

Improving the MEPA Process (2000)

Senate Joint Resolution No. 18: Report to the 57th Legislature of the State of Montana

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Chapter 1: The Need to Study the Montana Environmental Policy Act (MEPA)

Introduction

With the enactment of the Montana Environmental Policy Act (MEPA) 29 years ago, the Legislature intended to ensure that state agencies think about the consequences of their actions before they act and that Montanans be informed of and be allowed to participate in state agencies' decisions that affect Montanans and the quality of Montana's human environment. Although the purposes of MEPA are laudable, MEPA itself has not been comprehensively reviewed and the implementation of MEPA has not been extensively analyzed and updated since 1988.

The 1999 Legislature debated the need for significant policy changes to MEPA. In the end, the Legislature concluded that the magnitude and complexity of MEPA implementation and policy issues deserved careful and deliberative study. As a result, the Legislature enacted Senate Joint Resolution No. 18 (SJR 18) (**Appendix A**) requesting the Legislative Environmental Quality Council (EQC) to give priority to the study of MEPA with the goals of:

- (1) evaluating and improving the MEPA process;
- (2) ensuring that the MEPA process results in state agencies making timely, efficient, informed, cost-effective, legally defensible, and ultimately better decisions; and
- (3) ensuring that the MEPA process results in government accountability and that Montanans are informed of and participate in state agency decisions.

The resolution requests that the EQC study include the following elements:

- U** Determine whether the implementation of MEPA is achieving its intended purpose in fulfilling the policy set forth in statute.
- U** Consider a broad range of MEPA issues, including but not limited to existing implementation, issues raised and debated in House Bill No.142 and Senate Bill No.413, identifiable costs and benefits of MEPA implementation, suggestions for improving MEPA, effective citizen participation, and an analysis of successful and efficient implementation of other similar national and state laws.
- U** Actively solicit public and agency participation in the study process.

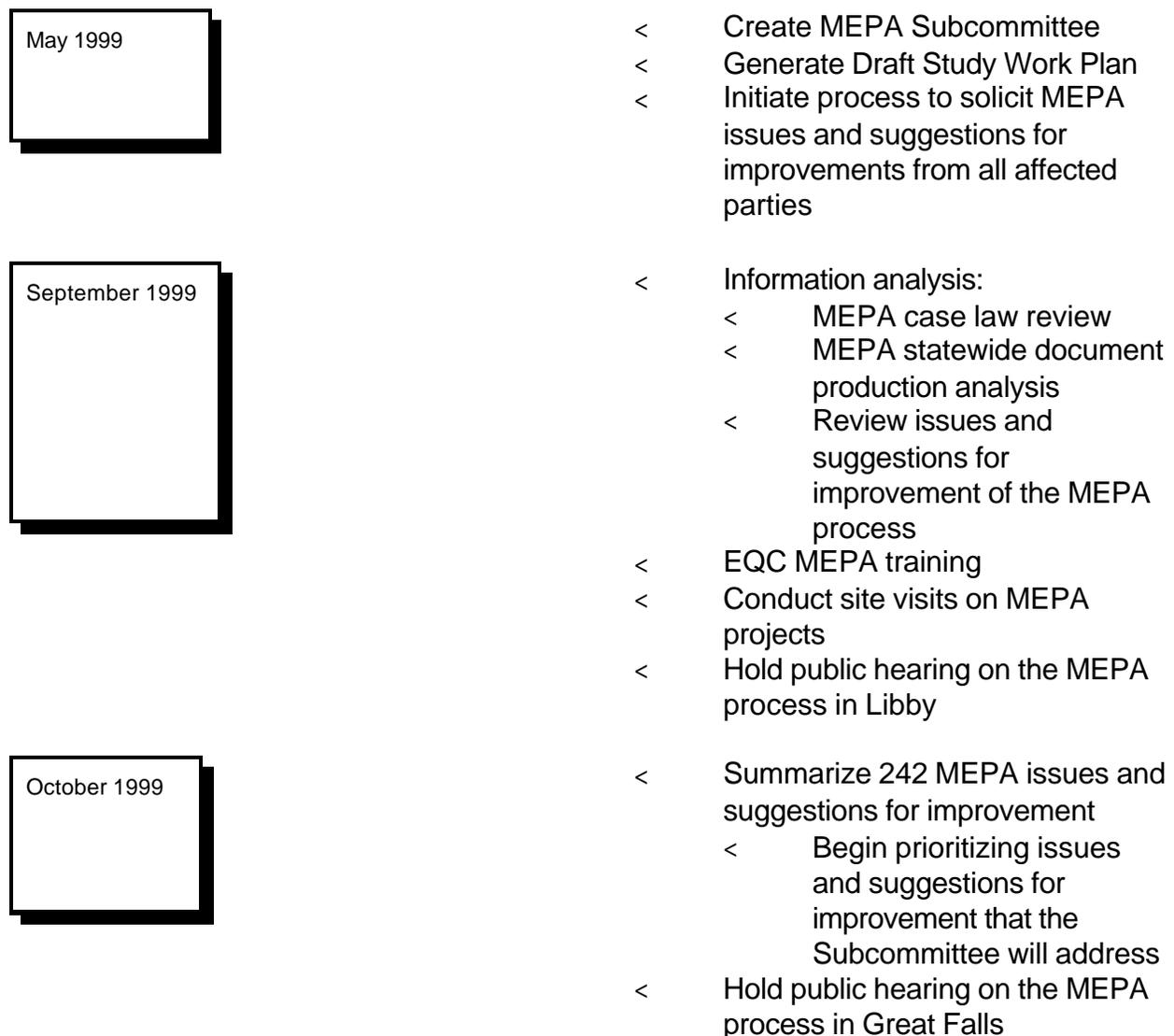
At the end of the legislative session, legislators were polled to determine which studies should receive a higher priority during the interim. This study was ranked 6th out of 24 studies in the legislator poll.

SJR 18 requests that the EQC prepare a report of its findings and conclusions and identify options and make recommendations, including legislation if appropriate, to the Governor and the 57th Legislature prior to September 30, 2000.

The SJR 18 Study Process

To carry out the study requests of SJR 18, the EQC, in May 1999, created a seven-person bipartisan Subcommittee and allocated one full time employee to help staff the Subcommittee. The Subcommittee then adopted a study work plan that outlined the goals and tasks necessary to complete the study by September 30, 2000. The Subcommittee's work was submitted to the full EQC for review and approval. In addition, the Subcommittee held public hearings in Libby, Great Falls, Helena, Missoula, and Billings with a turnout of 132 individuals. The Subcommittee also identified 242 issues and suggestions for improvements from interested and affected parties (see **Appendix C**). **Figure 1-1** outlines the Subcommittee's SJR 18 study process throughout the interim.

Figure 1-1. MEPA Subcommittee's Interim SJR 18 Study Process



December 1999

- < Information and issue analysis:
 - < Agency panel discussions on substantive vs. procedural MEPA and MEPA implementation
 - < Other state environmental policy act review
 - < MEPA document number analysis
- < Prioritization of issues and suggestions for improving the MEPA process
- < Hold public hearing in Helena
- < Review proposal to evaluate public participation

January 2000

- < Information and issue analysis
 - < Develop cost-benefit measurement criteria for the MEPA process
 - < Review timeliness information
- < Review chapter 1 of the SJR 18 report
- < Send out MEPA public participation surveys
- < Hold public hearing on the MEPA process in Missoula

February 2000

- < Information and issue analysis

March 2000

- < Information and issue analysis
- < Preliminary discussion of findings and conclusions
- < Hold public hearing on MEPA process in Billings

April 2000

- < Subcommittee discussion and decision on findings and conclusions
- < Subcommittee discussion of recommendations

May 2000	<ul style="list-style-type: none"> < Subcommittee discussion and preliminary decision on recommendations < Subcommittee review of draft report < Send out draft report for 30-day public comment period
July 2000	<ul style="list-style-type: none"> < Compile public comments < Final EQC Subcommittee decision on any recommendations to the EQC < Subcommittee briefs EQC on the recommendations
September 2000	<ul style="list-style-type: none"> < Final decision by the EQC on the study report and recommendations, including content of proposed legislation < Selection of bill sponsors if needed and development of session strategy

EQC Response to SJR 18

The Legislature requested that the EQC complete a number of study goals and tasks. These study goals and tasks and how the EQC responded to them are set out below.

SJR 18 Study Goals:

Study Goal: Evaluate and improve the MEPA process.

U EQC Response: **Figure 1-1** sets out the EQC's efforts to openly and comprehensively evaluate the MEPA process. **Chapter 10** lists the EQC's findings and recommendations to improve the MEPA process.

Study Goal: Ensure that the MEPA process results in state agencies making timely, efficient, informed, cost-effective, legally defensible, and ultimately better decisions.

U EQC Response: The EQC, in conjunction with the interested and affected parties of the MEPA process, generated information through panel discussions, solicitation of issues and suggested improvements, public hearings, and staff research reports on the criteria required in this

study goal. Much of the information required in this study goal is discussed in this report.

Study Goal: Ensure that the MEPA process results in government accountability and that Montanans are informed of and participate in state agency decisions.

U EQC Response: The EQC, with the assistance of the Montana Consensus Council, conducted a very comprehensive survey of 250 affected parties and individuals to determine whether the MEPA process results in governmental accountability and whether Montanans are informed of and participate in state agency decisions. The Subcommittee also heard public comment on this study goal. **Chapter 9** discusses the results of these surveys.

SJR 18 Assigned Study Tasks:

Study Task: That the EQC, in consultation with any affected parties, seek to identify whether the current implementation of MEPA is achieving its intended purpose in fulfilling the policy set forth in statute.

U EQC Response: The EQC, through panel discussions, public hearings, targeted solicitation of interested and affected parties, and staff-generated and agency-generated reports, produced findings specific to this study goal that are set out in **Chapter 10**.

Study Task: Review and analyze existing implementation of MEPA.

U EQC Response: **Figure 1-1** sets out the EQC's efforts to openly and comprehensively evaluate the existing implementation of the MEPA process. Much of the information required in this study task is discussed in this report.

Study Task: Review and analyze issues raised and debated in House Bill No. 142 and Senate Bill No. 413.

U EQC Response: The EQC reviewed House Bill No. 142 and Senate Bill No. 413 issues and generated findings and recommendations in **Chapter 10** on this study task.

Study Task: Review and analyze any identifiable costs and benefits to agencies, permit applicants, citizens, and the human

environment resulting from compliance with the policy and purpose of MEPA.

U EQC Response: **Chapter 7** analyzes the costs and benefits of the MEPA process.

Study Task: Review and analyze suggestions for improving the MEPA process.

U EQC Response: The EQC actively solicited issues and suggestions from interested and affected parties across Montana. This effort resulted in 242 identified issues and suggestions for improvement (**Appendix C**) that guided the EQC's SJR 18 review effort.

Study Task: Review and analyze whether citizens are effectively participating in the MEPA decisionmaking process.

U EQC Response: The EQC, with the assistance of the Montana Consensus Council, conducted a very comprehensive survey of 250 affected parties and individuals to determine whether the MEPA process results in governmental accountability and whether Montanans are informed of and participate in state agency decisions. The Subcommittee also heard public comment regarding this study task. **Chapter 9** discusses the results of these surveys.

Study Task: Review and analyze the successful and efficient implementation of other similar national and state laws.

U EQC Response: **Chapter 5** reviews and analyzes other similar national and state laws.

Study Task: That the EQC actively solicit the participation of Montana citizens, groups, and individuals whose state-regulated activities are subject to MEPA review, of state and local officials, and of any other persons or groups with interest in the outcome of the study.

U EQC Response: The EQC held public hearings in Libby, Great Falls, Helena, Missoula, and Billings, with a turnout of 132 individuals. The EQC actively solicited issues and suggestions from interested and affected parties across Montana. This effort resulted in 242 identified issues and suggestions for improvement (see **Appendix 3**) that guided the EQC's SJR 18 review

effort. The EQC also sent out 250 surveys to Montanans that attempt to evaluate the effectiveness of MEPA's public participation process. The EQC also sent this report out for a 30-day public comment period and received public comment on its findings and recommendations.

Study Task: That state agencies responsible for implementing MEPA fully cooperate and assist the EQC in this study.

U EQC Response: All of the agencies responsible for MEPA implementation have provided assistance with this study. Specifically, the EQC would like to thank DEQ, DNRC, FWP, MDT, DAg, DOC, and DOL for their assistance.

Study Task: That the EQC, prior to September 30, 2000, prepare a report of its findings and conclusions and identify options and make recommendations, including legislation if appropriate, to the Governor and the 57th Legislature.

U EQC Response: This report document fulfills this study task.

EQC Assigned Additional Study Tasks

Study Task: Train EQC members on the basics of MEPA implementation.

U EQC Response: EQC members received a 3-hour training seminar on MEPA implementation in September 1999.

Study Task: Review MEPA case law, develop summary briefs, and analyze legal trends that the Legislature may be able to address.

U EQC Response: **Chapter 4** analyzes MEPA case law trends and developments.

Study Task: Conduct site visits for a variety of MEPA reviews to get an on-the-ground understanding of what the MEPA process is evaluating.

U EQC Response: The Council conducted three site visits in Libby in September 1999.

Chapter 2: MEPA's Purpose, History, and Process in a Nutshell

CHAPTER SUMMARY

- < At its very core, the EQC views that the policy and purpose of MEPA is to foster:
 - < informed state government decisions;
 - < accountable and open state government decisions;
 - < balanced state government decisions; and
 - < ultimately better state government decisions.

- < Backed by a very broad and unanimous coalition of interests (**Table 2-1**), MEPA was enacted in 1971 by a Republican House (99-0), a Democratically controlled Senate (51-1), and a Democrat in the Governor's Office. The legislation was sponsored by George Darrow, a Republican Representative from Billings.

- < Since MEPA's enactment, successive Legislatures have struggled to achieve a consensus regarding the role of MEPA in directing state environmental policy (**Table 2-2**). Fifty-one pieces of legislation have been introduced that attempted to modify or study MEPA in some way. Twenty-four of those bills were enacted. Nineteen out of the fifty-one bills specifically involved or affected the EQC itself. Proposed legislation, ranging from significantly limiting the scope of MEPA to significantly expanding MEPA's breadth and influence, was frequently introduced and subsequently killed. The Legislature has tended to make incremental changes to the Act over the years.

- < The Legislature has introduced 13 bills over a 29-year period that attempted to exempt specific activities from MEPA review. Ten out of the thirteen bills passed, creating eleven statutory exemptions. Six out of the eleven statutory exemptions are for land management activities specifically.

- < Five pieces of legislation (SB 302 in 1977, SB 388 in 1977, SB 506 in 1979, SB 368 in 1983, and SJR 20 in 1983) were introduced that either would have clarified that MEPA is strictly a procedural statute or would have studied the impacts of the substantive vs. procedural issue. All five pieces of legislation failed. For a more thorough analysis of these bills see **Chapter 6**.

- < The past 29 years of legislative MEPA activity reveal that the scope of activities subject to MEPA review has been incrementally limited, that the Legislature has gradually made it somewhat tougher to litigate MEPA cases, and that the Legislature has clarified that MEPA is a balancing act and that private property considerations should be taken into account. The legislative history also illustrates that attempts to drastically alter MEPA one way or the other have all failed.
- < MEPA requires state agencies to think through their actions before acting. MEPA provides a process that should help ensure that permitting and other agency decisions that might affect the human environment are informed decisions--informed in the sense that the consequences of the decision are understood, reasonable alternatives are evaluated, and the public's concerns are known.
- < MEPA compels state agencies to involve the public through each step of the decisionmaking process. The underlying premise of the public participation requirement is government accountability. MEPA requires state government to be accountable to the people of Montana when it makes decisions that impact the human environment. **Chapter 9** of this report is dedicated to analyzing public participation in the MEPA process.

Chapter 2: MEPA's Purpose, History, and Process in a Nutshell

What is the Purpose of MEPA?

The purpose of MEPA 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 or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans, and to enrich the understanding of the ecological systems and natural resources important to the state (75-1-102, MCA). See **Appendix B** for a copy of the statute.

MEPA is patterned after the National Environmental Policy Act of 1969 (NEPA) and includes three distinct parts. Part 1 is the “spirit” of MEPA. Part 1 establishes Montana’s environmental policy. It requires state government to coordinate state plans, functions, and resources to achieve various environmental, economic, and social goals. Part 1 has no legal requirements, but the policy and purpose provide guidance in interpreting and applying the statute.

Part 2 is the “letter of the law”. Part 2 requires state agencies to carry out the policies in Part 1 through the use of a systematic, interdisciplinary analysis of state actions that have an impact on the human environment.

Part 3 of the Act establishes the Environmental Quality Council (EQC) and outlines the EQC's authority and responsibilities.

To truly understand MEPA's purpose, a brief review of the environmental, public participation, and right-to-know provisions of Montana's 1972 Constitution is necessary. The Legislature enacted MEPA in the spring of 1971 just prior to the Constitutional Convention, which started in November of 1971. The new Constitution was subsequently ratified by Montanans in June of 1972. The language of MEPA is, to some extent, reflected in the Constitution. Noteworthy constitutional provisions include:

Article II, section 3. Inalienable rights. All persons are born free and have certain inalienable rights. They include *the right to a clean and healthful environment* and *the rights of pursuing life's basic necessities*, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, *health* and happiness in all lawful ways. *In enjoying these rights, all persons recognize corresponding responsibilities.* (emphasis added)

Article II, section 8. Right of participation. The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.

Article II, section 9. Right to know. No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Article IX, section 1. Protection and improvement. (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.

The purpose of these constitutional provisions mirror, and are intertwined with, the underlying purposes of MEPA. MEPA should facilitate the ability of state agencies to make better decisions. Better decisions should be balanced decisions. Balanced decisions maintain Montana's clean and healthful environment without compromising the ability of people to pursue their livelihoods as enumerated in MEPA and the Constitution. Better decisions should be accountable decisions. Accountable decisions, as required in MEPA, clearly explain the agency's reasons for selecting a particular course of action. Better decisions are made with public participation. Montana's Constitution mandates open government--people have the right to participate in the decisions made by their government. MEPA requires agencies to open government decisions for public scrutiny. The Montana Constitution also recognizes that people have the responsibility to participate in decisions that may affect them.

At its very core, the EQC views that the policy and purpose of MEPA is to foster:

- U informed state government decisions;
- U accountable and open state government decisions;
- U balanced state government decisions; and
- U ultimately better state government decisions.

One of the ultimate questions of the SJR 18 study is whether MEPA is achieving its intended purpose or not. The EQC attempts to answer this question in **Chapter 10**.

Why Did Montanans Decide to Enact MEPA?

Backed by a very broad and unanimous coalition of interests (**Table 2-1**), MEPA was enacted in 1971 by a Republican House (99-0), a Democratically controlled Senate (51-1), and a Democrat in the Governor's Office. The legislation was sponsored by George Darrow, a Republican Representative from Billings. Although the legislative record is sparse in detail, it reflects some of the reasons why MEPA was enacted. Selective statements from the legislative record include:

- U MEPA "states the responsibility of the state".
- U MEPA spells out that "each citizen is entitled to a healthy environment".
- U "The intent of the bill is to establish a working partnership between the executive and legislative branch of state government concerning the protection of the environment".
- U MEPA "would coordinate the environmental facts of the state".
- U "Montana's productive age populace is leaving the state for employment in other states and if we wanted to keep taxpayers in the state, she suggested passage of HB 66 (MEPA)."
- U "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."
- U The sponsor of this bill "legislates foreknowledge".
- U MEPA "seeks that often elusive middle ground between purely preservationist philosophy and purely exploitive philosophy, and indeed we must soon find that middle ground".
- U MEPA will "establish a unified state policy pertaining to development and preservation of our environment".
- U "As we guide Montana's development we must use all of the scientific, technological, and sociological expertise available to us. This is our responsibility We must avoid creating emotionally explosive situations that have occurred in the past, and indeed, are present right now in some of our communities We must establish a state policy for the environment."

- U "Include people in the decisionmaking."
- U MEPA is "a master plan for the enhancement of our environment and promulgation of our economic productivity".
- U MEPA "commits the state, through its agencies, to consider the environmental consequences of its actions".
- U 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".

Unfortunately, the legislative record does not include transcripts from the floor debates in the House or the Senate. The votes are the only indicator of MEPA's support in those debates.

MEPA's almost unanimous bipartisan approval would, on its face, appear to have reflected a true consensus on the direction of the state's environmental policy. However, at the end of the 1971 regular session, MEPA's \$250,000 appropriation was removed from the state budget, leaving Montana with an environmental policy but no means to implement it. Later, during a second special legislative session in the summer of 1971 and after much debate, the MEPA appropriation was restored, but at a lower level--\$95,000. The battle over MEPA's funding indicates some political division surrounding its enactment that was not reflected in the votes on the House and Senate floors.

Table 2-1. Persons and Interests That Supported or Opposed MEPA During the House and Senate Legislative Hearings in 1971. (Source: Senate and House Minutes, 1971)

Person/Organization	Supported MEPA	Opposed MEPA
Ted Schwinden, Commissioner of State Lands	X	
R.W. Beehaw, Board of Natural Resources	X	
John Anderson, Executive Officer of the Department of Health	X	
Winton Weydemeyer, Montana Conservation Council	X	
Zoe Gerhart, Citizen	X	
Dennis Meehan, Citizen	X	
Wilson Clark, Professor at Eastern Montana College, Billings/Yellowstone Environmental Council	X	
Jan Rickey, Citizen	X	
Polly Percale, Assistant Professor at Eastern Montana College	X	
Ted Reineke, Eastern Montana College Wilderness Club	X	

Chris Field, Montana Scientist Committee for Public Information	X	
Marilyn Templeton, Gals Against Smog and Pollution (GASP)	X	
Cecil Garland, Montana Wilderness Society	X	
Robert Holding, Montana Wood Products Association	X	
Dorothy Eck, League of Women Voters	X	
Robert Fischer, Montana Chamber of Commerce	X	
Ben Havdahl, Petroleum Industry, Rocky Mountain Oil and Gas Association, Montana Petroleum Association	X	
Don Boden, Citizen	X	
Joe Halterman, Good Medicine Ranch	X	
Calvin Ryder, Citizen	X	
Gordon Whirry, Bozeman Environmental Task Force	X	
R.E. Tunncliff, American Association of University Women	X	
Kirk Dewey, Montana Council of Churches	X	
Pat Calcaterra and Margaret Adams, Montana Sierra Club	X	
Don Aldrich, Montana Wildlife Association	X	
David Cameron, Professor at Montana State University	X	
Mons Teigen, Montana Stock Growers	X	
Jim Posowitz, State of Montana Fish and Game Commission	X	
Frank Griffin, Southwestern Miners Association	X	

How Have Successive Legislatures Dealt With MEPA Since Its Enactment Over 29 Years Ago?

