open mind and thoughtfully weigh the pros and cons of certain approaches to climate analysis.

BARRIERS ADDRESSED:

Montana is the first state in the country where a court decision has opened the door to climate analysis rather than a mandate coming from the legislative or executive branch. If it upholds the district court decision in the *Held v. State* case, the Montana Supreme Court is unlikely to spell out what a climate analysis must look like within the context of MEPA.

KEY STRATEGIES:

DEQ should draft the interim study for consideration by the Legislature during the 2025 session. If successful, the EQC would be responsible for carrying out the study during the interim and presenting findings and any resulting legislation for consideration by the 2027 Legislature. There may also be interest from or a role for other interim committees in this study.

POSSIBLE CHALLENGES AND OUTCOMES:

There are strong feelings in the legislative branch about 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.

PUBLIC ENGAGEMENT, EDUCATION, AND OUTREACH SUBTASK GROUP

2A Analyze and consider increasing the capacity of the Environmental Quality Council to carry out statutory duties related to MEPA

The EQC should complete an analysis of available resources and staffing within the Legislative Environmental Policy Office (LEPO) and assess whether capacity exists to fulfill the needs associated with MEPA and its statutory duties. As part of that review, the EQC should complete a more thorough review of Title 75, Chapter 1, Part 3, MCA, to identify any potential statutory revisions necessary to articulate the role of the Council more clearly in today's landscape. That analysis and resulting recommendations should be reported to the Legislative Council for consideration.

The goal is to increase the capacity of the EQC, and thereby the LEPO, with at least one FTE who has a primary workplan dedicated to the oversight of implementation, training, outreach, and education about 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 would provide additional staffing resources for the Legislature more broadly.

RATIONALE:

The subgroup considered various options to increase the resources around education and outreach. In the end, the best fit seems to be with the Legislature itself, specifically the EQC. It is the statutory role of the EQC, and it makes sense to maintain that role at this time. However, the current capacity of the EQC was a major barrier identified by the workgroup. If it is to remain 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 so. The best step forward is to recommend that the EQC review its current capacity and statutory responsibilities (Title 75, chapter 1, Part 3), and complete a needs assessment.

BARRIERS ADDRESSED:

Generally, the capacity of both the EQC and agencies is the primary barrier to resolve challenges related to education and outreach more effectively. The EQC has struggled with competing priorities, staffing turnover, and diminishing capacity to oversee MEPA. 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.

The workgroup identified the following items as barriers to increasing broad understanding of MEPA:

- 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).

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) a current capacity assessment for the EQC 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 EQC provided for in 75-1-324, MCA, including suggested revisions to reflect the current needs, and

(3) a needs assessment of what the EQC is not able to do with their current staffing capacity.

The Legislative Council, and future Legislatures, would decide about 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:

This recommendation is one of many in a competing world of funding available to the Legislature. This workgroup did not identify any specific sources of funding for this work. It is possible the Legislature would not fund this study or any resulting capacity-building recommendations over the long-term.

It could be challenging to compel agencies, beyond DEQ, to participate in the review and complete any resulting recommendations.

Though it could be seen as such, this recommendation is not meant to be a reflection of what existing staff and resources are accomplishing. At the agency level, the current DEQ staff are doing great in their internal training protocols and programs and can serve as a model to build from to help provide more uniform application of the law across the executive branch. However, doing more is not possible without additional staff and resources from the Legislature. Likewise, the current EQC staff is doing tremendous work given the amount of capacity they have to fulfill the obligations.

2B Develop guidance about public meetings to include in all public notices

DEQ's public guidance during the MEPA process should more clearly identify when, what type, and how (structure) public meetings will occur for proposed projects, regardless of the analysis type. Essentially,

DEQ should develop a public disclosure document about how the agency will use its discretion related to decisions about public meetings. DEQ should include such guidance as a standard part of every scoping notice or other initial public notice for MEPA processes that include such documents (i.e. DEQ should not have to add additional public notices to implement this recommendation).

The guidance should be written to 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, and any other information that may help set clear expectations for the process. The guidance should also be included on 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 clearly communicating expectations for both project sponsors and members of the public.

RATIONALE:

The subtask group generally agreed that the most effective meetings increase shared learning, facilitate more substantive comments being provided to the agency, and decrease conflict to the extent possible. One way to reduce conflict is to reduce confusion up front in the analysis process about whether there will be a public meeting, what format the public meeting will take, 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.

BARRIERS ADDRESSED:

This recommendation addresses the lack of clarity and defined expectations about when or if a public meeting is going to be held in the MEPA process. The public does not always understand the different types of public meetings that the agency may hold and the purpose of different formats. Agency discretion is beneficial because it allows flexibility, but it can be a barrier for mutual understanding and shared expectations. In fact, it can at times lead to situations where the unintentional first MEPA disagreement is about process (whether to have a public meeting) rather than about the substance of the proposed action.

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 the guidance to its 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:

Conflict is often unavoidable on difficult projects. Further disclosure will not eliminate conflict but may help temper expectations.

