

Subtask Group Recommendations – DRAFT MEPA Process and Applicability for Report

April 29, 2024

SUMMARY DOCUMENT FOR REVIEW AND DISCUSSION

(#1) Initial Challenge Identified: Lack of understanding of, or agreement upon the core intent of MEPA.

The Process and Applicability Subtask Group believes it is important that the Legislature confirm the importance of MEPA as a valuable tool in providing good information to the public, decision-makers and lawmakers as each strives to uphold their Constitutional obligation to “maintain and improve a clean and healthful environment in Montana.”

(#1) Recommendations:

- 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.
- 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.
- Reiterate that a balanced view of social, economic, and environmental impacts must be presented in MEPA analyses.

(#2) Initial Challenge Identified: There is a lack of clarity in some definitions within MEPA.

Instances occur where the definitions are not consistent or not present in MEPA statute 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.

#2 Recommendations:

- The state agencies should review MEPA definitions for consistency to determine whether any ambiguity or inconsistency creates a challenge for the MEPA practitioners preparing the environmental review and whether these terms create a risk for legal challenge. If terms are identified, we recommend state agencies consider revising the model rules or presenting legislation in the 2025 Legislative session that would further clarify these terms.
- Terms for discussion include:
 - Those included in 75-1-220, MCA or only partially defined in statute and/or rule. Examples include: “Alternative” and “alternative analysis” and “environmental review” and “environmental assessment” and “environmental impact statement.”
 - Terms not defined in MCA or rule for discussion. Examples include: “Significant” and “Direct Impact.”

(#3) Initial Challenge Identified: There are inconsistencies in Montana Environmental Policy Act (MEPA) timelines and individual permitting timelines. Instances occur where the differing timelines create challenges in implementing both statutorily required permitting requirements and the procedural aspects of MEPA. Throughout statute there are also inconsistencies in the term complete application, determination of acceptability, and receipt of application – triggers for timelines. The variations in terminology can add to misunderstandings about timelines for development of environmental reviews as well as public participation.

(#3) Recommendations:

- Present legislation in the 2025 Legislative Session that:
 - provides one time only funds to hire a contractor to develop programmatic EA's for:
 - All asbestos permits.
 - High and dry open cut permits.
 - Hard rock exploration, under some circumstances; and
 - Motor vehicle wrecking facilities.
 - prioritizes development of the new programmatic EA's
 - requires that ALL programmatic EAs be reevaluated every 5 years from the date of adoption and provide an initial schedule to allow for a rolling timeline so reevaluation is staggered.

(#4) Initial Challenge Identified: There are instances where the parameters and requirements for categorical exclusions, programmatic environmental assessments, and environmental impact statements should be clarified under MEPA. As the significance and complexity of the impacts increase, the procedural requirements and the level of public involvement also increase. This, however, is not always communicated to the public or understood by stakeholders, applicants, and the public.

(#4) Recommendations:

- Potential cost-sharing agreements for more detailed environmental assessment documents, potentially at the discretion of the department or applicant.
- Collaborate with Public Education and Outreach Subtask Group on related recommendations on use of a single website for notices and clarifying language in notices.
- Review NEPA and its requirements/guidance for level of review related to controversy of a project.
- Better define what is the scope of MEPA and how that incorporates social, economic, and environmental impacted. Balanced reviews. (May be addressed in intent recommendation)

ADDITIONAL WRITTEN RECOMMENDATIONS FOR FUTURE DISCUSSION BY SUBTASK GROUP:

- Recommendation by Dick Thweatt: Review litigation under MEPA to determine how many cases have resulted from ambiguities in the statute or rules as opposed to how many cases resulted from how those rules apply to given unique facts, or how adequately the agency complied with the requirements of the statute or rules. Then identify any needed changes in statute or rules. In other words, if it ain't broke, don't fix it.

- Recommendation by Dick Thweatt: Analyze cumulative impacts on a broad scale by tiering to a programmatic review of statewide, national, and global effects. Put this in an international perspective by relating it to the commitments the United States has made in international compacts. We are all in the same boat, and the role of DEQ in complying with MEPA is to inform the decision maker, the public, and the legislature by telling the truth, the whole truth, and nothing but the truth. Without a global perspective, DEQ would not be telling the whole truth.
- Recommendation by Dick Thweatt: Do not limit the evaluation of impacts in the programmatic to monetary or economic values. For example, include effects that are significant but hard to monetize like extirpation of species and loss of biodiversity.

DRAFT