Since MEPA's enactment, successive Legislatures have struggled to achieve a consensus regarding the role of MEPA in directing state environmental policy (**Table 2-2**). Fifty-one pieces of legislation have been introduced that have attempted to modify or study MEPA in some way. Twenty-four of those bills have been enacted. Nineteen out of the fifty-one bills specifically involved or affected the EQC itself. Proposed legislation, ranging from significantly limiting the scope of MEPA to significantly expanding MEPA's breadth and influence, was frequently introduced and subsequently killed. The Legislature has tended to make incremental changes to the Act over the years. A closer look at the legislative history reveals some interesting trends and highlights.

The Legislature has introduced 13 bills over a 29-year period that attempted to exempt specific activities from MEPA review. Ten out of the thirteen bills passed, creating eleven statutory exemptions. Six out of the eleven statutory exemptions are for land management

activities specifically. Those activities that are now statutorily exempt from MEPA review include:

- U Public Service Commission activities.
- U Legislation.
- U Temporary exemption of oil and gas drilling permits (1987-89).
- U Certain emergency timber sale situations (fire, fungus, insect, parasite, blowdown, etc.) or time-dependent access situations involving timber. DNRC is exempt from MEPA review to the extent that DNRC's compliance with MEPA is precluded by limited time.
- U Issuance of a historic right-of-way deed (subsequently ruled unconstitutional).
- U Certain actions that involve an amendment to a hard-rock mine operating permit (categorical exclusions, administrative actions, ministerial actions, repair and maintenance actions, investigation and enforcement actions, actions that are primarily economic or social in nature, insignificant boundary changes in the permit area, and changes in an operating plan that was previously permitted).
- U The transfer of permits for portable emission sources.
- U A qualified exemption for reciprocal access agreements on state land. DNRC is not required to analyze or consider potential impacts of activities that may occur on private or federal lands in conjunction with or as a result of granting access.
- U A transfer of an ownership interest in a lease, permit, license, certificate, or other entitlement for use or permission to act by an agency, either singly or in combination with other state agencies. This does not trigger review under MEPA if there is not a material change in terms or conditions of the entitlement or unless otherwise provided by law.
- U DNRC's issuance of lease renewals.
- U Nonaction on the part of DNRC or the Board of Land Commissioners. Even though they have the authority to act, this does not trigger MEPA review.

Juxtapose with the above exemptions two bills that passed (HB 576 in 1991 and HB 344 in 1997), which clarified that transplantation or introduction of fish species and Montana University System land transactions are specifically subject to MEPA review.

Five pieces of legislation (SB 302 in 1977, SB 388 in 1977, SB 506 in 1979, SB 368 in 1983, and SJR 20 in 1983) were introduced that either would have clarified that MEPA is strictly a procedural statute or would have studied the impacts of the substantive vs. procedural issue. All five pieces of legislation failed. For a more thorough analysis of these bills see **Chapter 6**.

Two bills (SB 288 in 1995 and HB 142 in 1999) passed by the Legislature specifically deal with MEPA litigation issues. These bills clarified that the burden of proof is on the person challenging an agency's decision that an environmental review is not required or that the environmental review is inadequate and that in a challenge to the adequacy of an environmental review, a court may not consider any issue or evidence that was not first presented to the agency for the agency's consideration prior to the agency's decision. SB 288 also required that a court may not set aside the agency's decision unless it finds that there is clear and convincing evidence that the decision was arbitrary or capricious or not in compliance with law. In addition, HB 142 required that when new, material, and significant evidence is presented to the District Court that had not previously been presented to the agency for its consideration, the District Court shall remand the new evidence back to the agency for the agency's consideration and an opportunity to modify its findings of fact and administrative decision before the District Court considers the evidence within the administrative record under review. Immaterial or insignificant evidence may not be remanded to the agency. The District Court must review the agency's findings and decision to determine whether they are supported by substantial, credible evidence within the administrative record under review.

Perhaps the most significant clarification in terms of MEPA's purpose and policy occurred with the passage of SB 231 in 1995 (Chapter 352, Laws of 1995). The bill clarified that it is the state's policy not only to encourage productive and enjoyable harmony between humans and their environment, to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans, and to enrich the understanding of the ecological systems and natural resources important to the state, but also to protect the right to use and enjoy private property free of undue government regulation. MEPA has always required an economic and social impact analysis, but SB 231 further specified that when agencies conduct that analysis, regulatory impacts of private property rights and alternatives must be considered.

The past 29 years of legislative MEPA activity reveal that the scope of activities subject to MEPA review has been incrementally limited, that the Legislature has gradually made it somewhat tougher to litigate MEPA cases, and that the Legislature has clarified that MEPA is a balancing act and that private property consideration should be taken into account. The legislative history also illustrates that attempts to drastically alter MEPA one way or the other have all failed.

Table 2-2. MEPA's 29-Year Legislative History

Date	Bill Number	Bill Sponsor	Bill Title/Description	Bill Disposition
1971	HB 66	Darrow	Establish a state policy for the environment and to establish an Environmental Quality Council and to set forth its powers and duties.	Passed
1971	HB 600	Darrow	Provide funding for the Environmental Quality Council.	Failed
1971	HB 35	Darrow	Appropriate \$7,500 to the Environmental Quality Council for the remainder of the biennium to implement the provisions of MEPA.	Passed
1971	HB 36	Darrow	Appropriate \$87,500 for the operation of the EQC for the biennium ending June 30, 1973.	Passed
1974	HB 882	Shelden	Amend MEPA to require state agencies to adopt fees for EISs.	Failed
1974	HJR 73	Brown, Swanberg, et al	Provide for adequate representation of economic aspects of the total human environment.	Passed
1975	HB 340	Shelden	Authorize state agencies to adopt rules imposing a fee to be paid by an applicant for a lease, permit, contract license, or certificate when an agency is required to compile an environmental impact statement. Enacts sections 75-1-202 through 75-1-207, MCA.	Passed
1975	HB 401	Hager	Revise EQC members' terms, make Governor's representative nonvoting. Public members appointed by the Legislature rather than the Governor.	Passed
1975	SB 332	Graham	Repeal MEPA	Failed
1977	HB 57	Marks	Make consistent the statutes on the compensation and expenses paid to legislators. Amended 75-1-302, MCA.	Passed
1977	SJR 14	Story	Reduce the cost and duplication in the EIS process.	Passed
1977	HB 592	Meloy	Amend MEPA, specify the duties of the Governor concerning environmental affairs; expand MEPA authority similar to that of NEPA.	Failed
1977	HB 662	Nathe	Environmental Policy Planning and Legislation Study; redefine role of the EQC and coordinate environmental planning.	Failed
1977	SB 82	Dunkle	Revise EQC membership; remove public members.	Failed
1977	SB 247	Dover	Delete the option of state agencies to charge fees for EISs.	Failed
1977	SB 302	Roskie	Specify that MEPA does not expand the decisionmaking authority of state agencies.	Failed
1977	SB 314	Hager	Change method of filling vacancies on the EQC; have vacancy filled in same manner as original appointment instead of by Governor.	Failed
1977	SB 388	Hager	Amend MEPA to clarify state agency duties in environmental decisionmaking and provide judicial review.	Failed

1979	HB 815	Nathe	Exempt the Department of Public Service Regulation, in the exercise of its regulatory authority over rates, from the requirements of MEPA. Amended 75-1-201, MCA.	Passed
1979	HB 680	Kraalen	Retain MEPA; abolish the EQC	Failed
1979	SB 246	Hager	Remove public members and Governor from the EQC. Change name.	Failed
1979	SB 506	Roskie	Prohibit expansion of agency decisionmaking authority; authorize the EQC to review legislation for potential impacts.	Failed
1981	HB 682	Kemmis	Abolish the EQC	Failed
1981	SB 282	Dover	Establish a legislative energy and natural resources policy review committee; expand role of the EQC as adjudicator of complaints on resource issues.	Failed
1983	HB 489	Bardanouve	Revise existing code language to conform to Treasury Fund structure terminology. Amended 75-1-205, MCA.	Passed
1983	SB 368	Lee	Amend MEPA to explicitly state that it does not expand agency authority beyond existing authorizations otherwise possessed by boards, commissions, and agencies of the state.	Failed
1983	SB 406	Gage	Exempt the DHES from MEPA in its review of subdivisions; require the department to consider the environmental assessments submitted to local governments by developers under the Montana Subdivision and Platting Act.	Failed
1983	SJR 20	Lee	Request the EQC to conduct an interim study of MEPA; focus primarily on whether or not MEPA should expand agency authority to deny or condition permits because of adverse environmental impacts.	Failed
1985	SB 410	Keating	Declare that the issuance of a permit to drill an oil or gas well is not a major action under the provisions of MEPA.	Failed
1987	SB 184	Tveit	Exempt the issuance of oil and gas drilling permits from MEPA until a programmatic environmental statement is adopted.	Passed
1987	HB 830	Keenan	Exempt environmental reviews from small miner confidentiality provision.	Failed
1987	HB 879	Cobb	Appropriation for a programmatic review of the environmental impacts of oil and gas drilling.	Failed
1989	SB 201	Keating	Extend the exemption of oil and gas drilling permits from MEPA until December 31, 1989, the date by which the board must adopt a programmatic EIS. Amended 75-1-201, MCA.	Passed
1989	SB 327	Keating	Exempt certain state actions from MEPA; allow agencies to find on a case-by-case basis that an exempted action or combination of actions is a major action significantly affecting the quality of the human environment; require agencies to adopt this finding as a declaratory ruling pursuant to the Montana Administrative Procedure Act.	Failed
1991	HB 231	Cobb	Establish a process for delivering reports to the Legislature. Amended 75-1-203, MCA.	Passed
1991	HB 576	Harper	Require an environmental review prior to the transplantation or introduction of a fish species.	Passed

1993	SB 384	Lynch	Revise statutes governing reports to the Legislature; remove the requirement for the EQC to transmit a state of the environment report to the Legislature, the Governor, and the public. Amended 75-1-203 and 75-1-324, MCA.	Passed
1993	SB 320	McClellan	Exempt certain actions from MEPA that involve an amendment to a hard-rock mine operating permit (categorical exclusions, administrative actions, ministerial actions, repair and maintenance actions, investigation and enforcement actions, actions that are primarily economic or social in nature, insignificant boundary changes in the permit area, and changes in an operating plan that was previously permitted).	Passed
1993	HB 599	Grimes	Clarify that the Department of State Lands may not prepare an EIS for an operating permit that will not, as modified by mitigation requirements agreed to by an applicant, significantly affect the quality of the human environment.	Failed
1993	SB 253	Gage	Abolish the EQC and transfer some of its duties to Legislative Services.	Failed
1995	HB 274	Wagner	Exempt certain emergency and limited access opportunity timber sales from MEPA.	Passed
1995	SB 231	Mesaros	Revise the purpose and policy of MEPA to include private property right considerations and the impacts of state government actions. Amended 75-1-102, 75-1-103, and 75-1-201, MCA.	Passed
1995	SB 234	Grosfield	Reorganize the state's natural resource agencies. Amended 75-1-201, MCA	Passed
1995	SB 288	Keating	Clarify the burden of proof for actions in which an agency determines not to conduct an EIS; exempt the Legislature from the provisions of MEPA. Amended 75-1-201, MCA.	Passed
1995	SB 347	Crismore	Authorize the Department of State Lands to negotiate reciprocal access to facilitate the management of isolated state forest lands.	Passed
1995	SB 398	Gage	Generally revise the laws governing the Legislative Branch; eliminate the position of Executive Director and create the position of Legislative Environmental Analyst within the Legislative Services Division; move the duties of the staff to the Council. Amended sections 75-1-201, 75-1-323, and 75-1-324, MCA, and repealed sections 75-1-321 and 75-1-322, MCA.	Passed
1997	HB 132	Knox	Require the Departments of Environmental Quality, Agriculture, and Natural Resources and Conservation to report specific compliance and enforcement information to the Environmental Quality Council. Enacted section 75-1-314, MCA.	Passed
1997	HB 344	Peck	Revise the procedures for University System land transactions and clarify that proposed transactions must comply with MEPA and the Montana antiquities laws.	Passed
1997	HB 607	Grinde	Provide for the issuance of historic right-of-way deeds by the Department of Natural Resources and Conservation.	Passed

1997	HB 475	Cobb	Require the Department of Environmental Quality to assess the use of microbes in EISs for metal mines.	Failed
1999	HB 142	S. Anderson	Clarify the treatment of a transfer of ownership under MEPA; limit a court's scope of review for an action or challenge that an environmental statement or review is not required or is inadequate. Amended section 75-1-201, MCA .	Passed
1999	SB 64	Mohl	Exempt the transfer of permits for portable emission sources from MEPA.	Passed
1999	SJR 18	McCarthy	Request that the Environmental Quality Council conduct a study on MEPA.	Passed
1999	HB 346	Raney	Require that state agencies with the responsibility of issuing a permit, lease, license, contract, or certificate for which an EIS is required provide an annual summary of compliance with mitigation measures, etc.	Failed
1999	SB 413	Grimes	Revise various aspects of MEPA; provide definitions; clarify the requirement that state agencies identify and develop methods and procedures that ensure that presently quantified environmental amenities and values may be given appropriate consideration in decisionmaking; require the director of a state agency commenting on a proposed action to determine the significance of the proposed action; clarify the treatment of a transfer of ownership; limit a court's scope of review for an action or challenge that an environmental statement or review is not required or that the statement or review is inadequate; require an environmental impact statement contractor to post a performance bond.	Failed

What Is the MEPA Environmental Review Process?

MEPA requires state agencies to think through their actions before acting. MEPA provides a process that should help ensure that permitting and other agency decisions that might affect the human environment are informed decisions--informed in the sense that the consequences of the decision are understood, reasonable alternatives are evaluated, and the public's concerns are known.

MEPA requires state agencies to conduct thorough, honest, unbiased, and scientifically based full disclosure of all relevant facts concerning impacts on the human environment that may result from agency actions. This is accomplished through a systematic and interdisciplinary analysis that ensures the integrated use of the natural and social sciences and the environmental design arts in planning and decisionmaking. This analysis usually takes the form of an environmental assessment (EA) or an environmental impact statement (EIS).

Before making a decision to implement an action that might affect the human environment, MEPA generally requires the agency to generate and organize information, in the EA or EIS, that at a minimum:

- U describes the need for the action or the agency's proposal (purpose and need);
- U explains the agency's intended action (proposed action);
- U discusses other possible options to the proposed action (alternatives);
- U analyzes the potential consequences of pursuing one alternative or another in response to the proposed action (impacts to the human environment); and
- U discusses specific procedures for alleviating or minimizing adverse consequences associated with the proposed actions (mitigation).

Table 2-3 lists the specific environmental document content requirements of the environmental review process.

Table 2-3. Environmental Document Content Requirements

MEPA Rule Requirements	EA	EIS
A description of the proposed action including the purpose and benefits	Yes	Yes
A listing of entities with overlapping jurisdiction	Yes	Yes
Description of current environmental conditions	Yes*	Yes
Description and evaluation of the impacts (including primary, secondary, and cumulative) on the human environment	Yes	Yes
Description and evaluation of growth-inducing or growth-inhibiting impacts	Yes*	Yes
Description and evaluation of irreversible and irretrievable commitments of environmental resources	No	Yes
Description and evaluation of economic and environmental benefits and costs of the proposed action	Yes*	Yes
Description of the relationship between local short-term uses of the environment and long-term productivity of the environment	No	Yes
Description and analysis of reasonable alternatives including the no action alternative that may or may not be within the jurisdiction of the agency	Yes, when alternatives are reasonably available. (EA rules omit jurisdictional language.)	Yes
An explanation of the tradeoffs among the reasonable alternatives	Yes*	Yes
Agency's preferred alternative identified and its reasons for the preference explained	Yes*	Yes
Listing and an appropriate evaluation of mitigation, stipulations, or other control measures enforceable by the agency or another government agency	Yes	Yes
Discussion of any compensation related to the impacts from the proposed action	No	Yes

Listing of other agencies and groups that have been contacted or have contributed to the document	Yes	Yes
Listing of names consisting of those individuals responsible for preparing the document	Yes	Yes
Finding for need of an EIS and, if an EIS is not required, a description of the reasons the EA is the appropriate level of review	Yes	No

* Note that these rule requirements are not explicitly stated in the EA MEPA rules. However, by their very nature, the EA MEPA rules generally require some form of discussion and analysis here. The scope and depth of the analysis is discretionary.

How Do State Agencies Inform and Involve the Public in State Decisions That Impact the Human Environment?

MEPA compels state agencies to involve the public through each step of the decisionmaking process. This is accomplished by:

- X telling the public that an agency action is pending;
- X seeking preliminary comments on the purpose and need for the pending action (scoping);
- X preparing an environmental review (categorical exclusion (CE), environmental assessment (EA), or environmental impact statement (EIS)) that describes and discloses the impacts of the proposed action and evaluates reasonable alternatives and mitigation measures;
- X requesting and evaluating public comments about the environmental review; and
- X informing the public of what the agency's decision is and the justification for that decision.

The level of public participation is dependent on what type of review the agency is conducting. **Table 2-4** illustrates the procedural differences between an EA and an EIS in terms of discretionary and required MEPA public participation.

Table 2-4. Public Participation Requirements

Public Participation Elements	EA	EIS
Is public comment required?	Discretionary (except for mitigated EAs)	Yes
Are there duration requirements for public comment?	Discretionary	Yes (30 days for the DEIS and 15 days for FEIS)
Are draft revisions required?	Discretionary	Yes (DEIS & FEIS)
Is a scoping process involving the public required?	Discretionary (note that if the agency initiates the scoping process to determine the scope of the EA the agency must follow EIS requirements for scoping)	Yes
Are the sources and text of written and oral comments required to be included in the document?	Discretionary	Yes, within the FEIS
Must the agency respond to substantive comments received?	Discretionary (note that the agency must consider comments that are received)	Yes, within the FEIS

The underlying premise of the public participation requirement is government accountability. MEPA requires state government to be accountable to the people of Montana when it makes decisions that impact the human environment. **Chapter 9** of this report is dedicated to analyzing public participation in the MEPA process.

Chapter 3: MEPA by the Numbers: A Review of MEPA Activities

CHAPTER SUMMARY

- < State agencies are required to send copies of EISs and EAs to the EQC and to the Governor's Office. Agencies that produce MEPA documents generally comply with this requirement.
- < The EQC has the most comprehensive database available of MEPA documents produced and submitted by the agencies over time.
- < In the 10 years between 1989 and 1998, the EQC database has recorded 17,376 MEPA activities, some of which are duplicate MEPA activities for the same project. Five state agencies are responsible for producing 98% of these documents.
- < For the 3 recent years, 1996 through 1998, the EQC database includes 8,843 MEPA activity records. Four agencies produced 99% of these records. The Department of Environmental Quality (DEQ) produced 62% of these records, the Department of Natural Resources and Conservation (DNRC) 26%, the Department of Fish, Wildlife, and Parks (FWP) 7%, and the Montana Department of Transportation (MDT) 4%. Other agencies accounted for the remaining 1% of the records.
- < MEPA compliance in Montana is accomplished mainly through the production of EAs or EA checklists. Of the 17,376 MEPA activities recorded between 1989 and 1999, approximately 0.4% were activities involving the production of an EIS. Another 36% were identified as EAs, which includes EA checklists in the case of some agencies for some project types. The remaining 63% of the activities were identified as "other" MEPA activities that include EA checklists, categorical exclusions, public notices, records of decision, and other minor administrative MEPA activities.
- < In the 3 years between 1996 and 1998, the DEQ produced 5,444, or 62%, of the total MEPA activities documents recorded in the EQC database. Nearly 80% of those were "other" activities other than EISs or EAs. Of that 80%, some 84% of the other efforts were identified as EA checklists for subdivisions.

- < Between 1985 and 1998, state agencies have produced EISs on 60 specific projects. Less than half, or 27, have been on private projects requiring state permitting approval. The remainder were for state-initiated projects, mostly timber sales on state lands, highway construction projects, and programmatic wildlife management plans. The majority of the privately sponsored projects for which an EIS was prepared were for mining projects.

- < The EQC database is not an indicator of how much time is spent on the environmental analysis of projects that may have significant impacts on the environment. Some EAs may take more time and effort than some EISs. Similarly some EISs take far more time and effort to compile and process than others. The database can be used to identify what agencies are doing what type of analysis on what type of projects. It can also provide a relative number of MEPA activities reported from year to year and from agency to agency.

Chapter 3: MEPA by the Numbers: A Review of MEPA Activities

The Environmental Quality Council MEPA Database

Reporting Requirements

Section 75-1-201(1)(c), MCA, requires state agencies that are responsible for producing a "detailed statement" to make a copy of the statement available to the Governor, the EQC, and the public. The MEPA Model Rule II defines an environmental impact statement (EIS) as the detailed written statement required in law, and the term includes all forms of EISs. The MEPA Model Rules X and XI reaffirm the statutory notification requirements and further require agencies to make copies of Draft and Final EISs available to the Governor and to the EQC among others. Also, agencies are required by MEPA Model Rule VI to submit copies of completed environmental assessments (EAs) to the EQC and to provide a list of completed EAs to the Governor and to the EQC on a quarterly basis.