One prewritten statement may be too broad for all situations. DEQ should be adaptive from project to project as well as over time to revise the statement as needed.

Without broader public education and outreach around MEPA, not all members of the public will read or understand the language in the statement. Other strategies for increasing public understanding of MEPA are also needed.

2C Develop guidance on what it means to provide substantive or meaningful public comment in the MEPA process

DEQ should work with a set of key stakeholders to more clearly define the term "substantive or meaningful comment" as it relates to public participation in the MEPA process. The goal is to better describe what types of feedback and comments the agency is seeking. Clear communication about what the agency is seeking, using well-defined terms, can help set expectations for the public. That guidance could be included in similar standard/boilerplate language to the previous recommendation that goes out with every public notice/scoping document, when one is required or completed. Similarly, it should also be posted to DEQ's general MEPA website.

The workgroup identified several 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 impacts may result from a proposed action. 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. The public can share local knowledge that may 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.

RATIONALE:

Members of the public are always entitled to voice their opinion as part of the public process, 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. Participants in the public process should feel heard and the reviewing agency should get actual substantive comments that will make its analyses richer, better informed, and more durable. Providing better guidance about what the agency is seeking through public engagement can help clarify expectations and lead to better analyses.

BARRIERS ADDRESSED:

There is lack of clarity of roles and expectations. Members of the public are not immediately clear what the agency is seeking through 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 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 or consistently engaged in the world of MEPA, so simply asking for "substantive comments" isn't something that is readily understandable.

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 or meaningful comment or to accurately characterize what those are in every context. The definition may vary from project to project. It will be an adaptive and evolving process to refine.

This effort will take resources from within the agency.

DEQ may hesitate to define the types of comments the agency is seeking because the public has a broad right to voice concerns, regardless of whether their comments will be considered substantive or meaningful.

One of the challenges, even in this subgroup, is to get outside of the informed echo chamber. Asking people who regularly participate in or implement MEPA to characterize substantive or meaningful comments will lead to a very different outcome than asking folks who are not as versed in the process.

2D Continue to improve the use of technology to increase the availability and accessibility of information related to MEPA broadly and for specific projects

This recommendation involves two paths forward. Ideally DEQ's website and the EQC website would have some sort of connection between them. First, DEQ should continue to improve its website to host all MEPA guidance and related documents, provide better project-by-project search functionality for ease of public access to all related decision documents, and offer better notification 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 EQC should provide a central clearinghouse of materials about the law and how it is implemented as well as any training resources it has developed.

RATIONALE:

More transparent, accessible, and understandable information will help facilitate more beneficial engagement from the public. Technology presents many opportunities to increase the efficiency of providing and accessing informational materials and documents and there are always opportunities to adapt and improve our use of technology to meet the public information needs. Websites can serve as a critical component of any education and outreach efforts. A clear landing page for MEPA resources will improve the public's understanding of the law and its implementation.

The subtask group identified that there has been significant investment into the DEQ website and acknowledged that it is an ongoing effort to increase functionality for the public. However, the group was unclear about how much intentionality there has been to compile existing MEPA training and outreach materials that are available.

BARRIERS ADDRESSED:

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.

Cost, changing demands, and understanding. The primary barriers related to this challenge are that websites are complex to maintain, the needs are ever-changing, and the technology is evolving. There is also a barrier for members of the public without reliable internet access to use the web resources. Additionally, the public that may not know that the web resources exist or how to use them, which could be a challenge of marketing rather than the simple existence of the resources.

KEY STRATEGIES:

Complete a needs assessment of the current DEQ website regarding functionality for MEPA documents and resources. DEQ should consider including members of the public in the assessment.

The EQC should review technology solutions to meeting needs identified under recommendation 2A, specifically how they can provide more accessible education and outreach related information and materials.

Adaptively manage the needs of the public regarding information access and availability.

POSSIBLE CHALLENGES AND OUTCOMES:

Building new websites could be a costly investment, and it is unclear whose role it would be to maintain and update. The maintenance in and of itself could be challenging.

The primary challenge with websites and technology solutions generally is that they will always be out of date or incomplete.

Splitting roles and responsibilities between agencies and the EQC could create gaps and confusion unless there is intentional coordination and clear delineation of expectations.

Once the resources exist online in an accessible format, the public must be educated about their availability. It may be a challenge to market or sell the importance of the materials to the public.

PROCESS AND APPLICABILITY SUBTASK GROUP

3A Pursue one-time-only funds to complete additional programmatic reviews, where appropriate, to streamline the most straightforward MEPA analyses

Legislation should be brought forward in 2025 to provide DEQ with one time only funds to hire a contractor to develop programmatic EAs for certain permitting actions. The subtask group discussed specific examples of DEQ actions that may be appropriate for programmatic review, such as permitting of asbestos-related activities, high and dry opencut sites, and motor vehicle wrecking facilities.