The Records

Essentially, agencies submit EIS and EA documents to the Governor's Office and the EQC. The Governor's Office does not have a central repository or historical database of these documents. The EQC has been entering these documents into a computer database for many years and is able to provide some historical information for analysis. What are the "records" reported to and logged into the EQC database? Documents prepared by agencies conducting an environmental review of proposed agency actions take many forms depending on the nature of the proposed action. The type of documents submitted to and logged into the EQC database include environmental assessment checklists, preliminary environmental reviews, categorical exclusions, environmental assessments, draft or final environmental impact statements, records of decisions, public notices, and a historic laundry list of other administrative MEPA decision statements that some agencies have reported over the years. MEPA activities that are submitted to the EQC are logged into the EQC database by the date they are received.

The EQC MEPA database includes all MEPA-related documents that were submitted to the EQC by state agencies between the years 1971 and 1999 except for the years 1978 through 1986. MEPA activities for those 9 years were not logged into the database, but the information exists in archived files. Documents that were not submitted are not recorded in the database. Titles and descriptions of documents submitted are recorded as they were reported by the agencies. For the years between MEPA enactment in 1971 and 1998 (not including the missing 9 years between 1978 and 1986), the EQC database contains 21,060 records. The 10-year time period between 1989 and 1998 contains 17,376, or 83%, of the total database records and reflects the most accurate data for comparisons due to consistency of reporting and data entry efforts.

What Agencies Implement MEPA?

The answer to this question, based on the number of MEPA documents submitted to the EQC between 1989 and 1998, is shown in **Figure 3-1**. The chart shows that five state agencies accounted for 98% of the total MEPA document activity during that 10-year period, with the Department of Environmental Quality/Department of Health and Environmental Sciences (DEQ/DHES) accounting for over half, or 54%, of the total.

The 2% "Other" agency category consists of 329 records mostly from the Department of Commerce relating to department notices of intent to release grant or loan funds for local government projects, plus a smaller number of MEPA activities that were reported by the Departments of Agriculture and Livestock.

The data in **Table 3-1** provides the basis for the statistics in **Figure 3-1** and much of the information in this chapter. Following agency reorganization in 1995, the former Department of State Lands (DSL) programs, which accounted for approximately 9% of the total MEPA activities reported in the 10-year period (**Figure 3-1**), were incorporated into the Department of Natural Resources and Conservation with the exception of the DSL mining programs (hard-rock, opencut, and coal), which were incorporated into the Department of Environmental Quality (DEQ). All of the DHES environmental programs were incorporated into the new DEQ agency, so the MEPA activities shown for the

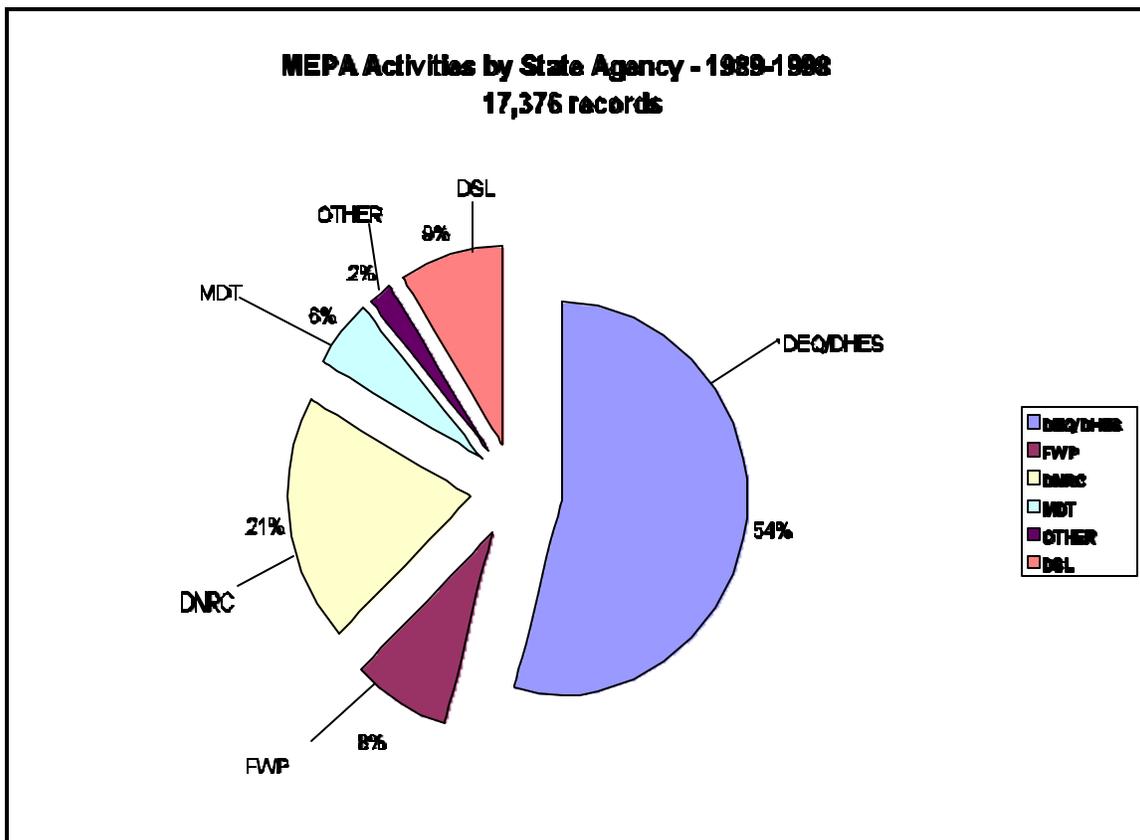


Figure 3-1

DEQ/DHES are actually DHES activities prior to 1995 and DHES plus DSL mining activities since 1995.

In an effort to review the most current status of MEPA activity in those agencies that implement MEPA and to remove any historic bias resulting from changes in agency reorganization, program procedures, or database input decisions, **Figure 3-2** shows the MEPA document activities for the most recent 3 years from 1996 through 1998.

These are the years following the 1995 reorganization of DHES, DSL, DNRC, and other state agencies and reflect the most current status of MEPA implementation by the agencies. Comparing **Figure 3-2** with **Figure 3-1** for the previous 10-year period, the MEPA activities of the former DSL are now being reported by DEQ and DNRC. Following reorganization, MEPA activities for DEQ and DNRC increased from 54% to 62% and 21% to 26% of the past 3 year totals respectively. For these 3 years, DEQ, DNRC, and FWP have accounted for 95% of the MEPA document activity recorded in the EQC database, and these three state agencies, plus the Montana Department of Transportation (MDT), account for 99% of the total MEPA implementation activities reported to the EQC. Essentially, the implementation of MEPA in Montana involves the MEPA activity of these four agencies. With limited exceptions (1% or approximately 88 of the 1996-1998 reported MEPA activities), the decisions of the Departments of Agriculture, Livestock, and Commerce are seldom determined to be subject to the environmental analysis requirements of MEPA. The EQC database rarely, if ever, records a MEPA analysis of

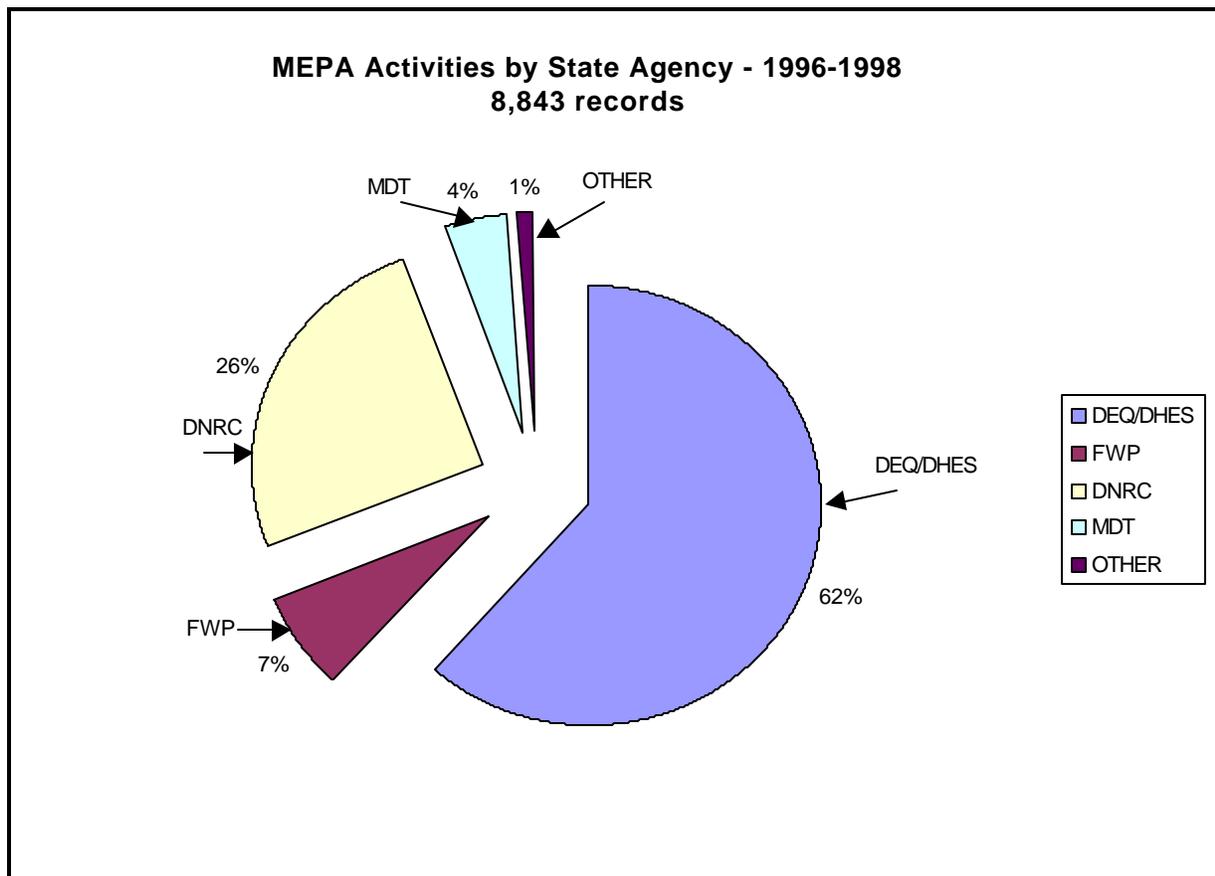


Figure 3-2

decisions made by the following state agencies: Labor and Industry, Public Health and Human Services, Administration, Revenue, Military Affairs, Corrections, and Justice and other boards, committees, and administratively attached organizations. Decisions by the Legislature and the Public Service Commission are statutorily exempt from MEPA.

MEPA Activities 1989-1998

The information in **Table 3-1** is a summary of information submitted to the EQC by state agencies and entered into the database. The EIS category may include multiple recordings of the same project if, for example, a draft, final, and supplemental EIS were provided to the EQC and entered in the database. The actual number of projects for which an EIS was prepared by a state agency in the 14-year period between March 1985 and June 1999, as reported by the agencies, is shown in **Table 3-6**.

The EA category may similarly reflect duplicate entries for the same project and may include some EA checklists if the agency reported them as EAs. Generally, an EA is a more lengthy document providing a more in-depth analysis of the impacts of a proposal than an EA checklist, the vast majority of which are included in the "Other" category. However, a review of the individual records in the EQC database indicates that this distinction between EAs and the EA checklist is sometimes blurred between reporting agencies and programs. An EA checklist is a type of EA and is reported that way by some programs.

The information in **Table 3-1** may be broadly used as a measure of relative agency workload, although such interpretations should be made with caution. For example, one complex EIS or EA may take far more effort than the time it takes to produce several hundred EA checklist documents. Similarly, not all project EAs are made the same. One may be very complex or controversial and very work-intensive, while another could be a relatively simple review that can be conducted in a few hours.

Table 3-1. MEPA Activities By State Agency - 1989-1998*

	DEQ/ DHES	FWP	DNRC	MDT	OTHER	DSL	TOTALS
1998							
EIS	4	1	2				7
EA	306	94	518	3	1		922
other	1452	84	209	132	25		1902
<i>year total</i>	<i>1762</i>	<i>179</i>	<i>729</i>	<i>135</i>	<i>26</i>		<i>2831</i>
1997							
EIS	2	2	4				8
EA	299	107	458	13	2		879
other	1446	96	267	112	32		1953
<i>year total</i>	<i>1747</i>	<i>205</i>	<i>729</i>	<i>125</i>	<i>34</i>		<i>2840</i>
1996							
EIS	3	2	7	1			13
EA	453	114	413	7	3		990
other	1479	145	391	124	31		2170
<i>year total</i>	<i>1935</i>	<i>261</i>	<i>811</i>	<i>132</i>	<i>34</i>		<i>3173</i>
1995							
EIS	5	2	1			2	10
EA	386	64	235	5	4	10	704
other	1318	169	158	127	71	236	2079
<i>year total</i>	<i>1709</i>	<i>235</i>	<i>394</i>	<i>132</i>	<i>75</i>	<i>248</i>	<i>2793</i>
1994							
EIS	1	3	2			1	7
EA	317	73	256	5	6	20	677
other	1100	203	1	91	58	432	1885
<i>year total</i>	<i>1418</i>	<i>279</i>	<i>259</i>	<i>96</i>	<i>64</i>	<i>453</i>	<i>2569</i>
1993							
EIS	1	2		1		2	6
EA	272	88	67	15	6	85	533
other	20	139		79	22	352	612
<i>year total</i>	<i>293</i>	<i>229</i>	<i>67</i>	<i>95</i>	<i>28</i>	<i>439</i>	<i>1151</i>

	DEQ/ DHES	FWP	DNRC	MDT	OTHER	DSL	TOTALS
	1992						
EIS	2		2	2	1	5	12
EA	210	48	222	5	5	139	629
other	6	12	3	50	18	189	278
<i>year total</i>	<i>218</i>	<i>60</i>	<i>227</i>	<i>57</i>	<i>24</i>	<i>333</i>	<i>919</i>
	1991						
EIS			2	1	1	4	8
EA	160	10	147	11	2	58	388
other	2			72	14	3	91
<i>year total</i>	<i>162</i>	<i>10</i>	<i>149</i>	<i>84</i>	<i>17</i>	<i>65</i>	<i>487</i>
	1990						
EIS			1				1
EA	99	7	210	13	8	39	376
other	3			21	9		33
<i>year total</i>	<i>102</i>	<i>7</i>	<i>211</i>	<i>34</i>	<i>17</i>	<i>39</i>	<i>410</i>
	1989						
EIS	1		2		2		5
EA	93	1	2	39	1	25	161
other	1			28	7	1	37
<i>year total</i>	<i>95</i>	<i>1</i>	<i>4</i>	<i>67</i>	<i>10</i>	<i>26</i>	<i>203</i>
TOTAL	9441	1466	3580	957	329	1603	17376

*Source: EQC MEPA documents database. Data is shown on a calendar-year basis.

Table 3-1 definitions and interpretations of data:

"EISs" include activities related to the production of environmental impact statements in any form, including draft, final, programmatic, and supplemental EISs.

"EAs" include activities related to the production of environmental assessments in any form, including draft, final, supplemental, revised, and mitigated EAs, and preliminary environmental reviews.

The "Other" category is a catchall for all other reported MEPA activities that do not involve the actual production of either an EIS or an EA document and includes such activities as categorical exclusions, EA checklists, public notices, records of decisions, and other more administrative or procedural MEPA activities that some of the agencies report to the EQC.

The information in **Figure 3-3** shows the type of MEPA documents that were reported to EQC for the past 10 years by calendar year and further separates them into three categories (EIS, EA, and Other) using the same definitions as noted previously. The information indicates that since 1994, the number of MEPA documents reported to the EQC has remained fairly constant, between a total of 2,500 to 3,000 per year. The large jump in the total number of MEPA documents filed between 1993 and 1994 is mostly the result of the advent of the EA checklist being used by state agencies, most notably in the DEQ subdivision program.

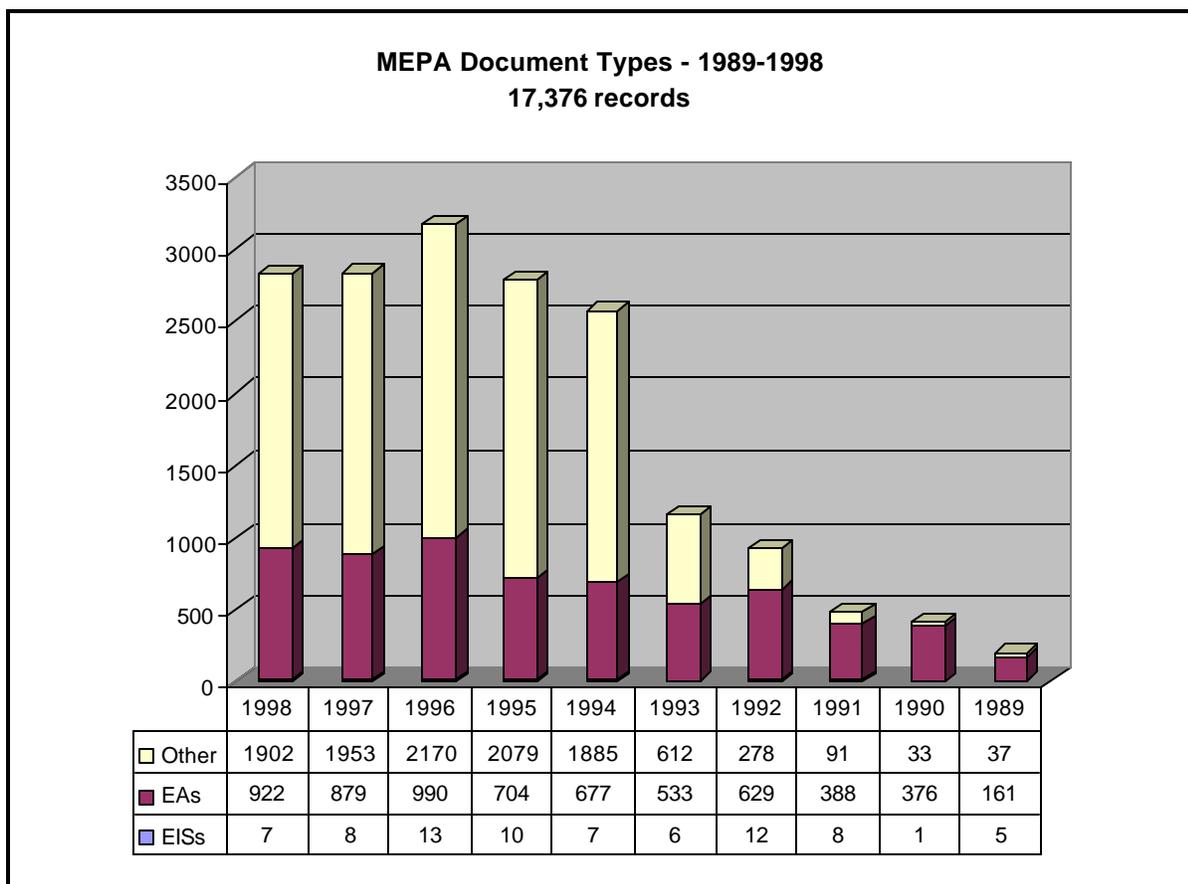


Figure 3-3

A further analysis of what type of MEPA activities are being conducted by the agencies is shown in the following charts. They show a breakdown of the MEPA activities reported by the three most active agencies over the 3 years from 1996 through 1998.

Figure 3-4 shows the 5,444 MEPA documents and activities reported to the EQC during the past 3 years by the DEQ by document type. The most time-consuming documents are usually the 9 EIS document efforts followed by the 1,058 EA efforts. Of the 4,377 "Other" documents reported, 3,672 or 84% of them were identified as EA checklists for subdivisions. Individual EA checklists are generally prepared with minimal agency effort, but thousands of them represent a considerable agency and EQC effort.

For comparison, **Figure 3-5** shows a breakdown of the 645 MEPA documents and activities reported to the EQC during the past 3 years by FWP. Most of the "Other" category includes EA checklists and records of decision on EAs that the agency produces. Much of the agency's MEPA activities involve the permitting of private game farms (now alternative livestock ranches), fish ponds, and upland bird farms and the acquisition and improvement of public access sites. The number of EAs prepared by FWP is similar to the number of "Other" MEPA documents and activities that it reports.