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

RATIONALE:

The disparity of timelines between permitting statutes and MEPA creates confusion and unnecessary challenges to the implementation of a defensible MEPA analysis. The workgroup reviewed an analysis provided by DEQ of the differences between timelines in permitting statutes and MEPA. A summary table is provided in **Appendix A** of this report. Several of the instances where statutory permitting timelines are shorter than the timelines allowed under MEPA may be better handled through a streamlined MEPA review process, such as programmatic review.

The MEPA rules define programmatic review as "an analysis (EIS or EA) of the impacts on the quality of the human environment of related actions, programs, or policies."[8] MEPA provides agencies with the discretion to determine when programmatic review is warranted for a series of actions. At the federal level, NEPA guidance encourages programmatic review as a way to provide for greater efficiency in analyzing environmental impacts.[9]

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 not anticipated to significantly impact the human environment, the agency has sometimes prepared a programmatic review that discusses the impacts of the series of actions. Existing examples include:

- Underground storage tanks – for existing tanks repairs/modifications and closures
- Solid waste program – for recycling and composting facilities
- Multiple MPDES general permits, including for Storm Water Discharges Associated with Municipal Separate Storm Sewer Systems (MS4)

Providing a programmatic EA, where appropriate, for activities from which impacts are anticipated to be consistent regardless of the applicant or proposed location is a reasonable approach to providing clear

[8] Administrative Rules of Montana, 17.4.603(15), https://rules.mt.gov/gateway/RuleNo.asp?RN=17%2E4%2E603 (accessed June 4, 2024).
[9] Council on Environmental Quality, Effective Use of Programmatic NEPA Reviews, Washington, D.C., 2014. https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Effective_Use_of_Programmatic_NEPA_Reviews_Final_Dec2014_searchable.pdf (accessed June 4, 2024).

direction and expectations for permit applicants, the public, and the DEQ. It is an approach that may help ease the burden of tight timelines where experience suggests a detailed case-by-case review may not add any new information to the decision-making process.

BARRIERS ADDRESSED:

MEPA is not the controlling statute for timelines. Agencies are subject to the MEPA timelines established in 75-1-208, MCA, to complete their environmental review process "unless other time limits are provided by law."[10] Only five (5) of the permitting actions identified by DEQ (see **Appendix A**) did not have different time limits in law and the workgroup identified 13 permitting actions within DEQ that are shorter than the MEPA timelines in 75-1-208, MCA. Most timelines established in statute and rule for permitting actions are unique and were established after careful contemplation and input from stakeholders. This is in part the reason why timelines vary widely and differ so significantly in some instances from the general timelines in MEPA. It could be a challenge to try to amend all statutory permitting timelines to be more consistent and may not be the most appropriate approach given that different types of actions require different levels of technical permitting review.

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 rules also provide for additional types of review – including programmatic reviews and supplemental reviews.

While programmatic reviews provide an opportunity to better sync up permitting and MEPA timelines, development of programmatic reviews is driven by DEQ staff and time. Though there are likely permitting actions that would be better suited to a programmatic review, rather than a full case-by-case EA process, there are limited resources to dedicate to these efforts. It will take time and resources not only to identify permitting areas where defensible MEPA documents could be completed through a programmatic review, but also to develop those programmatic resources.

Further, the legislature maintains an interest in requiring date-certain permitting decisions, inclusive of MEPA reviews, but is less inclined to fully fund the necessary staffing to complete defensible review.

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.

POSSIBLE CHALLENGES AND OUTCOMES:

There may be disagreement on the appropriateness of Programmatic EA and selection of appropriate permitting actions, as outlined above. The workgroup was thoughtful in its approach and permit

[10] §75-1-208, MCA (2023), https://leg.mt.gov/bills/mca/title_0750/chapter_0010/part_0020/section_0080/0750-0010-0020-0080.html (accessed June 4, 2024).

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.

DISSENTING OPINIONS:

- There was disagreement amongst the workgroup about exactly which permitting actions may be suitable for programmatic review. While this recommendation identifies three specific actions for programmatic review, some members argued that programmatic review would not be appropriate for any type of opencut mining activity, particularly given recent legislation and resulting changes to the permitting process that have resulted in heightened scrutiny and litigation. Members stated that further changes to the process, such as through programmatic review, would further exacerbate the issues. Specifically, they explained that the issues surrounding opencut mining relate to site-specific concerns that could not be appropriately addressed through programmatic review.
- This recommendation includes a staggered five-year review of any new programmatic reviews developed through the one time only funding, but some members expressed a desire to see a requirement that all programmatic reviews be subject to periodic updates. DEQ has a number of existing programmatic reviews with a variety of timelines for review. When to consider updating a programmatic review has typically been left to agency discretion. Periodically reviewing and updating programmatic EAs allows the agency to incorporate new information such as changes to regulatory frameworks or the availability of new technology. Members stated that ignoring such new information leaves the agency vulnerable to litigation.

3B Amend §75-1-208, Montana Code Annotated, to clarify agency discretion in extending deadlines and provide for increased transparency about extensions granted

The legislature should consider making 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 75-1201(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 75-2211, 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)~~(8)(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)~~(8)(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 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.