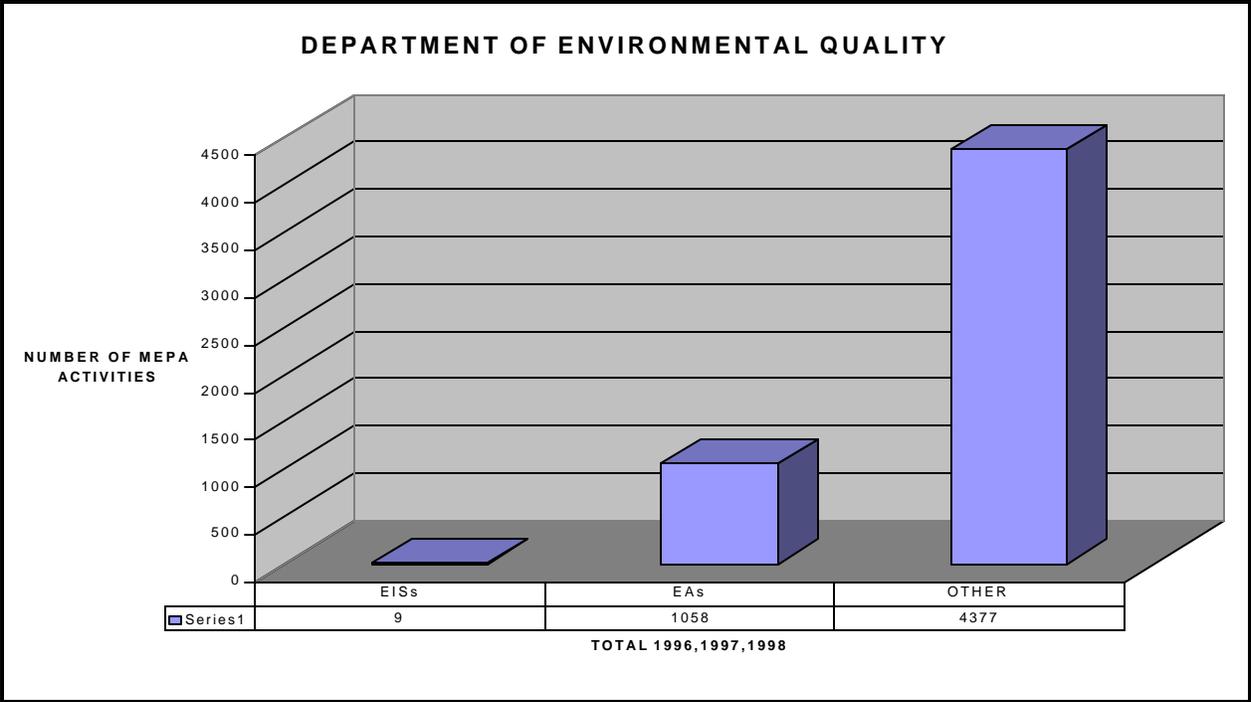


Figure 3-4

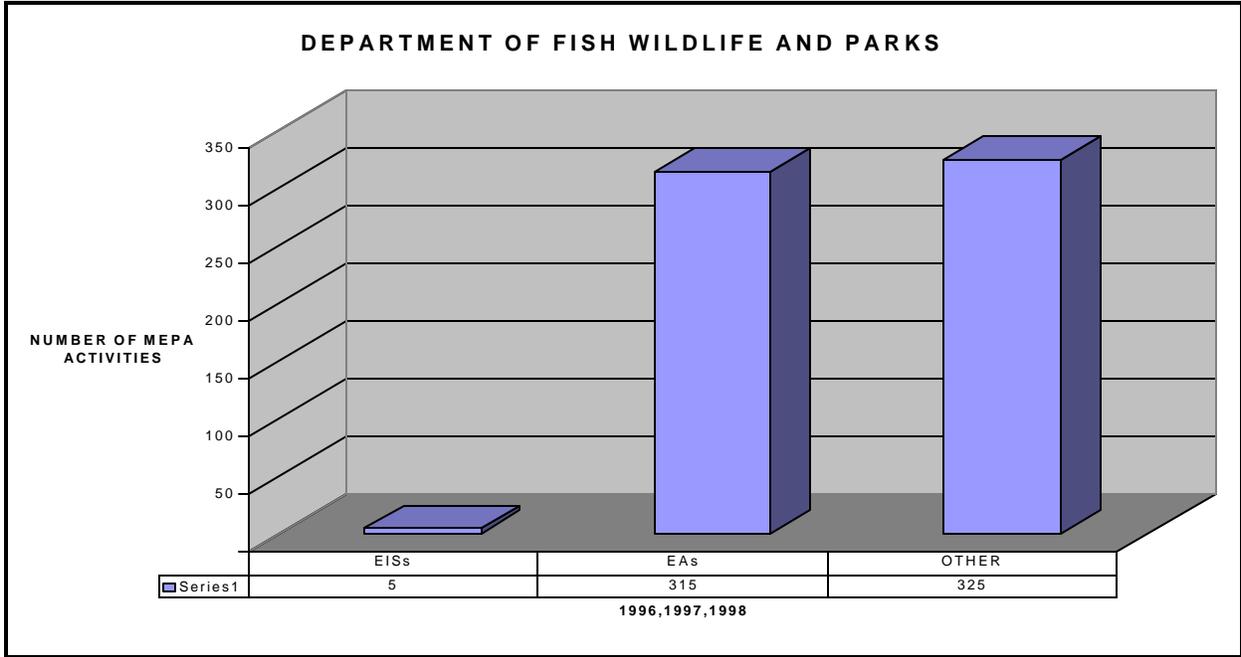


Figure 3-5

For the final comparison, the 2,269 MEPA documents prepared by the DNRC during calendar years 1996 through 1998 and submitted to the EQC are shown in **Figure 3-6**. Of the 1,389 EAs submitted during the 3-year period, 799, or about 58% of the total, were EAs for decisions regarding the issuance of oil and gas drilling permits. This format for reporting MEPA review of oil and gas drilling permits began following the production of a programmatic EIS for these activities by the Board of Oil and Gas. In the "Other" category, 66%, or 576, of the 867 MEPA documents and activities are EA checklists for land use lease permits.

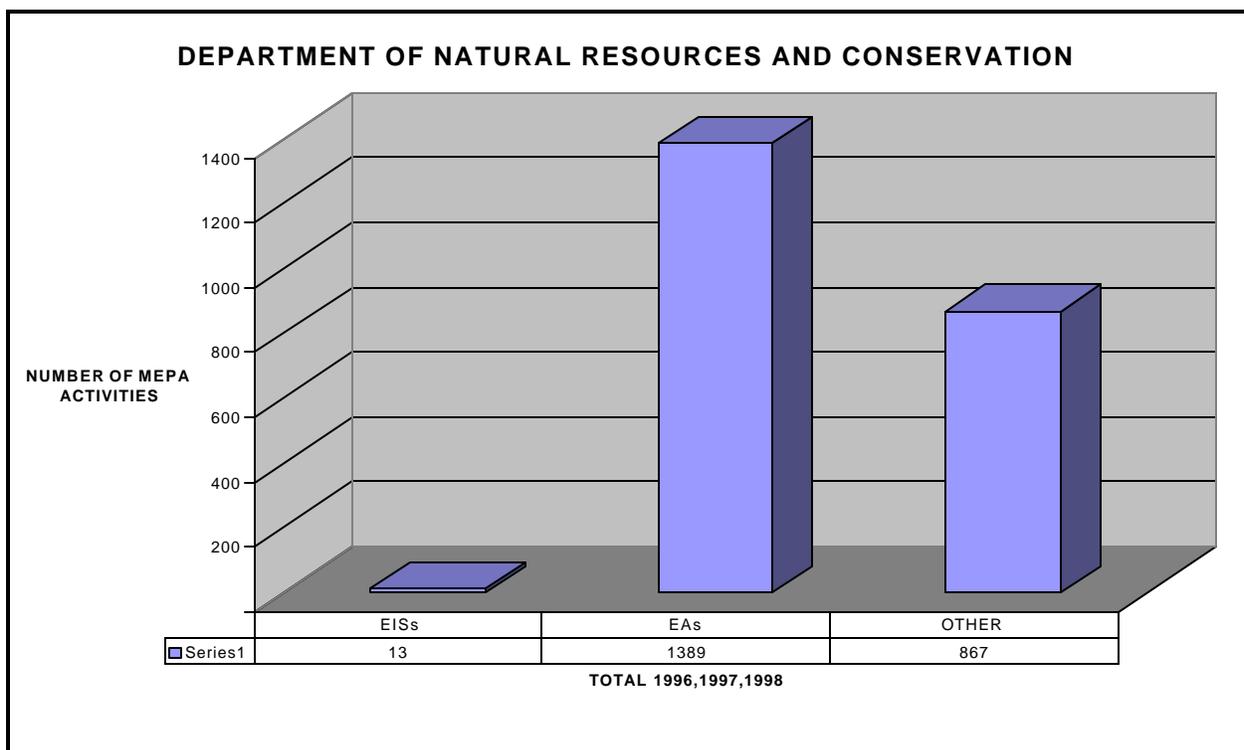


Figure 3-6

MEPA Projects by Agency - 1998

The above discussion briefly mentioned some of the activities for which three state agencies prepare environmental review documents. The following tables indicate what type of MEPA documents were prepared for what type of projects for the year 1998 as more detailed examples of how agencies were implementing MEPA. The most current data year (1998) was selected to reflect current agency MEPA practices and to represent the type of actions that an agency addresses in a typical year. The numbers and totals are equal or similar to those listed for the agencies in **Table 3-1**. Minor differences are the result of hand counting and classification of documents.

Table 3-2 shows the 1,762 MEPA activities reported to the EQC by DEQ for 1998. As indicated previously in **Figure 3-4**, a large number of EA checklists are produced by the agency. The majority of those were EA checklists for subdivision decisions. Others were for mining permits and operations (mostly gravel pits) and underground fuel tank installations and removals. Decisions involving air quality permits and subdivisions accounted for a total of 288 of the 305 EAs that were prepared by DEQ in 1998. Mining and subdivision projects triggered EISs in 1998. Numerically, the agency produces and reports a large number of MEPA documents for subdivisions, air quality permits, and mining (mostly gravel pits). Actions involving those three agency responsibilities accounted for 1,658, or 94%, of the total 1,762 MEPA activities reported by DEQ in 1998.

Table 3-2. DEPARTMENT OF ENVIRONMENTAL QUALITY
1998 MEPA Activities by Project and Document Type

PROJECT	FEIS , DEIS, EIS, PEIS, SEIS	EA, DEA, FEA, MEA, SEA	EA CHECKLIST	CATEGORI- CAL EXCLUSION	ROD, PUBLIC NOTICE, OTHER	TOTAL
AIR QUALITY PERMITS		212			48	260
FUEL TANK			42			42
HAZARDOUS WASTE PERMIT						0
JUNKYARD/ WRECKING FACILITIES		4				4
MINING PERMITS AND OPERATIONS	3	3	122		5	133
SOLID WASTE PERMITS		9			3	12
SUBDIVISION	1	76	1187		1	1265
SUPERFUND SITE						0
WASTE WATER DISCHARGE PERMITS				5	40	45
WATER PROJECT PERMITS		1				1
TOTAL	4	305	1351	5	97	1762

Table 3-3 shows the type of projects and MEPA review activities reported by the FWP for the year 1998. This agency's MEPA activities for 1998 show a variety of projects mostly resulting in the production of EA review documents. The EA checklist is mostly used for the permitting of private fish ponds (species introduction).

Table 3-3. DEPARTMENT OF FISH, WILDLIFE, AND PARKS
1998 MEPA Activities by Project and Document Type

PROJECT	FEIS , DEIS EIS, PEIS, SEIS	EA, DEA, FEA, MEA,SEA	EA CHECKLIST	CATEGORI- CAL EXCLUSION	ROD, PUBLIC NOTICE, OTHER	TOTAL
CONSERVATION EASEMENT		6			4	10
GAME BIRD FARM		2	3			5
ALTERNATIVE LIVESTOCK RANCH (GAME FARMS)		18			9	27
FERTILIZERS/ HERBICIDES/ PESTICIDES		1				1
FISHERIES		6			1	7
FISHING ACCESS SITE		12	1		11	24
FUTURE FISHERIES PROJECT		21			1	22
INSTREAM FLOW PROJECT						0
LAND ACQUISITION		1				1
LAND USE/ EASEMENT		1			1	2
LAND USE/ EXCHANGE		1				1
PARKS/ RECREATION		14			6	20
SPECIES INTRODUCTION		5	32		5	42
STREAM RESTORATION						0
WATER LEASE					1	1
WATER RIGHT			1			1
WILDLIFE MANAGEMENT	1	5			5	11
WILDLIFE MGMT AREA		1			2	3
TOTAL	1	94	37		46	178

Table 3-4 provides information on 1998 projects and MEPA activities addressed by DNRC. The information indicates that the agency conducts most of its MEPA reviews through the use of an EA. Most of the EA activities involve the granting of water rights

or oil and gas permits. These MEPA reviews are identified as EAs by the agency and are logged into the EQC database as such. They are very similar in depth and analysis to the EA checklists for the DEQ subdivision program. The agency uses EA checklists mostly for land use licenses or easements and timber projects. Timber sale projects also accounted for the EIS review documents that the agency prepared in 1998.

Table 3-4. DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
1998 MEPA Activities by Project and Document Type

PROJECT	FEIS, DEIS, EIS, PEIS, SEIS	EA, DEA, FEA, MEA, SEA	EA CHECKLIST	CATEGORICAL EXCLUSION	ROD, PUBLIC NOTICE, OTHER	TOTAL
DAM FACILITY		1				1
DRILLING ON STATE LEASE		11				11
GEOPHYSICAL EXPLORATION			5			5
LAND LEASE OR EXCHANGE		1				1
LAND SALE		1				1
LAND USE LICENSE OR EASEMENT			151			151
MINING PERMITS AND OPERATION			2			2
OIL AND GAS DRILLING PERMIT		342				342
OIL AND GAS LEASE SALE		11				11
TIMBER OR SALVAGE SALE	2	14	35		3	54
WATER LEASE						
WATER PROJECT		1			1	2
WATER RIGHT		146				146
WATER RIGHTS COMPACT						
TOTAL	2	528	193		4	727

The 1998 MEPA review activities for the MDT are shown in **Table 3-5**. The MDT prepares environmental review documents under NEPA for federal highway projects using federal funding and prepares MEPA documents for state highway projects using state funding. The majority of the MDT environmental review is conducted under a categorical exclusion document. The MEPA rules adopted by MDT describe what types of activities are subject

to review by categorical exclusion. In the case of MDT MEPA documents, the term "categorical exclusion" is somewhat of a misnomer. Although federal and state rules conclude that an EA or EIS is generally not required for activities that qualify for a categorical exclusion, the MDT often prepares a detailed project environmental review document in support of the categorical exclusion designation in a level of analysis that resembles other agencies' EAs.

Table 3-5. DEPARTMENT OF TRANSPORTATION

1998 MEPA Activities by Project and Document Type

PROJECT	FEIS , DEIS, EIS, PEIS, SEIS	EA, DEA, FEA, MEA, SEA, REA	EA CHECKLIST	CATEGORI- CAL EXCLUSION	ROD, PUBLIC NOTICE, OTHER	TOTAL
AIRPORT PROJECT		3		131	1	135
HIGHWAY PROJECT						0
MISC						0
TOTAL		3		131	1	135

Montana State Agency Environmental Impact Statement Projects - 1985-1999

The EQC database records show that in the 14 years between March 1985 and June 1999 Montana state agencies have prepared EISs on a total of 60 projects (**Table 3-6**). This figure is less than the total number of EIS activities shown in **Table 3-1**. This is because **Table 3-1** is based on a database search that reports multiple EIS document activities on the same project. For example, a draft EIS and a final EIS for the same project would have been listed as two separate MEPA activities if both documents were submitted to the EQC and recorded in the database. Sometimes the draft EIS and the final EIS are virtually the same document. For other projects, the draft EIS and the final EIS are significantly different due to public comments, agency responses, and changes made or mitigation measures added to the project. When both are submitted as required by rule, both are entered into the database.

The following information lists all those projects between March 1985 and June 1999 for which a state agency deemed it necessary to prepare an environmental impact statement due to the nature of the decision and the significance of the potential environmental impacts of the proposal. Any EIS documents that were prepared by the agencies but not reported to the EQC will not be listed here. The 60 EIS projects are listed below by year of initial EIS action and by lead agency.

Table 3-6. EIS Projects by Agency - March 1985 to June 1999

<u>Agency</u>	<u>Year- initial EIS action</u>	<u>Project</u>
DSL	1985	Stillwater Project
	1985	Jardine Joint Venture Project
	1988	Peabody Big Sky Coal Mine
	1991	Western Vermiculite Project
	1991	Stillwater PGM East Boulder Mine; nondegradation
	1991	Stillwater Mine, Nye
	1992	Meridian Minerals Bull Mountain Mine
	1993	Beal Mountain Mine
	1993	South Beal Mining Project
	1994	Holnam Project, Trident Plant
	1995	Swede Creek Timber Sale
	1995	State Forest Land Management Plan Programmatic
	DNRC	1986
1988		Upper Clark Fork Water Reservations
1989		Statewide Oil and Gas Drilling Permit Programmatic
1991		Missouri River Above Fort Peck
1992		Fort Peck to Wolf Point Transmission Line
1992		230 KV Trans Line - Noranda Minerals, Montanore Project
1994		Water Reservations: Lower Missouri River Basin
1995		Tongue River Basin Dam Project
1996		Tepee Creek Timber Sale
1996		Upper Stryker Ridge II Timber Sale
1996		Middle Soup Creek Timber Sale
1997		Callahan Timber Sale
1997		West Fork Blacktail Creek Timber Sale
1998		South Fork Lost Creek Timber Sale
1998		Cyclone/Coal I and II
1998	Sour Fish Timber Sale	
1999	Beaver Lake Timber Sale, Leases	
1999	Lukewarm Timber Sale	
1999	Keeler Mountain Timber Sale	
DHES	1985	Frenchtown Mill
	1988	Church Universal and Triumphant
	1993	Lewis and Clark County Landfill
DEQ	1995	Zortman-Landusky Mine Reclamation and Extension
	1995	Express Crude Oil Pipeline
	1995	ASARCO Rock Creek Project
	1995	Stillwater Mine E-W Connection and Tailings Pond
	1996	Diamond Hill Mine and Mill Project
	1997	Golden Sunlight Mine
	1997	Bull Lake Estates Subdivision
	1998	Stillwater Mine Revised Waste Management Plan
	1998	Yellow Band Gold Mine Scoping Project

<u>Agency</u>	<u>Year- initial EIS action</u>	<u>Project</u>
FWP	1986	Grizzly Bear in NW Montana Programmatic
	1993	Snowmobile Trail Programmatic
	1994	Black Bear Management in Montana Programmatic
	1995	Management of Mountain Lions in Montana Programmatic
	1995	Riparian Wetland and Habitat Cons. Programmatic
	1996	Montana State Trails Plan Programmatic: draft/scoping
	1997	Big Velvet Game Farm
	1998	Wildlife Management Programmatic
	1999	State Trails Plan Programmatic
	MDT	1986
1988		Madison Bridge
1991		N. Helena/Forestvale Interchange
1992		Shilo Road Interchange
1992		US Highway 2, Columbia Heights - Hungry Horse
1997		US Highway 93 Hamilton to Lolo
DAg	1989	Emergency Grasshopper Control Programmatic
	1991	Noxious Weed Trust Fund Programmatic

Programmatic Environmental Reviews

The MEPA Model Rule XVII requires an agency to prepare a programmatic review of its activities whenever it proposes a series of agency-initiated actions, programs, or policies that may constitute a major state action that will significantly affect the environment.

The Model Rules also allow an agency to prepare a programmatic review in certain cases, including whenever a series of agency jurisdictional actions deserve such an analysis as determined by the agency. The programmatic review can be in the form of an EA or an EIS. Through specific rulemaking or through the preparation of a programmatic review, an agency can identify actions that may be categorically excluded from environmental analysis and also establish thresholds for reviewing those same actions by identifying when and under what circumstances the action would not be categorically excluded from review. The programmatic review provides an opportunity for an agency to analyze the environmental impacts of its decisions or actions on a collective or programwide basis and determine under what circumstances a particular type of environmental analysis may be required for a specific project.

Model Rule XVII also allows an agency to prepare a programmatic review when directed by statute. The Legislature has directed an agency to prepare a programmatic environmental review on two occasions. The 1987 Legislature required the Board of Oil and Gas to prepare a programmatic environmental impact statement by December 31, 1989. The 1999 Legislature directed the Department of Fish, Wildlife, and Parks, in cooperation with the Department of Livestock, to conduct a programmatic review of environmental impacts associated with the licensing of alternative livestock operations.

Table 3-7 is a list of all the programmatic EISs that have been prepared to date by state agencies. Although they are allowed by the Model Rules, only one programmatic EA has been prepared.

Table 3-7. Programmatic Environmental Impact Statements

Department of Fish, Wildlife, and Parks

1986	Final PEIS	Grizzly Bear in Northwest Montana Programmatic
1993	Final PEIS	Snowmobile Trail Programmatic
1994	Final PEIS	Black Bear Management in Montana Programmatic
1995	Final PEIS	Management of Mountain Lions in Montana Programmatic
1995	Final PEIS	Riparian Wetland and Habitat Conservation Program, Libby and Hungry Horse Dams
1996	Draft PEIS	Montana State Trails Plan Scoping
1998	Final PEIS	Wildlife Management Programmatic Review
1999	Final PEIS	Montana State Trails Plan

Department of Natural Resources and Conservation

1989	Final PEIS	Statewide Oil and Gas Drilling Permits
1995	Final PEIS	State Forest Land Management Plan Programmatic

Department of Agriculture

1989	Final PEIS	Emergency Grasshopper Control
1992	Final PEIS	Noxious Weed Trust Fund

Department of Environmental Quality

2000	Final PEA	Small Quarry Permits
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Summary

The EQC MEPA database is the best source of collective information about MEPA-related documents and notices that are produced by the Executive Branch. Because of statutory and rule requirements, draft and final EISs and EAs are submitted to the EQC for entry in the database. Although agencies may have project-specific files, it is doubtful that there is a complete historical record of MEPA activities maintained within the agencies. The Governor's Office does not maintain a MEPA database or retain MEPA documents.

The information is logged into the database as it is received from the agencies without regard to agency MEPA policies or nomenclature. An agency-defined EA is entered as an EA; an EA checklist is entered as an EA checklist. Recordkeeping at the EQC has been consistent for many years, although some early year records (1978-1986) have not been entered into the system.

The database contains a total of 21,060 state MEPA records. However, 17,376 (83%) of the total were logged into the system in the 10-year period between 1989 and 1998. Records for 1999 are not yet complete. Of the 17,376 records entered in the past 10 years, 8,843 (51%) of them were received from agencies in the 3-year period (1986-1998) following executive agency reorganization. Over that same 3-year period, four agencies--

the Departments of Environmental Quality; Natural Resources and Conservation; Fish, Wildlife, and Parks; and Transportation accounted for 99% of the MEPA activities recorded in the EQC database.

Most of the MEPA activity in Montana involves the preparation of environmental assessments (EAs) or EA checklists. In the 14 years between 1985 and 1999, state agencies have prepared EIS documents for 60 projects according to information reported to the EQC. In recent years, actions by the DNRC timber program and the DEQ mine permitting programs account for most of the state EIS efforts in Montana.

Agencies have certain programs that result in a significant number of MEPA activities. An opportunity for increasing MEPA efficiencies may exist within these programs. The Department of Fish, Wildlife, and Parks has utilized the programmatic EIS process to a greater extent than other agencies.