BARRIERS ADDRESSED:

When agencies are held to strict statutory deadlines for completing environmental review and are limited in their discretion to extend their review when needed, the result may be an incomplete or inadequate review that does not hold up in court. This outcome does not serve anyone since court challenges may also slow down the potential permitted action.

There is currently a lack of transparency about what is driving the length of permitting review – technical permitting analyses or MEPA review. When statutory deadlines are missed or when agencies use their discretion to seek an extension, applicants and the public deserve to understand why, and tracking this information is critical if any solutions are to be put forward for agency or legislative consideration.

KEY STRATEGIES:

The proposed statutory amendments must be conducted through the normal legislative process. However, the recommendation regarding public transparency through publication on a website would not require statutory changes and should be considered and evaluated by DEQ independent of its legislative agenda. There has been extensive discussion regarding public transparency surrounding

MEPA, and so establishing a “deadlines” page on the agency website would fall within potential agency actions on this item, with little additional resources.

POSSIBLE CHALLENGES AND OUTCOMES:

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

DISSENTING OPINIONS:

Some workgroup members were opposed to requiring mutual agreement between the agency and applicant as a condition for extending the review timeline. While they agreed that agencies should consult with applicants about any extensions, they argued that ultimately the agency should be allowed to make a final decision to account for resource constraints.

3C Consider revising the MEPA model rules or presenting legislation to clarify problematic terms and definitions

DEQ should review litigation history to see if there are certain terms that are particularly problematic, and possibly survey MEPA practitioners (i.e., the staff responsible for implementing MEPA reviews and/or applicants preparing information to comply with the MEPA review process) to determine whether there are easily identifiable concerns with the clarity of legal terms and terms of art under MEPA.

DEQ should review the MEPA Definitions Consistency Review Table in **Appendix B** 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, leaves space for unnecessary confusion and challenges to the implementation of a defensible MEPA process. Clarifying these definitions would provide more certainty for decisionmakers, MEPA practitioners, applicants, and the public and reduce the need for the courts to rely on federal NEPA definitions or case law.

BARRIERS ADDRESSED:

Instances occur where the definitions of certain terms are not present or are inconsistent in MEPA statue and/or rules which create ambiguity in the interpretation for regulators, applicants, 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 MEPA Definitions Consistency Review Table in **Appendix B** 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.

KEY STRATEGIES:

If particularly problematic terms are identified, state agencies should consider revising the model rules or presenting legislation in the 2025 Legislative Session that would further clarify these terms.

POSSIBLE CHALLENGES AND OUTCOMES:

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.

3D Update the MEPA Handbook to more clearly explain the levels of environmental review and associated public engagement

DEQ should consider a collaborative update to the EQC's "Guide to the Montana Environmental Policy Act," also known as the MEPA Handbook, to provide a clearer, point-by-point explanation of the various levels of environmental review and associated levels of public engagement. As part of the exercise, DEQ should review NEPA and its requirements and guidance regarding opportunities for public engagement as related to level of public interest in a project. Once compiled, DEQ should consider whether rule amendments are warranted.

RATIONALE:

MEPA requirements and guidelines are somewhat scattered throughout statute, model rules, agency rules, and EQC documents. Applicants and members of the public would benefit from a consolidation of this information and the existing MEPA Handbook, which has not been updated in several years, is an obvious place to do so.

The reason(s) why a certain level of review is appropriate for a given action can be confusing and is not well explained. Drawing a clearer connection between the complexity of the agency decision and likelihood of significant impacts and 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.

BARRIERS ADDRESSED:

MEPA statutes and rules are relatively complete in their description of the various levels of environmental review, but they can be somewhat confusing in their presentation. For example, it is generally understood that as the significance and complexity of project impacts increase, the procedural review requirements also increase. In other words, more complex projects with greater potential to significantly impact the human environment require more detailed review. However, exactly what tips the scales or triggers a higher level of review is sometimes less apparent.

There is increasing pressure for a greater level of environmental review and/or more exhaustive public engagement in DEQ's review of state actions. The MEPA rules are clear about the criteria agencies must consider when determining significance, but there is an apparent perception that public interest or controversy should affect the agency's decision about which level of environmental review is appropriate. While the level of public interest does influence agency decisions about the most

appropriate public review process, it is not one of the significance criteria that influences decisions about whether an EA or EIS is the appropriate level of review.[11] Often, public interest and controversy are driven by a perception that the potential impacts should qualify as "significant" and warrant an EIS. There is a need for more education related to "significance."

KEY STRATEGIES:

It may be helpful 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. The agency should compile the list from model rules, agency rules and the MEPA Handbook.

Environmental Assessments:
Anything not exempted from review and that may have a significant impact on the human environment. DEQ should consider defining the various forms of EA, potentially including:

- Checklist EA
- Standard EA
- Mitigated EA
- Programmatic EA

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 EISs are addressed in ARM 17.4.621. DEQ may want to consider whether any additional clarification is needed for supplements to EAs.

POSSIBLE CHALLENGES AND OUTCOMES:

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.