The EQC MEPA database cannot be used to identify the time or resources that are spent on the preparation of a MEPA document. A single EA for a complex and controversial project may utilize a significant amount of agency resources that will not be reflected in the database statistics.

Chapter 4: MEPA and the Courts

CHAPTER SUMMARY

- < The total number of MEPA cases resolved by state courts over a 29-year period totals 27 (**Figure 4-1**). The state's total winning percentage in MEPA cases, excluding split decision cases, is 68%. Note that many MEPA cases also litigate other state laws in addition to MEPA. Fourteen, or 51%, of the MEPA cases have been litigated between the years of 1990 and 2000 (**Figure 4-1**). According to state legal counsel, there have been a total of four MEPA cases that have been dropped or settled (not resolved by a state court) over a 29-year period. There are currently eight cases involving MEPA issues pending in District Court and one case pending in the Montana Supreme Court.

- < Generally, MEPA issues resolved by the state courts can be lumped into three basic categories:
 - (1) Should the state agency have conducted a MEPA analysis (EA or EIS)?
 - (2) Was the MEPA analysis adequate?
 - (3) Does MEPA supplement a state agency's permitting/licensing authority?

The most commonly litigated MEPA issue (17 out of 27 MEPA cases) is whether the state agency should have conducted a MEPA analysis, usually an EIS (**Tables 4-1 and 4-2**). The second most commonly litigated MEPA issue (9 out of 27 MEPA cases) is whether the state agency's MEPA review (EIS or EA) was adequate.

- < **Table 4-3** illustrates those categories of state actions that elicit the most MEPA litigation. State timber sales and mining permits rank first and second in total number of lawsuits, with nine and seven lawsuits respectively. If state land activities (timber sales, oil and gas leases, grazing leases, and easements) are lumped together, they garner the majority of MEPA litigation with a total of 12 lawsuits.

- < On the question of whether, in light of the Supreme Court's decision construing the environmental provisions of the Constitution, MEPA is consider substantive, the short answer to this question is “no, not yet”. This case did not involve a MEPA issue. It is speculation at best to say what the Supreme Court would conclude on this issue.
- < On the question of whether, in light of the Supreme Court's decision construing the environmental provisions of the Constitution, MEPA would increase or decrease potential litigation, the panel of state agency and plaintiff attorneys were split in their opinions.
- < State agency attorneys and a plaintiff's attorney were also split in their individual opinions as to whether new evidence issues were a problem or not.

Chapter 4: MEPA and the Courts

Introduction

SJR 18 requests that the EQC ensure that the MEPA process results in state agencies making legally defensible and ultimately better decisions. The EQC took this study mandate very seriously, requesting a detailed staff review and analysis of all MEPA litigation and holding a series of state agency and MEPA plaintiff attorney panel discussions on a variety of MEPA and constitutional litigation issues. This chapter reflects EQC-generated information on this subject. EQC findings and recommendations on MEPA litigation can be found in **Chapter 10**.

Basics of MEPA Litigation

A typical MEPA case involves a person or entity (the **plaintiff**) filing suit against a state agency asking the state court to:

- (1) declare an agency's action invalid (**declaratory judgment**);
- (2) stop the agency from doing something (**injunctive relief**); and/or
- (3) tell the state agency to do something it had a clear legal duty to do in the first place (**mandamus**).

Before a court ever gets to these issues however, a MEPA plaintiff must be allowed through the courtroom doors. That is to say that a MEPA plaintiff must have "standing" to sue the state agency in the first place. A state court will first look to see if the statute at issue provides a MEPA plaintiff with standing. If it does not, the state court will make a determination as to whether the MEPA plaintiff has alleged a personal and sufficient stake in the outcome of the case that can be resolved by a court. The Montana courts like the federal courts, have, in general, been liberal in granting standing.

Although the remedy of mandamus has been attempted in many MEPA cases over the years, the courts tend to conclude that mandamus is not usually an appropriate remedy in MEPA cases because many agency MEPA decisions and actions are discretionary. Mandamus is a remedy that can only be used for nondiscretionary actions.

When a court makes a determination as to whether to issue an injunction or declare an agency's action invalid, the court usually determines whether the state agency:

- (1) violated a statute or regulation (**acted unlawfully**); or

- (2) did not consider relevant factors and made a clear error in judgment (**acted arbitrarily and capriciously**).

According to the Montana Supreme Court, state courts may not substitute their judgment for that of a state agency but must examine the agency's decision to see whether the information set out in the record was considered or whether the agency's decision was so at odds with that information that it could be characterized as arbitrary and capricious.

State courts generally look at the MEPA statute, the agency's MEPA administrative rules, and the administrative record to determine if the agency acted unlawfully. If MEPA or the rules do not provide adequate direction, the courts look to federal statutory, regulatory, and case law on the National Environmental Policy Act (NEPA) for guidance. If the courts find that the agency acted unlawfully, the inquiry usually ends and the plaintiff is granted relief.

A court could find that an agency acted lawfully but still grant the plaintiff relief because the agency acted arbitrarily and capriciously. A court will look at the administrative record, which usually involves an analysis of the MEPA review document, to determine whether the agency's action was a clear error in judgment and thus arbitrary and capricious.

A few jurisdictional basics are appropriate here. Supreme Court decisions are binding statewide. District Court decisions are binding on the parties and within the district in which the decision is made. First Judicial District Court decisions are not only binding within the First Judicial District but are binding and set precedent for state agencies and the actions those agencies take across the state.

Analysis of State Court Decisions

For the purposes of this analysis, a "MEPA case" is defined as litigation in state court in which a state agency is challenged on a MEPA issue and that legal issue is ultimately resolved by the court.

Over MEPA's 29-year history, the Montana Supreme Court has been called upon to review the Act seven times (**Table 4-1**). The state has prevailed in five out of those seven cases, or 71% of the cases. According to EQC and state agency records, MEPA has been litigated and resolved in the Montana District Courts 20 times and the state has prevailed in 12 of those cases with two split decisions (**Table 4-2**). The total number of MEPA cases resolved by state courts over a 29-year period totals 27 (**Figure 4-1**). The state's total winning percentage in MEPA cases, excluding split decision cases, is 68%. Note that many of MEPA cases also litigate other state laws in addition to MEPA. Fourteen, or 51%, of the MEPA cases have been litigated between the years of 1990 and 2000 (**Figure 4-1**). According to state legal counsel, there have been a total of four MEPA cases that have been dropped or settled (not resolved by a state court) over a 29-year

period. There are currently eight cases involving MEPA issues pending in District Court and one case pending in the Montana Supreme Court.

Figure 4-1. MEPA Cases Litigated Over Time

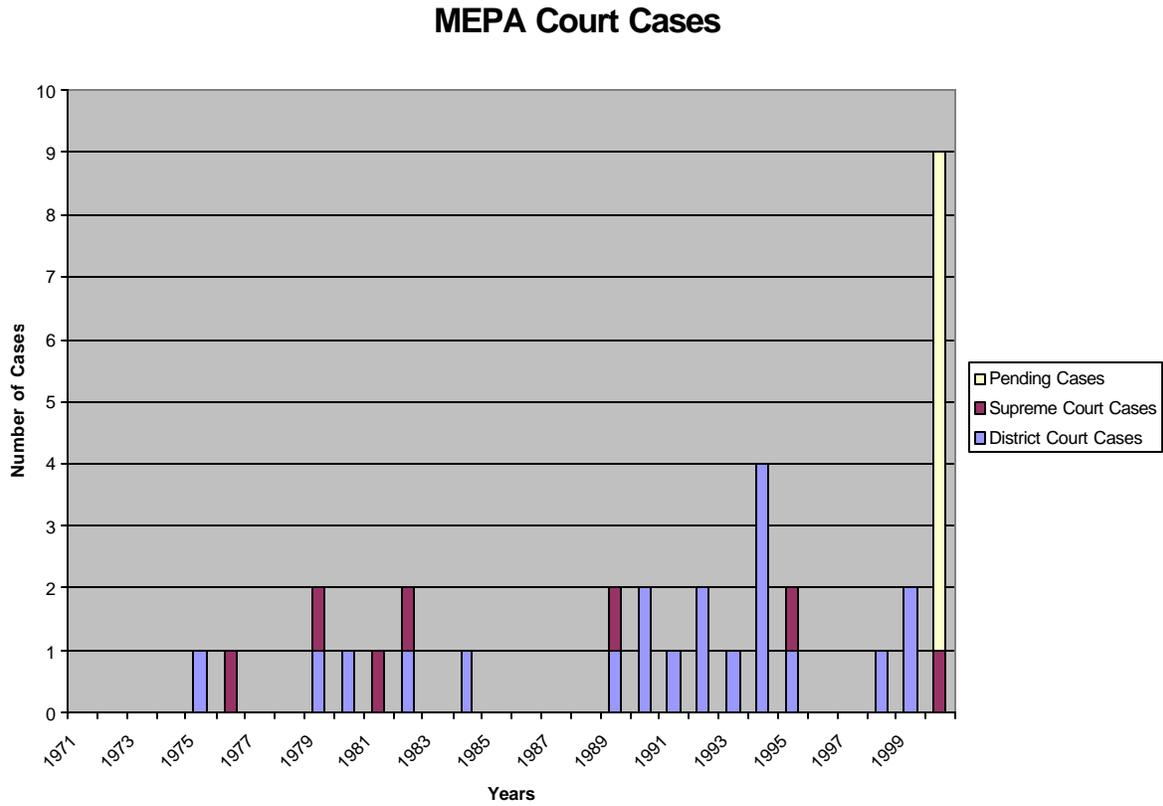


Table 4-1. Montana Supreme Court MEPA Cases

Supreme Court Case	MEPA Issue Litigated/Court Decision	State Wins	State Loses	Split Decision
Montana Environmental Information Center v. Dept. of Transportation, 2000 MT 5; Decided 2000	Should the agency have conducted a MEPA analysis (a supplemental EIS)? Court Decision: Yes		X	
Ravalli County Fish and Game Association v. Dept. of State Lands, 273 M 371, 903 P2d 1362; Decided 1995	Should the agency have conducted a MEPA analysis (an EA or EIS)? Court Decision: Yes		X	
North Fork Preservation Association v. Dept. of State Lands, 238 M 451, 778 P2d 862; Decided 1989	Should the agency have conducted a MEPA analysis (an EIS)? Court Decision: No Was the MEPA analysis (a preliminary environmental review) adequate? Court Decision: Yes	X		
Montana Wilderness Association v. Board of Natural Resources and Conservation, 200 M 11, 648 P2d 734; Decided 1982	Was the MEPA analysis adequate? Court Decision: Yes	X		
Titeca v. Dept. of Fish, Wildlife, and Parks, 194 M 209, 634 P2d 1156; Decided 1981	Does a preliminary environmental review require a public hearing? Court Decision: No	X		
Kadillak v. The Anaconda Company, 184 M 127, 602 P2d 147; Decided 1979	Should the state agency have conducted a MEPA analysis (an EIS)? Court Decision: No	X		
Montana Wilderness Association v. Board of Health and Environmental Sciences, 171 M 477, 559 P2d 1157; Decided 1976	Does MEPA supplement a state agency's permitting/licensing authority? Court Decision: No	X		
	TOTAL	5	2	0

Table 4-2. District Court MEPA Cases

District Court Case	MEPA Issue/Court Decision	State Wins	State Loses	Split Decision
Skyline Sportsmen's Association v. Board of Land Commissioners, BDV 99-146, 1st District, Judge Sherlock; Decided 9-16-1999	Should the agency have conducted a MEPA analysis (a supplemental EIS)? Court Decision: No Was the MEPA analysis (an FEIS) adequate? Court Decision: Yes and No			X
Little Snowies Coalition v. Dept. of Natural Resources and Conservation, BDV 99-10, 1st District, Judge Sherlock; Decided 2-12-1999	Should the agency have conducted a MEPA analysis (an EIS)? Court Decision: No Was the MEPA analysis (an EA) adequate? Court Decision: Yes	X		
Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, CDV 97-558, 1st District, Judge Honzel; Decided 12-23-1998	Was the MEPA analysis (an EIS) adequate? Court Decision: No Should the agency have conducted a MEPA analysis (a supplemental EIS)? Court Decision: Yes		X	
Friends of the Wild Swan v. Dept. of Natural Resources and Conservation, CDV 95-314, 1st District, Judge Honzel; Decided 12-13-1995	Can a court order a date certain for the completion of a MEPA analysis (a programmatic EIS)? Court Decision: No Should the agency be permanently enjoined from conducting further timber sales pending the completion of a MEPA analysis (a programmatic EIS)? Court Decision: No	X		
National Wildlife Federation v. Dept. of State Lands, CDV 92-486, 1st District, Judge Honzel; Decided 9-1-1994	Should the agency have conducted a MEPA analysis (an EIS)? Court Decision: Yes		X	

Table 4-2 continued

District Court Case	MEPA Issue/Court Decision	State Wins	State Loses	Split Decision
Wallace v. Dept. of Fish, Wildlife, and Parks, DV 93-356, 21st District, Judge Langton; Decided 1-10-1994	Should the agency have conducted a MEPA analysis (an EIS)? Court Decision: Yes	X		
Mott v. Dept. of State Lands, CDV 93-1731, 1st District, Judge Honzel; Decided 6-24-1994	Was the MEPA analysis (an EA) adequate? Court Decision: Yes	X		
Friends of the Wild Swan v. Dept. of State Lands, DV 93-361-B, 11th District, Judge McKittrick; Decided 2-9-1994	Was the MEPA analysis (an EA) adequate? Court Decision: No Should the agency have conducted a MEPA analysis (an EIS)? Court Decision: Yes		X	
Kilpatrick v. Dept. of Fish, Wildlife, and Parks, BDV 93-637, 1st District, Judge Sherlock; Decided 8-11-1993	Does MEPA supplement a state agency's permitting /licensing authority? Court Decision: Yes	X		
Murphy v. Dept. of Health and Environmental Sciences, BDV 92-1204, 1st District, Judge Sherlock; Decided 11-20-1992	Does an environmental assessment require that an agency conduct a public hearing? Court Decision: No	X		
Gold Creek Resource Protection Association v. Dept. of State Lands, Cause No. 76549, Consent to Judgment, 4th District; Entered 10-20-1992	Was the MEPA analysis adequate? Consent to Judgment: No		X	
Friends of the Wild Swan v. Dept. of State Lands, DV 89-074(A), 11th District, Judge Keller; Decided 10-17-1991	Was the MEPA analysis (EIS) adequate? Court Decision: Yes Should the agency have conducted a MEPA analysis (an EA or EIS)? Court Decision: No	X		

Table 4-2 continued

District Court Case	MEPA Issue/Court Decision	State Wins	State Loses	Split Decision
Westview People's Action Association v. Dept. of State Lands, Cause No. 72690, 4th District, Judge Harkin; Decided 6-27-1990	Should the agency have conducted a MEPA analysis (an EIS)? Court Decision: No	X		
Concerned Citizens of Pony v. Dept. of Health and Environmental Sciences, ADV 90-144, 1st District, Judge McCarter; Decided 3-30-1990	Should the agency have conducted a MEPA analysis (an EIS)? Court Decision: No	X		
Upper Yellowstone Defense Fund v. Dept. of Health and Environmental Sciences, BDV 89-261, 1st District, Judge Sherlock; Decided 5-12-1989	Was the MEPA analysis (an EIS) adequate? Court Decision: Yes	X		
Montana Environmental Information Center v. Montana Power Company, Cause No. 49784, 1st District, Judge Gary; Decided 2-16-1984	Should the agency have conducted a MEPA analysis (a preliminary environmental review)? Court Decision: Yes		X	
Cabinet Resource Group v. Dept. of State Lands, Cause No. 43914, 1st District, Judge Bennett; Decided 9-29-1982	Does MEPA supplement a state agency's permitting /licensing authority? Court Decision: Yes		X	
Friends of the Earth v. Dept. of State Lands, Cause No. 44384, 1st District, Judge Wheelis; Decided 4-2-1980	Should the agency have conducted a MEPA analysis (an EIS)? Court Decision: The possibility of mandamus exists to compel the agency to conduct an EIS but the court does not dismiss the case on this issue.			X
Guthrie v. Dept. of Health and Environmental Sciences, Cause No. 7118, 9th District, Judge McPhillips; Decided 3-1979	Should the agency have conducted a MEPA analysis (an EIS)? Court Decision: No	X		

Table 4-2 continued

District Court Case	MEPA Issue/Court Decision	State Wins	State Loses	Split Decision
Montana Wilderness Association v. Board of Land Commissioners, Cause No. 38544, 1st District, Judge Bennett; Decided 4-17-1975	Are EQC guidelines binding on state agencies? Court Decision: No Should the agency have conducted a MEPA analysis? Court Decision: No	X		
	TOTAL	12	6	2

Each MEPA suit has its own cause and effect, but generally MEPA issues resolved by the state courts can be lumped into three basic categories:

- (1) Should the state agency have conducted a MEPA analysis (EA or EIS)?
- (2) Was the MEPA analysis (EA or EIS) adequate?
- (3) Does MEPA supplement a state agency's permitting/licensing authority?

Only four cases fell outside of the above categories. *Montana Wilderness Association v. Board of Land Commissioners* (1975) not only dealt with the issue of whether a state agency should have conducted an EIS, but also whether EQC MEPA guidelines were binding on state agencies. The court held that EQC guidelines were not binding on state agencies. The courts, in *Titeca v. Dept. of Fish, Wildlife, and Parks* (1981) and *Murphy v. Dept. of Health and Environmental Sciences* (1992), ruled that a preliminary environmental review and an environmental assessment do not require that an agency conduct a public hearing. In *Friends of the Wild Swan v. Dept. of Natural Resources and Conservation* (1995), the question arose as to whether the court could order a date certain for the completion of a Programmatic EIS by a state agency. The court declined to do so.

The most commonly litigated MEPA issue (17 out of 27 MEPA cases) is whether the state agency should have conducted a MEPA analysis, usually an EIS (**Tables 4-1 and 4-2**). The court decisions have been evenly split on this issue, with nine decisions holding that the agency either need not have conducted a MEPA analysis or was not required to conduct an EIS. Eight court decisions held that the agency was either required to conduct a MEPA analysis or that the agency should have done an EIS. At the heart of this issue is whether the state agency made the proper "significance" determination of the impacts. The court will generally review the record to see whether the agency's significance determination of the impacts was reasonable in light of the significance criteria set out in the agency's administrative rules.

The second most commonly litigated MEPA issue (9 out of 27 MEPA cases) is whether the state agency's MEPA review (EIS or EA) was adequate. Again the court will review the record to determine whether the agency complied with the statute and its own MEPA rules in writing the MEPA review document. Adequacy issues that the courts have reviewed include cumulative impacts, alternatives, cost-benefit analysis, impact analysis generally, and economic impact analysis. Of special note, the issue of cumulative impacts has been litigated in eight cases. The state has been upheld on its analysis of cumulative impacts in six out those eight cases. The issue of adequate alternatives analysis has been litigated in four cases. The courts upheld the adequacy of the state's alternative analysis in three out of those four cases.

Three MEPA cases directly analyzed and ruled on the issue of whether MEPA supplements an agency's permitting/licensing authority or is strictly procedural--meaning that MEPA does not dictate a certain result. MEPA is generally considered to be a procedural act by state courts. The Supreme Court, in *Montana Wilderness Association v. Board of Health and Environmental Sciences (1976)*, held that MEPA did not supplement DHES's permitting authority under the Montana Subdivision and Platting Act. However, the First Judicial District has determined that MEPA is substantive (supplements an agency's permitting authority) under the Hard-Rock Mining Act, section 82-4-351, MCA (*Cabinet Resource Group v. Dept. of State Lands (1982)*) and under the game farm (now alternative livestock ranch) licensing and roadside zoo/menagerie permit statutes (*Kilpatrick v. Dept. of Fish, Wildlife, and Parks (1993)*). This issue of whether MEPA is substantive or procedural is extensively analyzed in **Chapter 6**.

The Supreme Court, in *Kadillak v. The Anaconda Company (1979)*, and the Fourth Judicial District, in *Westview People's Action v. Dept. of State Lands (1990)*, have held that when there is a clear and unavoidable conflict in statutory authority between MEPA and another statute, MEPA must give way. Specifically a statutory time limit (in a permitting statute for example) precludes the agency's statutory duty to prepare an environmental impact statement. See the examples in **Chapter 8** of statutory timeframes that make it difficult for agencies to conduct a MEPA analysis.

Table 4-3 illustrates those categories of state actions that elicit the most MEPA litigation. State timber sales and mining permits rank first and second in total number of lawsuits, with eleven and seven lawsuits respectively. If state land activities (timber sales, oil and gas leases, grazing leases, and easements) are lumped together, they garner a majority of the MEPA litigation with a total of 15 lawsuits.

Table 4-3. Categories of State Actions Most Subject to MEPA Litigation

State Action	Past Lawsuits	Pending Lawsuits	Total Lawsuits
Timber Sales (State Land)	8	3	11
Mining Permits	5	2	7
Alternative Livestock Ranch/Zoo Menagerie Permits	2	1	3
Water Quality, Public Water, and Waste Water Permits	2	1	3
Facility Siting Certification	2	0	2
Oil and Gas Leases (on State Land)	1	0	1
State Land Grazing Lease	1	0	1
Granting of an Easement on State Land	1	1	2
Subdivision Review	2	0	2
Fishing Access Site	1	0	1
Solid Waste	1	0	1
State Road Construction	1	0	0
TOTAL	27	8	34

Legislative Action Dealing With MEPA Litigation Issues

The Legislature over time has made it somewhat tougher for a plaintiff to both litigate a MEPA case and to win a MEPA case against a state agency.

Two bills (SB 288 in 1995 and HB 142 in 1999) passed by the Legislature specifically dealt with MEPA litigation issues. These bills clarified that the burden of proof is on the person challenging an agency's decision that an environmental review is not required or that the environmental review is inadequate and that in a challenge to the adequacy of an environmental review, a court may not consider any issue or evidence that was not first presented to the agency for the agency's consideration prior to the agency's decision. SB 288 (Chapter 331, Laws of 1995) also required that a court may not set aside the agency's decision unless it finds that there is clear and convincing evidence that the decision was arbitrary or capricious or not in compliance with law.