[11] See Administrative Rules of Montana 17.4.608 for significance criteria and 17.4.610 for public review requirements.

There was some crossover in this recommendation with others in this report. This workgroup, through the Public Engagement, Education, and Outreach subtask group also recommended that DEQ provide further guidance on public participation, including the process for holding public meetings and soliciting comments. That subtask group also recommended improving upon the use of technology to better facilitate public engagement and education, such as through a MEPA hub website that would centralize all relevant information in one spot.

3E Consider statutory revisions to clarify legislative intent and the procedural nature of MEPA

DISCLAIMER: There was strong disagreement among workgroup members about this recommendation and much of the dissent focused on how to appropriately characterize the law and any legal challenges or barriers that the recommendation may help to address. This section summarizes the recommendation proposed through the subtask group, the rationale, barriers, and key strategies behind it, and documents the main areas of dissent. However, because so much of the disagreement over this recommendation centered on differing legal analyses, a summary is insufficient to fully capture the lengthy debate. Therefore, the two main written perspectives, as submitted by workgroup members, including differing legal interpretations, are included in full in ***Appendix C****.*

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 and control environmental impacts. Legislation could consolidate the language in statute that limits the ability of procedural (MEPA) challenges to hold up permits that could otherwise be issued based on the technical analysis conducted under the appropriate substantive statutes for those individual permits.

For instance, legislation should make it clear that 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 of the substantive regulatory standards under the Clean Air Act of Montana. The same would be true for any substantive requirement that is part of a necessary permit for the project. If the project requires additional permits from the state, and the courts identify deficiencies in the analysis related to the substantive regulatory standards of those permits, the project should not proceed until all permits are approved. However, in the event that all other substantive regulatory requirements are met, or no other permits are required, the project should be allowed to proceed while procedural MEPA challenges or supplemental analyses continue.

Put another way, MEPA's remedy under 75-1-201(6), MCA, could be revised to include a provision stating that if it were determined by a court that an agency failed in one part of the MEPA process, the remedy would not enjoin the entirety of the permit. The only part of the permit that could be enjoined would be the portion the court determined was inadequate. In such a scenario, the project still could move forward minus the portion of the project where the court found a deficiency. Agencies should be required to remedy the MEPA deficiencies within 90 days of the court's finding. The project sponsor could move forward with the rest of the project at their own risk and be required to bond for the project. For example, if a court found the portion of the MEPA review's operational noise impacts inadequate, the project could still be constructed, but the operational noise impacts could not take place until the agency remedied this section of the environmental review.

Legislation also could reiterate that a balanced view of social, economic, and environmental impacts must be presented in MEPA analyses. Finally, the Legislature should review the duties of EQC 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 conveyed to the Legislature and the Governor.

RATIONALE:

This recommendation encourages the Legislature to 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 projects, development, or impacts of any sort or measure.

The recommendation is assigned to the Legislature, which aligns with the Constitution. 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."[12]

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 the Montana 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.

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 be held up due to a litigant's concerns over whether appropriate consideration was given to an unregulated issue raised by the public that would have no effect on the air quality analysis and over which the agency has no regulatory authority.

BARRIERS ADDRESSED:

See **Appendix C.**

KEY STRATEGIES:

It is 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

[12] Constitution of the State of Montana, Article IX, Section 1, https://leg.mt.gov/bills/mca/title_0000/article_0090/part_0010/section_0010/0000-0090-0010-0010.html (accessed June 5, 2024).

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 AND OUTCOMES:

Statutory changes could 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. However, litigation is always a risk when MEPA is revised.

DISSENTING OPINIONS:

- There was significant discussion and dissent related to this recommendation, including intense debate, and differing legal interpretations that could not be reconciled through the workgroup process. Some members disagreed with the initial premise that there is a lack of understanding or agreement on the core intent of MEPA. They argued that further statutory clarification of MEPA's intent is not necessary because the law is already clear. However, in some ways, the level of debate and disagreement amongst the workgroup made clear that there are real challenges in this arena.
    - Some feel that disagreement over MEPA's implementation and the legal ramifications of that disagreement do not require a major overhaul of the process. Further, they believe that such changes have the potential to backfire for applicants and the public by unintentionally creating further confusion and risking constitutional violations that may result in additional litigation and add even more unpredictability to the MEPA process. By way of example, members pointed to large and small revisions to MEPA over the last decade plus that have sought to "clarify" and "streamline" the statute, but for which any real benefits remain to be seen.
    - Some subgroup members suggested that jumping to statutory overhaul is the wrong approach to a problem that might be better addressed through education. Statutes do not necessarily need to be rewritten when they are poorly communicated or misunderstood.
    - Some members stated that the legal analysis included in the draft recommendation misrepresents the plain language of MEPA statutes, omits important constitutional protections, and skips past multiple decades of judicial interpretation of the statutory and constitutional language. See **Appendix C** for further detail.
- Some subgroup members also disagree with the recommendation to allow permits to be issued when there may be a pending challenge under MEPA, even if the challenge is over procedure rather than substance. They argue that MEPA requires a "hard look" at all potential impacts to the human environment and that MEPA must be completed and the impacts disclosed before a decision is made to allow a project to move forward.
- Some also point out that limiting the ability of the public to seek redress under MEPA in any way may risk legal challenge and point to recent judicial decisions, one of which states, "deny[ing] the people of Montana […] remedies, falls short of the constitutional guarantee and is therefore

facially unconstitutional."[13] Limiting remedies has subsequently been found to be unconstitutional in the *Held* decision.