In addition, HB 142 (Chapter 223, Laws of 1999) required that when new, material, and significant evidence is presented to the District Court that had not previously been presented to the agency for its consideration, the District Court shall remand the new evidence back to the agency for the agency's consideration and an opportunity to modify its findings of fact and administrative decision before the District Court considers the evidence within the administrative record under review. Immaterial or insignificant evidence may not be remanded to the agency. The District Court must review the agency's

findings and decision to determine whether they are supported by substantial, credible evidence within the administrative record under review.

In 1995 the Legislature passed two bills that did not specifically amend MEPA but make it potentially more difficult to litigate MEPA cases. Set out below are the statutory provisions enacted in 1995:

27-19-306. Security for damages. (1) Subject to 25-1-402, on granting an injunction or restraining order, the judge shall require a written undertaking to be given by the applicant for the payment of the costs and damages that may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. Except as provided in subsection (2), the undertaking:

(a) must be fixed at a sum that the judge considers proper; and

(b) may be waived:

(i) in domestic disputes; or

(ii) in the interest of justice.

(2) (a) If a party seeks an injunction or restraining order against an industrial operation or activity, the judge shall require a written undertaking to be filed by the applicant. The amount of the written undertaking must be set in an amount that includes all of the wages, salaries, and benefits of the employees of the party enjoined or restrained during the anticipated time that the injunction or restraining order will be in effect. The amount of the written undertaking may not exceed \$50,000 unless the interests of justice require. The written undertaking must be conditioned to indemnify the employees of the party enjoined or restrained against lost wages, salaries, and benefits sustained by reason of the injunction or restraining order.

(b) As used in subsection (2)(a), "industrial operation or activity" includes but is not limited to construction, mining, timber, and grazing operations.

(3) Within 30 days after the service of the injunction, the party enjoined may object to the sufficiency of the sureties. If the party enjoined fails to object, all objections to the sufficiency of the sureties are waived. When objected to, the applicant's sureties, upon notice to the party enjoined of not less than 2 or more than 5 days, shall justify before a judge or clerk in the same manner as upon bail on arrest. If the sureties fail to justify or if others in their place fail to justify at the time and place appointed, the order granting the injunction must be dissolved.

(4) This section does not prohibit a person who is wrongfully enjoined from filing an action for any claim for relief otherwise available to that person in law or equity and does not limit the recovery that may be obtained in that action.

77-1-110. Written undertaking required in legal action for challenge to use or disposition of state lands. In any civil action seeking an injunction or restraining order concerning a decision of the board approving a use or disposition of state lands that would produce revenue for any state lands trust beneficiary, the court shall require a written undertaking for the payment of damages that may be incurred by the trust beneficiary if the board is wrongfully enjoined or restrained.

The Montana State Courts: MEPA and the Environmental Provisions of Montana's Constitution

Overview of State Court Decisions

The interrelationship between the environmental provisions of Montana's Constitution and MEPA have been discussed and, to some limited extent, analyzed over the years in state court decisions. Set out below is a summary of that analysis and discussion.

The environmental provisions of Montana's Constitution that are usually cited in state court cases include:

Article II, section 3. Inalienable rights. All persons are born free and have certain inalienable rights. They include *the right to a clean and healthful environment* and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, *health* and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities. (emphasis added)

Article IX, section 1. Protection and improvement. (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.

The Montana Supreme Court has discussed the environmental provisions of the Constitution and their relation to MEPA in only one case: *Kadillak v. The Anaconda Company (1979)*. In *Kadillak*, the Court noted that the EIS provisions of MEPA have not been given constitutional status. The Court specifically states:

Both the MEPA and the HRMA predate the new constitution. There is no indication that the MEPA was enacted to implement the new constitutional guarantee of a "clean and healthful environment." This Court finds that the statutory requirement of an EIS is not given constitutional status by the subsequent enactment of this constitutional guarantee. If the legislature had intended to give an EIS constitutional status they could have done so after 1972.

Judge Honzel, in *Friends of the Wild Swan v. Dept. of Natural Resources and Conservation* (1998), said that the environmental provisions of the Constitution mean something. He states:

This Court has previously held that the right to a clean and healthful environment as stated in Article II, Section 3, and Article IX, Section 1, is self-executing, and that "all persons" affected by state action which degrades the environment have recourse to the courts. See *Montana Wildlife Federation v. Dep't of State Lands*, Docket No. CDV-92-486, Order entered May 28, 1993. The right to a clean and healthful environment is inalienable and has substance.

However, in the instant action, FWS [Friends of the Wild Swan] has not shown that DNRC's proposed action will result in an unclean, unhealthful environment. Consequently, the Court is unable to discern the grounds on which FWS bases its claim. If FWS is alleging that DNRC is violating the Constitution by degrading the water quality, stemming from its allegation that DNRC failed to prepare an adequate watershed analysis, then that argument must fail. If FWS is simply alleging that the proposed harvesting of old growth timber will result in an unclean, unhealthful environment, there is insufficient evidence in the record to support that claim. Therefore, the Court concludes that FWS has failed to prove a constitutional violation.

Judge Honzel, in *National Wildlife Federation v. Dept. of State Lands* (1994), also states that the constitutional right to a clean and healthful environment indicates a strong public policy in favor of environmental protection and that MEPA plays a role in determining whether these constitutional provisions have been abridged. He specifically states:

The state of Montana not only has its own environmental policy act, but it has specific constitutional guarantees respecting the environment as well. (Art. II, § 3, and Art. IX, §§ 1 and 2, Mont. Const.) That the people's right to a clean and healthy environment has been elevated to constitutional status in this state indicates a strong public policy in favor of environmental protection. As this Court has said previously, these constitutional provisions mean something. The Court concludes, therefore, that the constitutional and

legislative policies embodied in MEPA strongly favor independent review of cases such as this.

The fact that this is a large open pit mining operation which will eliminate a portion of the Bull Mountains does not necessarily violate the constitution. The issue is whether such an operation constitutes an "unreasonable depletion and degradation of natural resources." That is a factual issue for which summary judgment is not appropriate.

The EA certainly indicates that there is a significant potential for pollution of the Jefferson River. DSL contends that there will not be any pollution because of the stipulations attached to the permit. This creates a factual dispute and, again, summary judgment is not appropriate.

The Court has concluded that DSL should have required an EIS and that it did not follow the provisions of the MMRA. Arguably, the failure to require an EIS and the failure to comply with the MMRA constitute violations of Article IX, Section 1. The remedy, however, would be for DSL to comply with MEPA and the MMRA. Plaintiffs have not shown that those remedies are inadequate. The Court concludes, therefore, that it is not necessary to find that DSL has violated Article IX, § 1.

Judge Langton, in *Wallace v. Dept. of Fish, Wildlife, and Parks (1994)*, held as a conclusion of law that MEPA does implement the environmental provisions of the Constitution, stating that:

The Montana Constitution requires the Legislature to "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". Montana Constitution, Article IX, Section 1. Pursuant to that mandate, the Legislature enacted the Montana Environmental Policy Act (MEPA) (Title 75, Chapter 1, M.C.A.) which requires, to the fullest extent possible, that all state actions that may impact the natural environment be thoroughly considered prior to action. The actions of the 1993 Legislature to revise the game farm laws to fully implement MEPA requirements, and the Department's decision to apply the new requirements to the Wallaces' pending application and any other such pending applications, are proper and necessary actions to implement the actions of the Legislature and, ultimately, to enforce the mandate of the people expressed in the state's Constitution.

In *Cabinet Resource Group v. Dept. of State Lands* (1982), Judge Bennett concluded that MEPA is substantively based not only on federal law but on the Montana Constitution. He notes:

The fact that Montana has given constitutional status to maintenance of a clean and healthful environment demonstrates the heightened importance which must be placed on actions which affect the environment in this state. There is no comparable constitutional protection afforded federal actions. The conclusion we reached above as to the impact of MEPA was based largely on federal interpretation of NEPA. The presence of these additional constitutional provisions provides authority for even stronger environmental protection in this state. See Tobias and McLean, *Of Crabbed Interpretations and Frustrated Mandates*, 41 Mt. L. Rev. 177 (1980). In the event we could not find support for our conclusion in NEPA interpretation, the combination of MEPA and the above constitutional sections would provide the necessary authority.

Judge Wheelis, in *Friends of the Earth v. Dept. of State Lands* (1980), determined that MEPA recognizes that each citizen is entitled to a healthful environment. He notes:

The Montana Environmental Policy Act (MEPA), §75-1-103(3) MCA 1979, recognizes each citizen entitlement to a healthful environment and the Montana Constitution Article II, § 3, guarantees the inalienable right to a "clean and healthful environment."

Supreme Court Defines the Right to a Clean and Healthful Environment in Montana Environmental Information Center v. Dept. of Environmental Quality

Background

On October 20, 1999, the Montana Supreme Court, in *Montana Environmental Information Center v. Dept. of Environmental Quality*, 296 M 207, 988 P2d 1236 (1999), for the first time issued an opinion construing the right to a clean and healthful environment contained in Article II, section 3, of Montana's Constitution, and the environmental nondegradation policy established by Article IX, section 1, of Montana's Constitution. The case instantly generated statewide headlines and produced a number of questions from the general public and the EQC members themselves about the interplay and impact between these constitutional provisions as now defined by the Supreme Court and MEPA. The EQC requested two expert panel discussions on the following issues:

- T In light of the Supreme Court's decision, is MEPA now considered substantive?

- T In light of the decision, would MEPA increase or decrease potential litigation?

What follows is a summary of the information that the EQC heard on the subject.

A Summary of Montana Environmental Information Center v. Dept. of Environmental Quality Court Decision

This case involved a discharge from an mine exploration pump test well of deep aquifer ground water to the alluvial aquifer of the Blackfoot River with the potential for migration to the surface waters of the Landers Fork of the Blackfoot River. The discharged ground water contained concentrations of arsenic (a known carcinogen) that were in concentrations greater than the receiving water found in the Landers Fork and Blackfoot River alluvium. In 1995, the Montana Legislature amended the Water Quality Act to exclude certain exploration activities (including test wells) from review pursuant to the Act's nondegradation policy (75-5-317(2)(j), MCA).

However, the Board of Environmental Review had promulgated a rule that sets out criteria that determine whether certain activities will result in nonsignificant changes to the existing water and therefore do not require a nondegradation review under the Water Quality Act (ARM 17.30.715(1)(b)). Under this rule, discharges containing carcinogenic parameters at concentrations less than or equal to the concentrations of those parameters in the receiving water do not require a nondegradation review.

Because there was an increase in arsenic levels in the receiving waters, because any increase in a carcinogen according to the DEQ's own rule is a significant impact requiring review under Montana's policy of nondegradation, and because the Legislature arbitrarily excluded this discharge from nondegradation review, the Supreme Court concluded that the constitutional right to a clean and healthful environment and to be free from unreasonable degradation of the environment was implicated in this case. The Court's decision is limited to this specific statutory exclusion (75-5-317(2)(j), MCA) as applied to the facts in this case.

The importance of this case is found in what the Court both concluded and did not conclude. The Court held that:

- T There is a fundamental right to a clean and healthful environment and it includes the concept of being free from "unreasonable" degradation.
- T The state had admitted that there was significant degradation, which equates to unreasonable degradation in this case, because of a DEQ rule

that says that any increase in a carcinogen above background levels in the receiving water is significant.

- T When a fundamental right is implicated, the state must show a compelling state interest in action that implicated the right.
- T A fundamental right is not only enforceable for state actions but for private actions as well.

The Court did **NOT** conclude that:

- T The statute was unconstitutional on its face.
- T There is a fundamental right to “no” adverse change in the environment.
- T For pollutants other than carcinogens, the right to a clean and healthful environment is implicated any time there is a release in a concentration that is greater than what is found in the receiving water.

The Supreme Court remanded the case to the District Court to determine whether the exclusion in section 75-5-317(2)(j), MCA, for mining exploration activities is constitutional under the rigorous strict scrutiny test that evaluates whether the Legislature had a compelling state interest in enacting the exclusion.

In Light of the Supreme Court’s Decision, is MEPA Now Considered Substantive?

To clarify this question, does the Supreme Court’s decision in this case require the state in every instance to choose the most environmentally protective alternative revealed in a MEPA analysis? The short answer to this question is “no, not yet”. This case did not involve a MEPA issue. It is speculation at best to say what the Supreme Court would conclude on this issue.

In Light of the Decision, Would MEPA Increase or Decrease Potential Litigation?

The panel of state agency counsel and plaintiff attorneys split on this question. Legal counsel for the Departments of Natural Resources and Conservation (DNRC) and Transportation (MDT) both agreed that litigation will increase. DNRC legal counsel noted that MEPA and the Constitution impose separate obligations upon state agencies. MEPA does not implement the constitutional right to a clean and healthful environment. The dimensions of that constitutional right will be developed by case law.

Counsel for MDT noted that some agency decisions are not given deference. A problem with the Supreme Court's decision is imprecise language. In the short term, this Supreme Court decision will cause increased litigation.

Legal counsel for the Departments of Environmental Quality (DEQ) and Fish, Wildlife, and Parks (FWP) and the two plaintiff attorneys agreed that effective implementation of MEPA should decrease the potential for litigation under the Supreme Court's holding that people have the fundamental right to a clean and healthful environment free of unreasonable degradation. However, the DEQ legal counsel cautioned that whether MEPA litigation in fact decreases in practice or not is speculative. Legal counsel for DEQ also noted that the Court held that the balancing process for determining degradation under the Water Quality Act was reasonable. Other regulatory statutes do not have this type of balancing process to determine whether degradation of the environment is reasonable. MEPA provides such a process. DEQ counsel did note that one area in which litigation may increase is in situations in which agencies do not have time to prepare an EIS. The agency may point out impacts without the ability to adequately mitigate those impacts. This could implicate a fundamental right.

Legal counsel for FWP noted that MEPA has the potential for decreasing litigation. It is the process by which agencies can implement a clean and healthful environment.

The plaintiff attorneys noted that restricting the scope of MEPA would be beneficial to plaintiffs. A robust MEPA process, according to the plaintiff attorneys, will provide information to protect agency decisions from a constitutional challenge. The plaintiff attorneys also noted that legislative blanket exemptions without some environmental review via a specific statute or, lacking that, via MEPA raises a red flag under the constitutional rights defined by the Supreme Court.

New Evidence Issues in MEPA Litigation

New evidence, for the purposes of this analysis, is factual, opinion, or testimonial information allowed into the judicial record by a District Court that was not in the agency's administrative record. It is important to realize that individuals and attorneys differ on what constitutes the definition of "new evidence".

Evidence issues in some MEPA cases have been controversial. A basic tenant of administrative law states that, in general, agencies should have the chance to consider information about a project at the administrative stage of a project or proceeding and that a protesting party should not be allowed to present new evidence in a legal proceeding. Administrative agencies therefore often protest when the person bringing the lawsuit attempts to provide additional evidence that was not considered by the agency. For those protesting an agency action in court, the counterargument to limiting the introduction of new evidence is that the time period for citizens to present their evidence is limited. For

example, an agency may spend 2 years preparing an EIS and give the public 30 days to comment. It is contended that it is difficult for a citizen to conduct the type of scientific studies necessary to generate detailed information in the 30-day time limit. Citizens therefore often attempt to provide a court with additional information during legal proceedings.

Federal courts have developed detailed analyses that they apply on a case-by-case basis to address new evidence issues. The Montana Supreme Court has not directly addressed this issue.

During the 1999 legislative debates on House Bill No. 142, which limits a court's ability to review evidence that was not presented at the administrative level during the MEPA review process, it was argued that new evidence (not in the agency's administrative record) introduced in District Court placed the court in a position of a trier of fact as to whether a project should go forward or not. The proper function of the court, it was argued, should be strictly a review function. The MEPA Subcommittee requested a panel discussion on this issue that included attorneys from DEQ, FWP, DNRC, and MDT and a plaintiff's attorney. The panelists were asked whether the introduction of new evidence is a problem (**Table 4-4**).

Table 4-4. Is New Evidence a Problem?

Question	DNRC	DEQ	FWP	MDT	Plaintiff Attorney
Is new evidence a problem for the agency?	Yes	No	No	Yes	No

Counsel for MDT noted that new evidence issues can be somewhat problematic and there is not much legislative guidance on what is included in the administrative record.

FWP counsel said that new evidence issues had not been a problem. Discovery opportunities are available during the judicial process, so there should not be the element of surprise.

DNRC counsel noted that new evidence issues are a serious problem and that on a number of occasions, evidence had been deliberately withheld at the administrative level and introduced in the District Court. People have saved studies, testimony, or allegations about the adequacy of an EIS until the matter was in District Court. This claim was disputed by the plaintiff's attorney.

Counsel for DEQ said that there were four cases that involved new evidence issues. In each of the cases, the court determined that the agency had conducted a sufficient analysis. While there was disagreement between experts in those cases, the court found for the agency.

The plaintiff's attorney emphasized that the administrative record should not be unduly restricted. He noted that agency experts have worked on the EIS for quite some time, but that the public has only 30 days to get its evidence into the record. The issues need to be raised. Withholding evidence until the District Court proceedings is not recommended because this reduces the integrity of the administrative record.

The plaintiff's attorney also felt that the Legislature should not try to legislate how courts should address evidence issues. Courts are best equipped to deal with evidence issues on a case-by-case basis, which they do in many different contexts. There are some cases when a plaintiff should be barred from introducing new evidence because it should have been presented to the agency. On the other hand, there are situations where it was impossible to get information during the administrative proceedings, and in the interests of fairness, the plaintiffs were allowed to present it in court.

The EQC directed its staff to research case files to determine whether new evidence was in fact raised as an issue and whether it was a problem. Based on that review, the EQC staff concluded that new evidence was not a significant issue in MEPA litigation. The EQC staff also found that when new evidence had been raised in court, it was an issue that both the state and plaintiff counsel raised against the other.

Chapter 5: How Does MEPA Compare With Other State Environmental Policy Acts?

CHAPTER SUMMARY

- < State environmental policy acts are creations of individual states and are not mandated by federal law.
- < Fifteen states, the District of Columbia, and the Commonwealth of Puerto Rico have adopted state environmental policy acts. Some other states have enacted specific statutes for establishing environmental review procedures for specific activities or activities in specific areas.
- < Ten jurisdictions, including Montana, require the environmental review of state actions only. In the other seven jurisdictions, both state and local actions require environmental review.
- < Eleven of the seventeen jurisdictions, including Montana, require the environmental review of government permitting actions, but only Montana, Massachusetts, South Dakota, and Wisconsin limit this review to state permitting actions only.
- < State environmental policy acts (SEPA) vary in terms of what sort of action triggers the environmental impact statement process. "Action" or "project" has many different meanings.
- < The applicability of the SEPA to various state actions varies widely. A variety of models are available.
- < Most states follow the NEPA model by requiring agencies to prepare an EIS on a major action if the action "may" or "will" have a significant impact on the environment.
- < MEPA's threshold for the type of environmental analysis required depends on the significance criteria in the Model Rules.
- < Connecticut, Massachusetts, Minnesota, New York, North Carolina, and Wisconsin all use standardized thresholds or categories in the environmental review process.
- < No state has developed a specific list of measurable significance criteria by which to gauge the need to prepare an EIS.

- < The state environmental policy acts in California, Washington, Minnesota, New York, and the District of Columbia, either by statute or judicial ruling, have "action-forcing" or substantive provisions that require a certain decision or outcome based on the impact information developed in the environmental review process.
- < California, New York, Washington, and the District of Columbia do not require, but may allow, private project applicants to conduct and pay the costs of SEPA compliance.
- < An attempt to thoroughly analyze the success or efficiency of the various state environmental policy acts was not possible within the constraints of this study.

Chapter 5: How Does MEPA Compare With Other State Environmental Policy Acts?

Other States' Mini-NEPAs - Overview

Senate Joint Resolution No.18 includes a request that the Environmental Quality Council MEPA study include a review and analysis of "the successful and efficient implementation of other similar national and state laws".

Following enactment of the National Environmental Policy Act (NEPA) in 1969 and as of 1999, fifteen states, the District of Columbia, and the Commonwealth of Puerto Rico (**Figure 5-1**) have adopted state environmental policy acts, commonly referred to as SEPAs or mini-NEPAs, which are generally modeled after NEPA (Mandelker, 1999). New Jersey and Michigan implemented NEPA-like environmental review procedures by executive orders, however Michigan's executive order was rescinded in 1991. Texas, New Mexico, and Utah reportedly adopted environmental assessment requirements in the 1970s either by statute or executive order but have since rejected or repealed the requirements (Pendall, 1998). Other authorities indicate that 28 states have enacted NEPA-like environmental impact statement procedures, but only the 17 jurisdictions mentioned here have comprehensive environmental policy acts similar to MEPA (Caldwell, 1998).

Most states did not adopt NEPA verbatim, although many, including Montana's original MEPA, closely followed the federal model. States provided for SEPA implementation by establishing separate organizations or agencies to provide state agencies with guidance or model rules and/or by requiring individual implementing agencies to adopt their own rules, sometimes subject to review by a central authority. NEPA provided for the establishment of the President's Council on Environmental Quality (CEQ). Montana established the Environmental Quality Council within the Legislative Branch and provided it with general oversight responsibilities of the state's implementation of the environmental policy proclaimed in MEPA. In Montana, early MEPA Model Rules were provided to the agencies by the Attorney General's Office. The most recent (1988) Model Rules were developed through the coordinated efforts of the EQC and the state agencies.

In common, the SEPAs require agencies to review certain actions to determine whether they will have any significant impact on the environment. They all require the preparation of detailed reports or statements (EIS) when an agency knows or believes the proposed action may or will have significant environmental impacts. Most have essentially three process steps in common. First, an agency must determine whether or not the action it is taking "triggers" the law and is subject to environmental review.