3F Additional Process Recommendations

Members of the subtask group also discussed additional recommendations for DEQ, though not in as much detail as the items described in the sections above. For example, some suggested that DEQ should consider pursuing cost-sharing agreements for more detailed environmental assessments, upon consent of both the agency and the applicant. This could enable the agency to hire additional staff or contract with outside experts for to conduct detailed reviews that require time and attention but fall below the level of an EIS.

Other members suggested DEQ should review judicial decisions on MEPA challenges to identify instances where there have been questions of law, as opposed to questions of fact. Members explained that this would help focus future discussions on real versus perceived issues. Similarly, some members recommended that DEQ review litigation history to determine if there are trends on this issue that could be addressed through more clarity in statute or rule.

Finally, members discussed finding ways to better communicate where specific MEPA reviews stand in the overall process.

[13] *Park County Environmental Council v. Montana Department of Environmental Quality* (477 P.3d (Mont. 2020)).

LIST OF WORKGROUP MEMBERS

Name	Affiliation
Sen. Pat Flowers	Legislator
Rep. Steve Gist	Legislator
Sen. Greg Hertz	Legislator
Rep. Jonathan Karlen	Legislator
Rep. Rhonda Knudsen	Legislator
Sen. Keith Regier	Legislator
Jon Bennion	Washington Companies
Gordon Criswell	Talen Montana
Clayton Elliott	Montana Trout Unlimited
Krista Lee Evans	Blake Creek Project Management; Montana Irrigators
Darryl James	Consultant
Rich Janssen, Jr.	Confederated Salish and Kootenai Tribes
Derf Johnson	Montana Environmental Information Center
Jen Lane	Stillwater Mining Company
Chelsea Liddell	Private Citizen
Remy Sexton	Student, Park High Green Initiative
David Smith	Montana Contractors' Association
Dan Spencer	University of Montana
Dick Thweatt	Private Citizen
Peggy Trenk	Private Citizen

SUBTASK GROUP CO-LEADS

Public Engagement, Education and Outreach

Clayton Elliott and Sen. Pat Flowers

Process and Applicability

Krista Lee Evans and Darryl James

Climate Analysis

Jon Bennion and Dan Spencer

APPENDICES

APPENDIX A – DEQ REGULATORY TIMELINES TABLE

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.

APPENDIX B – 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

MEPA Definitions Consistency Review				
75-1-220, MCA	**Definition**	**ARM 17.4.603**	**Definition**	**Notes**
				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;

MEPA Definitions Consistency Review				
75-1-220, MCA	**Definition**	**ARM 17.4.603**	**Definition**	**Notes**
				(B) department of fish, wildlife, and parks pursuant to Title 87, chapter 4, part 4; (C) board of oil and gas conservation pursuant to Title 82, chapter 11; or (D) department of natural resources and conservation or the board of land commissioners pursuant to Titles 76, 77, 82, and 85; or (ii) a project or activity involving the issuance of a permit, license, certificate, or other entitlement for permission to act by another agency acting in a regulatory capacity, either singly or in combination with other state agencies. The state agencies should work together to determine if this term needs to be included in MCA definitions.
		(6) "Compensation"	means the replacement or provision of substitute resources or environments to offset an impact on the quality of the human environment. The agency may not consider compensation for purposes of determining the significance of impacts (see ARM 17.4.607(4)) .	Compensation is not defined in MCA. The term is defined in rule to address means to mitigate impact. Mitigation is also not defined in MCA, although the term is used in 75-1-220 (1) "Alternatives Analysis." The state agencies should work together to determine if this term needs to be included in MCA definitions.
(3) "Complete application"	means, for the purpose of complying with this part, an application for a permit, license, or other authorization that contains all data, studies, plans, information, forms, fees, and signatures required to be included with the application sufficient for the agency to approve the application under the applicable statutes and rules.			The term complete application is not defined in rule. This term is likely defined in the underlying permitting statue and rule. The state agencies should work together to determine if this term needs to be included in rule definitions.
(4) "Cumulative impacts"	means the collective impacts on the human environment within the borders of Montana of the proposed action when considered in conjunction with other past, present, and future actions related to the proposed action by location or generic type.	(7) "Cumulative impact"	means the collective impacts on the human environment of the proposed action when considered in conjunction with other past and present actions related to the proposed action by location or generic type. Related future actions must also be considered when these actions are under concurrent consideration by any state agency through preimpact statement studies, separate impact statement evaluation, or permit processing procedures.	Defined in both MCA and rule.
		(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	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.

MEPA Definitions Consistency Review				
75-1-220, MCA	**Definition**	**ARM 17.4.603**	**Definition**	**Notes**
			(c) projects, whether public or private, undertaken to prevent or mitigate immediate threats to public health, safety, welfare, or the environment.	
		(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

MEPA Definitions Consistency Review				
75-1-220, MCA	**Definition**	**ARM 17.4.603**	**Definition**	**Notes**
				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.

MEPA Definitions Consistency Review				
75-1-220, MCA	**Definition**	**ARM 17.4.603**	**Definition**	**Notes**
				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;			The state agencies should work together to determine if this term needs to be included in rule definitions.

MEPA Definitions Consistency Review				
75-1-220, MCA	**Definition**	**ARM 17.4.603**	**Definition**	**Notes**
	(B) department of fish, wildlife, and parks pursuant to Title 87, chapter 4, part 4; (C) board of oil and gas conservation pursuant to Title 82, chapter 11; or (D) department of natural resources and conservation or the board of land commissioners pursuant to Titles 76, 77, 82, and 85; or (ii) a project or activity involving the issuance of a permit, license, certificate, or other entitlement for permission to act by another agency acting in a regulatory capacity, either singly or in combination with other state agencies.			
Terms not defined in MCA or Rule				
Significant	The terms significant and significance are not included in MCA or Rule. Both words are used through MCA and has an entire section in Rule (ARM 17.4.608) that describes how to determine significance. Even though the language in ARM 17-4-608 is thorough, it still leaves room for wide interpretation. **17.4.608** DETERMINING THE SIGNIFICANCE OF IMPACTS (1) In order to implement 75-1-201, MCA, the agency shall determine the significance of impacts associated with a proposed action. This determination is the basis of the agency's decision concerning the need to prepare an EIS and also refers to the agency's evaluation of individual and cumulative impacts in either EAs or EISs. The agency shall consider the following criteria in determining the significance of each impact on the quality of the human environment: a) the severity, duration, geographic extent, and frequency of occurrence of the impact; (b) the probability that the impact will occur if the proposed action occurs; or conversely, reasonable assurance in keeping with the potential severity of an impact that the impact will not occur; (c) growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts; (d) the quantity and quality of each environmental resource or value that would be affected, including the uniqueness and fragility of those resources or values; (e) the importance to the state and to society of each environmental resource or value that would be affected; (f) any precedent that would be set as a result of an impact of the proposed action that would commit the department to future actions with significant impacts or a decision in principle about such future actions; and (g) potential conflict with local, state, or federal laws, requirements, or formal plans. (2) An impact may be adverse, beneficial, or both. If none of the adverse effects of the impact are significant, an EIS is not required. An EIS is required if an impact has a significant adverse effect, even if the agency believes that the effect on balance will be beneficial. How many of the criterion need to be met in order for the determine the impact is significant? Example: If a project has the potential for a “long-term impact” under criterion (a) but the impact is minor, does that mean it’s significant? The agencies (decisionmakers) may determine that it does not reach the level of significance, but the public and courts may interpret the level of significance differently. It may be beneficial for the state agencies to consider revising the language to provide better predictability for the applicant and public. Possible revision: (1) In order to implement 75-1-201, MCA, the agency shall determine the significance of impacts associated with a proposed action. This determination is the basis of the agency's decision concerning the need to prepare an EIS and also refers to the agency's evaluation of individual and cumulative impacts in either EAs or EISs. The agency shall consider the following criteria in determining the significance of each impact on the quality of the human environment. The agency has discretion to determine whether one singular criterion or a combination of criteria rises to the level of a significant impact.			
Direct Impact	The term direct impact is not defined in MCA or Rule, nor is it used in the text with either. The only reference to a direct impact is in EQC’s MEPA Handbook (2019). The state agencies should consider whether the term should be defined in MCA and Rule. https://leg.mt.gov/content/Committees/Interim/2019-2020/EQC/2019-mepa-handbook.pdf			

APPENDIX C – SUPPLEMENTAL LEGAL DISCUSSION ON RECOMMENDATION 3D

This appendix provides two detailed legal analyses associated with the recommendation to revise MEPA to clarify its procedural intent. The first was drafted by Darryl James, co-lead of the Process & Applicability subtask group. The second was submitted as a dissenting opinion by Derf Johnson, a member of the same subtask group.

The following text submitted by Darryl James:

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 bill:

> 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 sparse, 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.

The following text submitted by Derf Johnson:

Montana's Constitution affords the strongest environmental protections of any state in the country. Indeed, delegate McNeil of Montana's Constitutional Convention stated succinctly that:

> Subsection (3) *mandates* the Legislature to provide adequate remedies to protect the environmental life-support system from degradation. The committee intentionally avoided definitions, to preclude being restrictive. And the term "environmental life support system" is all-encompassing, including but not limited to air, water, and land; and whatever interpretation is afforded this phrase by the Legislature and courts, there is no question that it *cannot be degraded*.
>
> *Montana Constitutional Convention*, Vol. IV at 1201, March 1, 1972 (emphasis added).