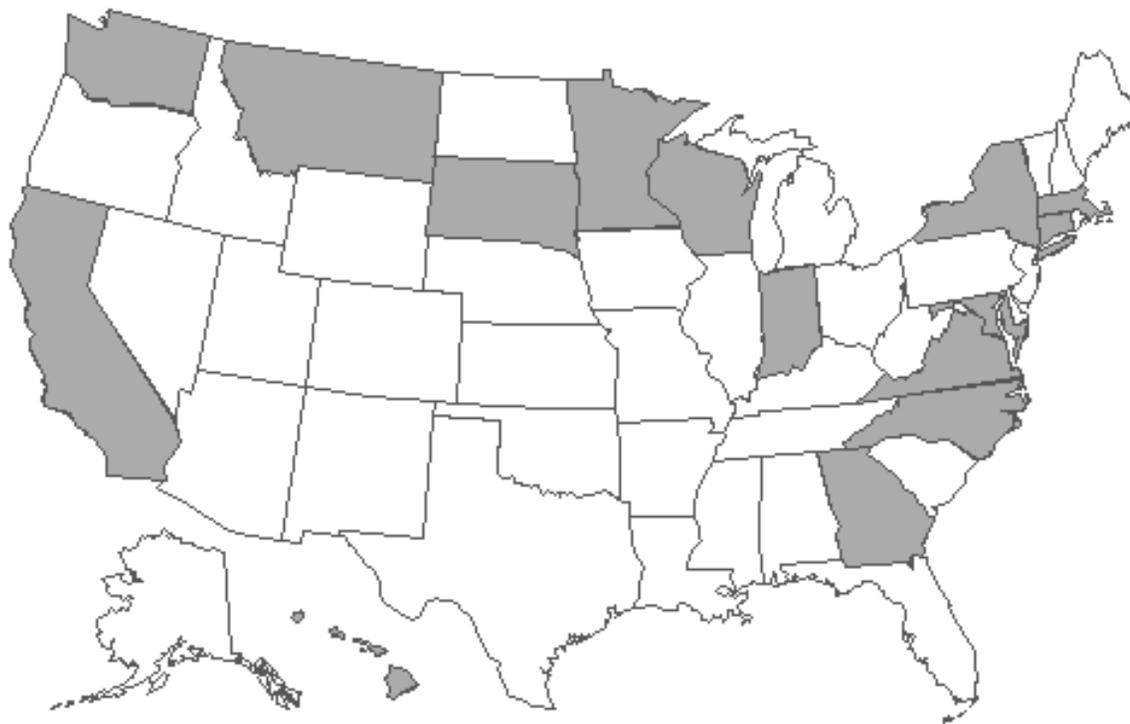


Figure 5-1. Map of States With State Environmental Policy Acts (SEPA)

The 15 states with NEPA-based state environmental policy acts are shown above.

Puerto Rico and the District of Columbia have also enacted NEPA-based environmental review policies within their jurisdictions.

New Jersey has implemented NEPA-like environmental review procedures by executive order. Several other states (Alaska, Arkansas, Delaware, Florida, Kentucky, Maine, Mississippi, Nevada, Vermont, others) have adopted specific statutes establishing environmental review procedures for specific activities or for activities in specific areas such as coastal zones.

Table 5-1. SEPA's (State Environmental Policy Acts) - General Application and EIS Triggers

STATE	Law since	SEPA applies to projects undertaken/funded by:		SEPA applies to projects permitted by:		EIS is required for actions that:		
		state only	state and local agencies	state only	state and local agencies	may significantly affect environment	significantly affect environment	and are major
NEPA	1970	federal		federal			x	x
California	1970		x		x	x		
Connecticut	1971	x				x		x
District of Columbia	1989		ordinance		x			
Georgia	1991	x				x		
Hawaii	1974		x		x	x		
Indiana	1972	x					x	x
Maryland	1973	x					x	
Massachusetts	1972	x		x			x	
Minnesota	1973		x		x	x		x
Montana	1971	x		x			x	x
New York	1976		x		x	x		
North Carolina	1971	x					x	
Puerto Rico	1970		x		x		x	
S. Dakota	1974	x		x				
Virginia	1973	x					x	
Washington	1971		x		x	x		x
Wisconsin	1971	x		x			x	x

- * All 17 state environmental policy acts (SEPA's) require environmental review of state-initiated actions.
- * 10 jurisdictions, including Montana, require environmental review of state actions only. In 7 other jurisdictions, state and local actions require review.
- * 11 of the 17 jurisdictions, including Montana, require review of government permitting actions, but only Montana, Massachusetts, South Dakota, and Wisconsin limit this review to state permitting actions only.
- * Montana's threshold for conducting an EIS is that the action is a **major** state action and the impacts **will**, not may, significantly affect the environment.

If so, then the agency must determine, by some process, whether or not the action exceeds some threshold that results in significant impacts or will result in a finding of no significant impact. The MEPA and rules describe this as the environmental assessment or EA process. Finally, if there are significant effects or the possibility of significant effects, the action is then subject to a detailed environmental review, the EIS in Montana, that identifies and discusses anticipated impacts and reviews alternatives. The EA process can be eliminated entirely if the significance of the impacts is such that an EIS is triggered by the project or if other mandatory thresholds are exceeded. A further discussion of how the various SEPAs address common topics of the environmental review process is provided below in “State Environmental Policy Acts - Functional Comparisons”.

Beyond what the SEPAs have in common, their applicability varies widely (**Table 5-1**). All seventeen jurisdictions require environmental analysis of certain state actions, and seven of them (California, the District of Columbia, Hawaii, Minnesota, New York, Puerto Rico, and Washington) require environmental reviews of certain local actions. Six of the SEPAs (Connecticut, Georgia, Indiana, Maryland, North Carolina, and Virginia) specifically exclude state-issued permits from environmental analysis. However, the remaining eleven jurisdictions, including Montana, plus the federal NEPA require state-issued or federal-issued permits to be subject to review. Additionally, seven of these eleven SEPAs require that certain permits issued by local governments be subject to environmental review. Of the eleven jurisdictions that require environmental review of certain permits, only Montana, Massachusetts, South Dakota, and Wisconsin do not extend the requirement to locally issued permits (Sigford, 1993)

The applicability of the SEPAs to various state actions varies widely as well. For example, in South Dakota, the environmental review of state actions is voluntary and there is no provision for an environmental assessment; only a detailed statement or environmental impact statement. A further summary of the state environmental policy acts is provided in pages 76-85, “A Brief Synopsis of State Environmental Policy Acts”.

State Environmental Policy Acts - Functional Comparisons

Actions That Don't Trigger the SEPA Process

All mini-NEPAs and NEPA exempt ministerial actions, such as sporting permit issuance and issuance of driver's licenses, and ministerial funding disbursements. The definition of ministerial varies between states, particularly in the area of building permits, which in some states have been argued as not fitting the definition of ministerial. Most states have SEPA exemptions for emergencies and provisions for identifying categorical exclusions for certain actions that could be excluded from review. Some states simply list these actions arbitrarily and others first require a SEPA review process such as the programmatic environmental review or rule listing required by MEPA. In conducting a SEPA review to identify what categories of action typically meet certain criteria that qualify them to be

categorically excluded from further environmental analysis or review, several states, including Montana, also require the identification of situations when the exclusions would not apply; exceptions to the categorical exclusion. In several states these involve categorically excluded actions that are proposed to occur in locations generally described as "environmentally sensitive areas", which may or may not be specifically defined. Most states, including Montana, have also provided for specific statutory exemptions from SEPA review.

Entering the Environmental Impact Statement Process - Triggers

State environmental policy acts vary in terms of what sort of action triggers the environmental review process. NEPA requires the review of major federal actions significantly affecting the environment. Statutes in Montana, Indiana, and Wisconsin have similar or identical language in regard to major state actions. Other states have lowered the trigger to those projects that "may", instead of "will", significantly affect the environment. The definitions of "project" or "action" vary greatly among the states and are discussed briefly in pages 76-85, "A Brief Synopsis of State Environmental Policy Acts".

Most states and NEPA require some type of environmental assessment procedure to identify whether or not a detailed statement (EIS) is required. Exceptions are the District of Columbia, Maryland, South Dakota, and Virginia. South Dakota's environmental review process is voluntary and only provides for an EIS, Virginia requires an EIS only on state construction projects that exceed \$100,000, Maryland requires analysis only on certain state legislative and budget proposals, and the District of Columbia requires an EIS for construction projects that cost more than \$1 million. Montana requires the preparation of an EIS whenever an EA determines that one is necessary or whenever the proposed action is a major state action significantly affecting the quality of the human environment based on the significance criteria of Model Rule IV.

Standardized or Mandatory Thresholds

Connecticut, Massachusetts, Minnesota, New York, North Carolina, and Wisconsin all use standardized thresholds or categories in the environmental review process. Some states separate actions into Type I actions (or some other designation), Type II actions, and so forth. Actions that meet these standardized thresholds may require an EA, a detailed EA, or an EIS. In these states, the law or rules generally require agencies to prepare lists of actions for which one type of review or another will be utilized. Some states require a third-party review (e.g., Minnesota's Environmental Quality Board) and acceptance of agency determinations, while other state lists are subject to public review and comment. The "action" definition in some states limits environmental reviews to specific projects (state construction) or projects exceeding a certain cost. Others have established arbitrary thresholds related to the size of projects that trigger the preparation of SEPA documents. For example, in large cities, Minnesota requires an EA for new warehouse construction exceeding 600,000 square feet in size, but an EIS is mandatory if the warehouse exceeds 1.5 million square feet.

The federal Council on Environmental Quality guidelines for federal agencies implementing NEPA require agencies to adopt procedures that include specific criteria for and identification of typical classes of action that (1) normally do not require an EIS; (2) normally may be categorically excluded from review; and (3) normally require an EA but not necessarily an EIS.

MEPA provides three different levels of environmental review--categorical exclusion, environmental assessment, and environmental impact statement. MEPA's thresholds for the type of environmental analysis required depend on the significance criteria in the Model Rules. The preparation of each document is based on the significance of the potential impacts of the proposal. The MEPA Model Rules allow for agencies to define (list), through rule or through the preparation of a programmatic environmental review, those actions that could be categorically excluded. Otherwise, the threshold for conducting a MEPA review is any major state action that significantly affects the quality of the human environment. The terms "action" and "human environment" are defined in the Model Rules. Model Rule IV sets forth the criteria for subjectively determining significant impacts.

Significance

A determination of the significance of the potential impacts of an action is common to all SEPA processes. A significant effect under NEPA may be direct, indirect, or cumulative. MEPA uses the terms primary, secondary, and cumulative. Most states follow the NEPA model in requiring agencies to prepare an EIS on a major action if the action may or will have a significant impact on the environment, although the definition of "action" varies. The determination of whether or not an impact will be significant is left to the agency and identified through the review process, which usually includes the input of others. No state has developed a specific list of **measurable** significance criteria by which to gauge the need to prepare an EIS (Sigford, 1993). The determination of "how significant" is typically subjective and left to the judgment of the agency or the interpretation of the courts. The criteria that must be considered in determining the significance of an action are spelled out in statute or rules. Montana agencies gauge significance based subjectively on the proposed action's impact on a variety of criteria, including the frequency, geographical extent, severity, and duration of the impacts, the project's growth-inducing or growth-inhibiting impacts, its relationship to other cumulative impacts, impacts on unique environmental characteristics and resources and the societal value of those resources, establishment of undesirable precedents, and the degree to which the action may conflict with other laws, rules, or plans. (See Model Rule IV.)

The Environment

In considering impacts affecting the environment, some states have defined the term "environment" in various ways. Georgia limits environmental review to impacts on air, water, land, plants, animal, historical sites or buildings, and cultural resources. Indiana, Massachusetts, and Minnesota are similarly restrictive. Washington limits its review to the natural and built environment. California restricts review to the physical environment but

allows agencies to weigh the indirect social or economic effects when considering whether or not the effect on the physical environment is significant. This is similar to the language of NEPA.

Montana, Hawaii, Maryland, and Connecticut all require the evaluation of at least some economic and social effects. The term in Montana's MEPA and its rules is "human environment" and it "includes, but is not limited to biological, physical, social, economic, cultural, and aesthetic factors". Economic and social impacts alone do not trigger an EIS, but if one is prepared, those factors must be discussed.

Who Pays for Environmental Analysis?

Agencies that propose agency-initiated projects pay the costs of SEPA compliance in every case. In those 11 states that require SEPA compliance for governmental permitting of private actions, none specifically provide that the state is liable for the costs. The implication, at least, is that the applicant is responsible for some or all SEPA compliance and review costs. Many states go beyond the implication. Minnesota has a detailed formula for recovering its review costs.

Massachusetts requires SEPA compliance for state-issued private project permits and also requires that the applicant prepare and submit the initial environmental document. A state review board then determines whether or not an EIS is necessary, and the applicant is also responsible for those costs.

California, New York, Washington, and the District of Columbia do not require, but may allow, private project applicants to conduct and pay the costs of SEPA compliance. None of these states allow private project applicants to make determinations on significance of impacts, and most assess an agency review fee. Neither Hawaii nor Puerto Rico address cost recovery, although both reportedly allow applicants to prepare their own EISs. Of the other states that require EISs on private sector projects, only NEPA and Minnesota, Montana, South Dakota, and Wisconsin specifically require the agencies to prepare the EISs themselves or hire consultants to do so.

Montana requires that the state or its consultants conduct the environmental review process and that the applicant pay only the costs of gathering data and information up to a statutory limit for those projects that require an EIS costing more than \$2,500. If an agency intends only to file a negative declaration of impacts for the project, the agency absorbs all costs. Arguably, MEPA does not allow the state to recover the cost of reviewing MEPA documents. Unless costs can be tied to the cost of gathering data and information for the preparation of an EIS, Montana agencies absorb the costs of complying with the scoping, contract management, document reviews, public meetings, comment response, and other procedural costs of complying with MEPA. Montana's metal mine reclamation laws, Title 82, chapter 4, part 3, MCA, do include specific language that authorizes the state to recover MEPA document review costs.

Effectiveness

An attempt to analyze the success or efficiency of the various state environmental policy acts was not made due to time limitations. A thorough analysis of each SEPA could be a separate effort similar to the MEPA study requested in SJR 18. It is often difficult to correlate a particular policy or statute to specific measurable outcomes. In determining the effectiveness of the mini-NEPAs, outcomes are especially difficult to measure. A set of objective criteria would first need to be established to comparatively measure the effectiveness of the various statutes, and data common to all state programs would have to be available. If the former could be developed by the Subcommittee, it does not appear that the latter is available in many cases.

If the number of environmental assessments or environmental impact statements produced in each state were used as a measure of the effectiveness of a SEPA program, some figures are available. However, because many states have no central reporting requirement for EAs or EISs as in Montana, the figures are suspect and incomplete. Even Montana's EQC MEPA database is not totally complete as it relies on the agencies' compliance with the notification requirements and a consistency of data entry over time by both the agencies and the EQC. Also, because of the wide variation between the applicability requirements of the state SEPAs, environmental reviews are not always required on the same actions from state to state. Finally, total numbers of environmental reviews will vary due to state populations and levels of project activity.

A survey of states conducted by Sigford (1993) reported that for the years 1990-1993, California and New York reported that thousands of EAs were prepared annually but that there was no central reporting requirement. Indiana and Puerto Rico failed to report, and Georgia's law was not enacted until 1991. Connecticut kept no records, and the SEPAs for Maryland, the District of Columbia, South Dakota, and Virginia do not provide for an EA process. For those that reported, Wisconsin averaged 106 EAs annually for the time period, Minnesota 120, North Carolina 177, Hawaii 310, Montana 338, Massachusetts 393, and Washington 7,105.

In terms of the annual average numbers of EISs produced in SEPA states during the 1990-1993 time period, the report shows the following: the District of Columbia 0, South Dakota 1, Montana 2 (EQC database shows 15; **Chapter 3, Table 3-6**), Georgia 3, North Carolina 3, Wisconsin 3, Connecticut 3, Minnesota 6, Hawaii 18, Virginia estimates 60, Indiana estimates 80, Washington 119, Massachusetts 176, New York 260, and California 838.

These figures do not reflect the current situation, any legislative changes to the SEPAs since the survey, or any changes in the administrative implementation of the laws. They are only comparable for the time period. The projects for which these documents were prepared obviously vary depending on the triggers in the individual laws, the SEPA thresholds of significance, and the impacts of the individual projects themselves.

Do states with SEPA's have better or worse environmental conditions than other states because of or in spite of the law? Do states with very active SEPA's have improved environmental circumstances over other states? Is there a relationship between a state's economic viability and the presence or active implementation of a SEPA? These questions are beyond the scope and time limitations of this study, but they may provide an interesting thesis for others to pursue.

From an empirical standpoint, a measure of the effectiveness of NEPA and the mini-NEPA's can be gained by a crude review of the legislative history of the laws in the states that have SEPA's (**Table 5-1**). Since the 1969 passage of NEPA, most of the states that enacted mini-NEPA's still have them. This is not to say that they haven't been subject to periodic review or legislative amendment, usually in response to judicial rulings or particularly contentious projects. NEPA itself has been the subject of frequent congressional oversight hearings. On the other hand, since the early 1970s, only New York (1976), the District of Columbia (1989), and Georgia (1991) have added overarching environmental review policy acts. However, both the District of Columbia and Georgia statutes are limited in their application to specific actions. Other states without full environmental review programs or SEPA's often require environmental analysis of specific proposals through specific statutes or through statewide or regional planning statutes.

At least three recent reports on the subject of state or federal environmental policy act effectiveness are available: *The National Environmental Policy Act - A Study of Its Effectiveness After Twenty-five Years*, Council on Environmental Quality, January 1997; *Paperwork or Protection? A Comparative Assessment of State Environmental Policy Acts*, Minnesota Center for Environmental Advocacy, December 1993; and *Fixing CEQA - Options and Opportunities for Reforming the California Environmental Quality Act*, Landis, et. al, California Policy Seminar, 1995. The SEPA analyses for this chapter relied upon these reports, staff contacts with other state officials, and staff review and analysis of SEPA's from other states.

The 1997 Council on Environmental Quality report on NEPA's effectiveness concludes that, overall, NEPA is a success in that it requires an advance analysis of the potential environmental consequences of federal actions and in that it brings the public into agency decisionmaking like no other federal statute. It also concludes that there are substantial opportunities to improve the effectiveness and efficiency of the NEPA process and that the CEQ is "embarking on a major effort to reinvent the NEPA process". With a recent change in CEQ administration, however, this may no longer be a priority issue according to one source (Kemmis, 1999).

The Minnesota and California reports were documents that analyzed and compared state mini-NEPA's with the purpose of identifying ways to conduct environmental reviews of certain actions in the most efficient manner (Minnesota) and identifying specific ways to improve the overall environmental review process (California). Both state reports conclude with specific recommendations for improving their state environmental policy acts.

A Brief Synopsis of Other State Environmental Policy Acts

The following is a brief summary of state mini-NEPA laws, including those from the jurisdictions of the District of Columbia and the Commonwealth of Puerto Rico. New Jersey currently has a mini-NEPA by executive order. The states of Maine, Vermont, and Florida are among other states that require the environmental review of certain specific actions under planning or other statutes. Those listed below are only those NEPA-like statutes that have a full environmental review program similar to the Montana Environmental Policy Act, although their applicability varies. Included in the summaries are some comparisons with MEPA.

NEPA - Effective in 1970. The National Environmental Policy Act is implemented through federal CEQ rules and guidelines and individual agency NEPA rules. NEPA applies to major federal actions, including actions conducted, financed, regulated, or approved by federal agencies and rules, plans, policies, procedures, and agency proposals for legislation that will have significant impacts on the environment. Courts have ruled that any action with significant environmental impacts is major. As in MEPA, unless a project is reviewed and determined to be categorically excluded, EAs are prepared to determine the significance of an action, unless it is obvious that an EIS is needed. Agency rules may determine what classes of action require what type of review. As in MEPA, an EA must consider alternatives and impacts. No public participation is needed for EAs. If a Finding of No Significant Impact (FONSI) can not be declared, then either a mitigated EA (FONSI) or an EIS must be prepared. An EIS must include mitigation measures, but courts have ruled that agencies are not responsible for implementing mitigation measures. Mitigated FONSI's are enforceable. An EIS means the "detailed statement" referred to in the statute. As in MEPA, the EIS process is publicly noticed and the document is prepared by an agency or an agency's consultant. A minimum 45-day DEIS comment period is required in the regulations. An agency response to comments on the DEIS is required. The record of decision explains the analysis and decision, including the preferred alternative. Programmatic EISs are allowed. The NEPA is not "action-forcing" in that it requires agencies to select a particular course of action. The U.S. Supreme Court has established that NEPA is procedurally enforceable in several rulings. Congress has exempted certain regulatory programs of the EPA (Clean Air Act, Federal Water Pollution Control Act, Toxic Substances Control Act) because of specific programmatic requirements that provide functional equivalence to NEPA.

California - CEQA was enacted in 1970. It requires an environmental impact report similar to the federal EIS, including mitigation measures and a description of growth-inducing effects. CEQA applies to both state agencies and local governments. It requires environmental review of state or local actions that may have significant environmental impacts, including the review of discretionary permitting actions by state or local agencies that may have significant environmental impacts. Permit applicants bear the costs of environmental assessments. CEQA includes detailed provisions governing the preparation of the impact report and for judicial review. Statutory terms are defined in rule. Unlike NEPA and MEPA, CEQA is "action forcing" in that it provides that agencies should not approve projects with significant unmitigated impacts if there are feasible alternatives. Like MEPA, CEQA uses significance criteria for determining impacts and environmental review document types. More environmental review documents are prepared in California than in any other state.

Connecticut - The state CEPA was adopted in 1971 and has been amended several times since. The law requires environmental review of only state or state-funded actions that may have a major impact on state physical resources. Each agency must develop for review and approval a listing of actions that are subject to a particular type of environmental analysis. An EA is required for a specific listing of activities in order to determine the significance of the environmental impacts. Either a FONSI is issued or an EIE (EIS) is prepared by the agency. Environmental reviews apply only to specific state activities listed in each agency's environmental classification document.