Subsequent legislation and case law have affirmed and further defined Montanans' right to a clean and healthful environment, including establishing this right as fundamental and requiring a strict-scrutiny analysis when this right is implicated. *Montana Envtl. Info. Ctr. v. Dept. of Envtl. Quality*, 1999 MT 248, ¶ 65, 296 Mont. 207, 988 P.2d 1236 (*MEIC*). Further, in subsequent legislation the Montana Legislature has clearly acknowledged that the Montana Environmental Policy Act (MEPA) is a foundational, "remedy" that, in part, satisfies the Legislature's mandate to provide for a clean and healthful environment that cannot be degraded. Mont. Code Ann. § 75-5-102(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." See also *Park Cty. Envtl. Council v. Mont. Dep't of Envtl. Quality*, 2020 MT 303, ¶ 68, 402 Mont. 168, 477 P.3d 288 (*Park County*).

In the face of these constitutional principles, and well-established law, this recommendation makes the bold statement that "There is a lack of understanding of, or agreement upon the core intent of MEPA," and relies upon numerous incorrect legal and factual assumptions in recommending unlawful, unconstitutional recommendations that will result in a "groundhog day" scenario between the legislature and the courts and will not resolve the ongoing constitutional dispute. Most notably, the recommendation confuses well established, basic principles of the separation of powers, beginning by

stating that "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."

Of course, while the Montana Legislature is tasked with the duty to provide for *adequate* remedies for the environmental life support system, decisions over constitutional interpretation and the adequacy of laws in the face of the constitution are ultimately left to the judiciary, *See*, Art. III, § 1, 1972. Notably, "The [Montana] Constitution vests in the courts the exclusive power to construe and interpret legislative Acts, as well as provisions of the Constitution. Inherent in this power is the responsibility to determine whether a particular law conforms to the Constitution." *State v. Guillaume*, 1999 MT 29, ¶ 14, 293 Mont. 224, 975 P.2d 312 (citing *In re License Revocation of Gildersleeve* (1997), 283 Mont. 479, 484, 942 P.2d 705, 708 (citations omitted)).

Based upon a very flawed analysis of a foundational principle of U.S. Government, this recommendation then goes on to reason that "Nowhere in the Constitution did the people of Montana give the courts the authority to regulate the condition of the environment," which is an absurd and confusing sentence that doesn't address the heart of the matter. This statement also conflicts with several decades of established law.

The recommendation then goes on to state that "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." Indeed, while the MEPA process is procedural, procedural does not mean meaningless, and it has been identified by the legislature as part and parcel to its constitutional obligations, which is further discussed below.

Precipitating from the faulty legal analysis, there are recommendations for "reforming" MEPA. The most troublesome recommendations for changes include that (a) "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," and that (b) "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." Each of these will be addressed in turn.

(a) "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."

The Montana judiciary, in interpreting Montanans' fundamental right to a clean and healthful environment, concluded that the intent of the constitutional delegates "was to provide language and protections which are both anticipatory and preventative. The delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked." *MEIC* at ¶ 77. Based upon this principle – that environmental harm be prevented before it occurs – the legislature has enacted MEPA, recognized its constitutional utility, and asserted that its core purpose is to assure that the public is "informed of the anticipated impacts in Montana of potential state actions." Mont. Code Ann. § 75-5-102(1)(b).

In interpreting legislative and constitutional intent, the Montana Supreme Court further recognized this important principle when stating 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."
>
> *Park County* at ¶ 70.

Indeed, MEPA is a "look before you leap," one-stop shop for engaging the public and analyzing the environmental impacts associated with a particular state action. Relegating MEPA to a simple, procedural paper exercise, as suggested in this recommendation, does not just cut the public out of substantive and meaningful governmental decision-making, but directly conflicts with both the Constitution and legislative intent to assure that governmental actions are anticipatory and preventative, and that harm be prevented in advance of occurring.

(b) "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."

This recommendation suggests a narrowing or elimination of effective remedies to members of the public, in litigation, to prevent harm as part of the MEPA process. Such legislation has already been found to not pass constitutional muster, most recently where the Court in *Park County* noted that "MEPA is an essential aspect of the State's efforts to meet its constitutional obligations, as are the equitable remedies without which MEPA is rendered meaningless." *Id* at ¶ 89.

To conclude, if enacted, the suggested recommendations would not likely meet the high standards that have been set for our right to a clean and healthful environment –through a strict scrutiny analysis – as these changes would not provide the essential protections for the environmental life support system that our constitution affords to Montana's citizens. While the legislature is charged with providing *adequate* remedies to assure a clean and healthful environment, such laws must meet the rigorous test of our fundamental and explicit guarantee to the citizens that our government will provide for *adequate* remedies. These recommendations ultimately conflict with "black letter" law, and have been attempted in the past without success. Additional, similar amendments are likely to only result in more, prolonged litigation, creating uncertainty for the public, DEQ, and applicants, and unnecessarily prolonging a dispute over settled law.