District of Columbia - The environmental policy statute has been effective since 1989. It applies to major actions by district officials, including permitting decisions. The term "action" is limited to projects costing more than \$1 million unless the mayor determines that there are likely to be imminent and substantial effects on the public health, safety, and welfare. An EIS is required for major actions likely to have significant impacts on the physical environment. For permitting actions, the applicant may be required to prepare the EIS and reimburse the government's review costs. The district law is "action-forcing". The agency may substitute or require an alternative action or require mitigation measures if the alternative or mitigated action will accomplish the same purposes with minimized or no adverse environmental effects. Otherwise, the action may be denied if there are unmitigated negative impacts.

Georgia - Georgia has the most recent SEPA law, which was passed in 1991. The law applies only to state actions defined as land-disturbing activities conducted by a state agency or funded 50% or more by a state grant, to the proposed sale or exchange of 5 or more acres of state land, or to the proposed harvesting of more than 5 acres of trees from state land. The law has no policy statement; only findings of need for state stewardship of the physical and cultural environment. Guidelines were developed by DNR for use by other state agencies. If by taking an agency action it is "probable to expect a significant adverse impact on the natural environment", then the statutory threshold for conducting a review is triggered. An Environmental Effects Report (EER/EIS) is required unless a FONSI can be prepared. The statute requires analysis of alternatives and mitigation measures. Following comment, the decision may be to proceed, to proceed with mitigation, or to not proceed. It also implies that the law is procedural only and declares that the final decision to proceed with an agency action "shall not create a cause of action" by any person provided that the procedural notice and hearings provisions have been followed.

Hawaii - Hawaii has had a SEPA, patterned after NEPA, since 1974. The law is administered by the state Office of Environmental Quality Control. Hawaii's SEPA applies to state and local actions, including permits, but limits the term "action" to specific activities. SEPA is closely tied to state planning efforts. Hawaii has state land use planning and mandatory comprehensive planning in its four counties. An environmental assessment is not required if the project is consistent with a county comprehensive plan unless it is located in an environmentally sensitive area that is defined. A 15-member citizen's Environmental Council appointed by the Governor advises agencies and adopts administrative rules. There are eight specific triggers that can require an environmental assessment, relating mostly to land uses in specific locations or the reclassification of land uses. Significance criteria are used to determine the level of environmental review. Private applicants may be allowed to produce EIS documents. There are specific time limits for document review and for initiating judicial review proceedings challenging agency decisions.

Indiana - The Indiana Environmental Policy Act was enacted in 1972. A primary author of NEPA, Lynton Caldwell, is a professor at Indiana University. The state law is similar in text and terminology to NEPA and MEPA except that it applies only to state actions by state agencies that will significantly affect the quality of the environment. The state issuance of permits or licenses is expressly exempt from the law. Terms are defined in agency rules. An EA determines the need for an EIS. Agency rules include the form and substance of the EA, which appears as an EA checklist. Proposed state actions likely to be "highly controversial from an environmental standpoint" may be a justification for the preparation of an EIS. Agency boards for air, water, and solid waste are responsible for defining actions that constitute a major state action significantly affecting the environment.

Maryland - Maryland has had a SEPA since 1973. The law applies to state agency actions only and not to state-issued permits. It has broad NEPA-like policy language but also a very restrictive "action" definition. "Proposed state action" means requests for legislative appropriations or other legislative action that will alter the quality of air, land, or water resources. State actions regarding secondary roads are exempt. Guidelines for state agencies are issued by the Secretary of Natural Resources. The statute includes a statement that "each person has a fundamental and inalienable right to a healthful environment". A subsequent court case restricted this language, finding that the Legislature did not intend to create new or enlarged personal actionable rights under the law.

Massachusetts - The state law was enacted in 1972. As in MEPA, the law requires environmental review for state, but not local, permitting actions. The state or the project applicant is required to prepare the Environmental Notification Form (ENF or EA), which is reviewed by a separate state review agency (the Secretary of the Office of Environmental Affairs). That agency then determines whether or not the applicant will prepare an EIS based on whether or not the project exceeds mandatory EIS thresholds of magnitude or impact (22% of EAs in 1990-1993 became EISs). The applicant is responsible for the preparation of the EIS document as well but does not pay for the state agency's review costs. A previous state fee of \$300 was dropped for not being sufficient to make the collection worthwhile. The law includes mandatory thresholds for conducting EAs and EISs and provides for agency discretion regarding significance determinations. Unique to Massachusetts, the threshold for preparing an EIS is not a finding of significant environmental impact, but a finding that the proposal may "damage" the environment. "Damage to the environment" is defined by rule. Also, unique to Massachusetts and Minnesota, citizens can petition the government to require the preparation of an EA. No state provides for the preparation of an EIS by citizen petition. Massachusetts requires a significant number of environmental review documents each year, and the law is actively implemented. In 1992, 69 EISs were produced in the state, ranking it fourth behind California, New York, and Washington (Landis, 1995). Montana prepared EISs on five projects in 1992 according to the EQC database.

Minnesota - The state SEPA was enacted in 1973, was amended significantly in 1980, and is patterned after NEPA. It requires environmental review of actions and permitting at both the state and local level. Minnesota does not prepare many EISs annually; about the same number as Montana for 1991-1993. An EIS is triggered when a proposal exceeds a mandatory threshold provided in rules or when impacts identified in an EA may be significant. Using this agency discretion threshold, 1.4% of EAs in 1990-1993 became EISs. Citizens may petition for the preparation of an EA in cases in which the agency determines that an action will not exceed the document threshold, but when citizens can show the potential for significant impacts. Minnesota's law contains "action-forcing" language that prohibits significant environmental impacts that cause or may cause pollution or damage "so long as there is a feasible and prudent alternative consistent with reasonable requirements". This provision is reportedly seldom used although it appears to provide substantive authority to the law.

Montana - MEPA was enacted in 1971 and is closely patterned after the NEPA model. It requires an environmental assessment for state actions and state-permitted actions only, which is similar to SEPAs in South Dakota, Massachusetts, and Wisconsin (and NEPA for federal actions). The triggers for the preparation of environmental reviews are major state actions that significantly affect the environment. Definitions are provided in rule. The thresholds for MEPA document preparation are the significance criteria found in the agency rules. There are provisions for categorical exclusions to MEPA review. As in most states, MEPA has a two-stage environmental review process--an EA on nonexcluded projects and an EIS if impacts are found to be significant. Permit applicants pay the costs of EIS preparation over \$2,500 up to a statutory limit that is based on the estimated cost of the project. MEPA documents are prepared by the state or the state's contractors.

New York - The New York SEPA law was enacted in 1976; it follows the NEPA model. It is one of the most implemented SEPAs in the country. The law requires state and local agencies to prepare environmental reviews that address mitigation, growth-inducing, and energy impacts on government and private permitting actions that may have a significant impact on the environment. Terms are defined in statute. Judicial decisions have provided that the law has "action-forcing" (substantive) authorities by requiring an obligation to consider and impose practicable mitigation measures. Before approval of an action subject to an environmental review, agencies must make an explicit finding that any identified adverse effects will be minimized or avoided and that alternatives are chosen that minimize or avoid as many adverse environmental effects as possible and practicable. The rules have thresholds for activities requiring review. Actions are categorized by type in rules--Type I actions usually require an environmental review and may require an EIS, and Type II actions usually do not. Beyond this initial screening, the agencies rely on a significance test for determining impacts and the need for further environmental analysis. An EIS is required for all Type I actions that may have significant impacts and on all uncategorized actions that do not result in a negative declaration, a mitigated negative declaration, or a finding of no significant impact.

North Carolina - The SEPA was enacted in 1971 and modeled after the language in NEPA. The law was adopted with sunset provisions that were removed in 1991. It applies only to state agency actions and not to permitting, except in the case of local government units that require a state permit or the state funding of major local developments having significant impacts. Local governments may establish an EIS process for major developments, public or private, within their jurisdiction. Up through 1995, only one local government had used the authority. A central agency, the Department of Administration, is responsible for model regulations, receipt and circulation of environmental review documents, training of state officials, and coordinating and reviewing the establishment of minimum threshold criteria by state agencies. Statute and rules define "action". Agencies, by rule, develop specific minimum criteria that designate minimum levels of environmental impact. Actions below the threshold receive no review (categorical exemption). If an action is above the threshold, an EA is needed, as in Montana, to determine if a FONSI, mitigated FONSI, or EIS is necessary. The law requires only an analysis and discussion of significant adverse effects.

Puerto Rico - Puerto Rico has had a SEPA since 1970. Its purpose, policy, and goals language is reportedly identical to NEPA. It applies to actions that will significantly affect the environment. Action taken by commonwealth (state) and local agencies and permits issued by both governments are included. The federal CEQ rules are used as guidance, including the use of the significance criteria for document threshold determination. A commonwealth agency similar to the federal CEQ has authority to approve regulations for the implementation of the law and also has the authority to review EISs and reject them for inadequacy.

South Dakota - The South Dakota SEPA was enacted in 1974 and is similar to the NEPA model language, but it has no policy statement and no overarching statement of purpose or goals. Early guidance was provided by the state Department of Environmental Protection. Like Montana, the law provides for the environmental review of state actions, including state-permitted actions, but in South Dakota, the review is only voluntary. Agencies "may" prepare NEPA-like environmental reviews that address criteria such as mitigation measures and growth-inducing aspects. Courts have held that the state law cannot be used to force the agencies to prepare an environmental review. The law is not aggressively implemented. Few environmental reviews have been produced, and the law has not been actively litigated.

Virginia - The Department of Environmental Quality, Office of Impact Review, coordinates Virginia's responses to environmental documents prepared for state and federal projects. The law was effective in 1973. It does not follow the NEPA model. Only major state projects, which are defined as those that involve the acquisition of an interest in land for the construction or expansion of a state facility and that cost more than \$100,000, are subject to environmental review. Other specific state statutes require the preparation of an environmental review document for the operation or expansion of public airports, mineral exploration or mining of state lands, drilling permits in the Tidewater area, and certain highway projects. DEQ distributes the documents to state and local agencies, summarizes the comments, and makes recommendations. DEQ reports reviewing about 100 environmental review documents each year. Implementation is through a procedures manual. No EAs are produced, and significance is not a threshold for determining the type of environmental analysis required. The statute defines what activities are to be reviewed and what information is to be included in the environmental impact report. Environmental impacts are to be addressed, including impacts on wildlife habitat, unavoidable adverse impacts, proposed mitigation measures, alternatives to the construction project, and irreversible environmental changes because of the project.

Washington - The state has had a mini-NEPA law since 1971 that was nearly identical to NEPA. Former U.S. Senator Henry Jackson was one of the primary sponsors of NEPA. The state law was subject to bipartisan studies in 1983, 1994, and 1995, and legislative changes have altered it from its original form. The SEPA applies to actions by both state and local agencies and includes state and local permitting decisions. Following California and New York, Washington has one of the more actively implemented SEPAs. In 1996, the law was amended to integrate the SEPA process with the permitting and growth management activities required by the state's Growth Management Act (GMA). If the GMA rules and regulations consider the environmental impact and mitigation measures of a project, then SEPA is satisfied. In any event, the review of the project under both laws and the issuance of permits are to be integrated and not segregated. Washington's SEPA was judicially granted substantive authorities that allow for the denial or conditioning of projects. Subsequent legislative changes have limited that authority to conditioning projects based on previously established agency rules or policies and not based on circumstances first identified in a project's environmental review. Terms are defined in statute and rule. Environment includes natural and "built" (infrastructure). The law includes language that the "legislature recognizes that each person has a fundamental and inalienable right to a healthful environment". Unlike the Maryland Supreme Court, the Washington Supreme Court has stressed the importance of this language and has referenced its applicability in state rulings. Except for the preparation of an EIS, rules specify time limits for threshold determinations, document preparation, and reviews. The threshold for determining if an EIS is required is whether or not a project may have a significant adverse environmental impact. During the initial review (EA), a project's impacts may be nonsignificant, may be mitigated to nonsignificance, or may be significantly adverse and require an EIS. Permits and project approvals may be conditioned or denied based upon information resulting from the SEPA document.

Wisconsin - The state SEPA was enacted in 1971 and modeled after NEPA, directing state agencies to substantially follow the guidance developed by the federal CEQ for NEPA. The law lacks procedural guidance, and most implementation details are found in agency rules. As in MEPA, the law requires an environmental review of major state actions, including state permitting actions significantly affecting the quality of the human environment. Like Minnesota and Massachusetts, the Wisconsin law includes the provision for mandatory thresholds for conducting environmental reviews. An EIS is required when the EIS threshold is met or at the agency's discretion when an EA shows there may be significant impacts (agency discretion required an EIS for 0.3% of total EAs in 1990-1993). The DNR agency rules list categories of actions (Type I through Type IV) that require a certain minimum of environmental review. Type I category actions are major actions that would significantly affect the environment, triggering an EIS, and include such actions as the state acquisition of over 1,000 acres and converting its basic land use, new electric generation facilities over 20 megawatts, new metal ore refineries, certain metal mine permitting (greater than 160 acres or 5 million tons of ore), or new waste disposal facilities of a certain size (80 acres or 1 million tons of waste). Type II actions always require an EA and may require an EIS depending on the significance of the impacts. Type III actions do not normally require an EA but may need a checklist review, and Type IV actions are generally categorically excluded from review. The rules are fairly detailed. For private actions requiring state approval, the state DNR rules allow the agency to require the applicant to prepare and submit an environmental impact report describing the proposed activity, sometimes in great detail (1,000 pages or more) to assist the state agency in its environmental review process. Wisconsin prepared a similar number of EISs as in Montana for 1991-1993. The DNR completed 5 EISs (all on power plants) and 77 EAs in fiscal year 1999.

Chapter 6: MEPA: Is It Substantive, Procedural, or Both?

CHAPTER SUMMARY

- < Five pieces of legislation (SB 302 in 1977, SB 388 in 1977, SB 506 in 1979, SB 368 in 1983, and SJR 20 in 1983) were introduced that would have clarified that MEPA is strictly a procedural statute or an action-forcing substantive statute or that would have studied the impacts of the substantive vs. procedural issue. All five bills contentiously failed.
- < Three MEPA court cases analyzed and ruled on the issue of whether MEPA supplements an agency's permitting/licensing authority or is strictly procedural. Two cases favor a substantive interpretation, and the other case favors a procedural interpretation. However, in seven court cases in which a judge or the Supreme Court has judicially reviewed other MEPA issues, the courts have made statements that NEPA and MEPA are essentially procedural statutes.
- < The state courts are split on the issue. Add to that the 1999 Supreme Court ruling in the *Montana Environmental Information Center v. Dept. of Environmental Quality* case that defines Montanan's right to a clean and healthful environment, which may or may not have a bearing on whether MEPA is substantive or not, and the courts of Montana have not added much clarity to this issue.
- < As with the Legislature and the courts, the agencies are also not consistent on the issue of implementing MEPA substantively or procedurally. Each of the agencies has its own interpretation. DEQ and FWP each implement MEPA both substantively and procedurally depending on the permitting or licensing act being implemented and on particular factual circumstances. DNRC and MDT strictly implement MEPA procedurally.
- < At the federal level, the United States Supreme Court has determined repeatedly that NEPA is essentially a procedural statute.
- < Of the 15 states, the District of Columbia and the Commonwealth of Puerto Rico, only 5 jurisdictions (California, Minnesota, New York, Washington, and the District of Columbia) implement their SEPA's substantively.
- < The importance of this issue is obvious--should MEPA dictate a result or dictate a process or both? Currently it is "both". A consensus of the

Montana public, the Legislature, state agencies, and state courts on this divisive issue, has not been reached to date--or maybe it has.

Chapter 6: MEPA: Is It Substantive, Procedural, or Both?

What Is the Substantive vs. Procedural Issue and Why Is It Important?

Definitions

Everyone throws out the terms "substantive" and "procedural" when talking about the Montana Environmental Policy Act. But what do those terms really mean? The following are the definitions of "substantive" and "procedural":

Substantive: If an agency implements MEPA substantively it could mean the following:

- (1) that MEPA dictated the agency's decision in some way (action-forcing); and/or
- (2) that the agency is using MEPA as the authority to mitigate or use stipulations on a permit, license, or state-initiated action beyond the agency's permitting, licensing, or state-initiated action authority.

Procedural: If an agency implements MEPA procedurally, it means that MEPA does not dictate a certain result--it is an information process only. As long as the decisionmaker has been fully informed, the decisionmaker can make a decision regardless of the impacts disclosed in the MEPA document.

Why Is the Substantive vs. Procedural Issue Important?

At its very core, this issue resolves around whether MEPA provides state agencies with additional authority to regulate a permit or license or whether MEPA directs a state agency that is taking a state-initiated action (i.e., timber sale or building a fishing access site) to conduct that action in a certain way.

The substantive vs. procedural issue has been a politically divisive one in the past. In the late 1970s and early 1980s, the Legislature debated the issue extensively and contentiously and could never come to any resolution. Since the early 1980s, debate on this issue has been almost nonexistent. This could be attributed to a variety of factors. State agencies primarily use MEPA procedurally, which has not engendered controversy. The instances in which the agencies have used MEPA substantively have been very narrow and limited.

The state courts have differing opinions on the issue. Add to that the 1999 Supreme Court ruling in the *Montana Environmental Information Center v. Dept. of Environmental Quality* case that defines Montanan's right to a clean and healthful environment, which may or may not have a bearing on whether MEPA is substantive or not, and the courts of Montana have not added much clarity to this issue.

Some state agencies implement MEPA both procedurally and substantively, while other agencies implement MEPA procedurally. Public testimony before the Subcommittee has been split on this issue.

The importance of this issue is obvious--should MEPA dictate a result or dictate a process or both? Currently it is "both". A consensus of the Montana public, the Legislature, state agencies, and state courts on this divisive issue, has not been reached to date--or maybe it has.

Legislative History

Five pieces of legislation (SB 302 in 1977, SB 388 in 1977, SB 506 in 1979, SB 368 in 1983, and SJR 20 in 1983) were introduced that would have clarified that MEPA is strictly a procedural statute or an action-forcing substantive statute or that would have studied the impacts of the substantive vs. procedural issue. All five bills contentiously failed.

Historically, nothing highlights the substantive vs. procedural issue more than the events that unfolded during the 1977 Legislative Session. Frustrated by divergent opinions regarding the status of MEPA and ready for a resolution, Governor Tom Judge offered two opposing legislative proposals, requesting that the Environmental Quality Council (EQC) and the Administrative Code Committee jointly introduce the bills. One bill clarified that MEPA was procedural, while the other bill clarified that MEPA was substantive. The Administrative Code Committee introduced the procedural bill (SB 302) with modifications. The EQC introduced SB 388, a substantive, action-forcing piece of legislation with modifications. The following language in each bill highlights the opposing views:

SB 302 Pertinent portion of the title of the bill: AN ACT TO AMEND THE MONTANA ENVIRONMENTAL POLICY ACT TO SPECIFY THAT THE ACT DOES NOT EXPAND THE SUBSTANTIVE DECISION-MAKING AUTHORITY OF STATE AGENCIES . . .

Amendatory language making MEPA procedural: "make a final decision on an action for which an environmental impact statement has been prepared, based only on the express decision-making authority granted to the agency under the specific statute administered by the agency."

SB 388 Pertinent portion of the title of the bill: AN ACT TO AMEND THE MONTANA ENVIRONMENTAL POLICY ACT, CLARIFYING STATE AGENCY DUTIES IN ENVIRONMENTAL DECISIONMAKING . . .

Amendatory language making MEPA substantive: “No board, commission, or agency of the state may implement any policy, adopt any rule, or approve any action inconsistent with the policies and goals expressed in this chapter [MEPA] unless the board, commission, or agency can demonstrate that:

(a) there is no feasible alternatives consistent with the public health, safety, or welfare;

(b) the benefits of the policy, rule, or action, as defined by some other essential consideration of state policy, outweigh the harm to the environment; and

(c) the formulation of the proposed policy or the planning and implementation of the proposed action includes all feasible efforts to comply with the policies, goals, and procedures of this chapter and to mitigate adverse environmental impacts to the fullest extent possible.”

The 1977 Legislature was unable to choose a policy direction--both bills failed. SB 302 was reintroduced in 1979 as SB 506, but the results were the same. In 1983, SB 368 was introduced that again attempted to clarify that MEPA is procedural. The language in this bill stated:

. . . nothing in this chapter [MEPA] creates any right of action beyond one to require an environmental impact statement or expands the decision making authority granted by the existing authorizations [state permitting/licensing authority . . .

When SB 368 failed, an attempt was made to study the procedural vs. substantive issue, but SJR 20 also failed to pass the 1983 Legislature. Not a single bill has been introduced on the procedural vs. substantive issue since the 1983 Legislative Session.

Judicial Perspectives

Three MEPA court cases analyzed and ruled on the issue of whether MEPA supplements an agency’s permitting/licensing authority or is strictly procedural.

The first court to rule on this issue was the Montana Supreme Court in *Montana Wilderness Association v. Board of Health and Environmental Sciences* (1976). In that case, the Supreme Court held that there was a direct conflict between MEPA and the Montana Subdivision and Platting Act (MSPA). The MSPA specifically limits the state's review of local development to water supply, sewage disposal, and solid waste disposal. The MPA further places control of subdivision development in local governmental units in accordance with a comprehensive set of social, economic, and environmental criteria and in compliance with detailed procedural criteria. MEPA does not extend or supplement the state's control over subdivisions beyond matters of water supply, sewage disposal, and solid waste disposal.

In 1982, Judge Bennett of the First Judicial District determined that MEPA is substantive under the Metal Mine Reclamation Act (*Cabinet Resource Group v. Dept. of State Lands*).

In making his ruling, Judge Bennett specifically noted the following:

- X That "MEPA itself specifies that its policies and goals are supplementary to the existing authorizations of state boards, commissions and agencies. 75-1-105, MCA".
- X That there is not a direct conflict between the Metal Mine Reclamation Act (MMRA) and MEPA in this case. Denial of a permit under the MMRA is discretionary and there is no clear statutory language barring consideration of environmental factors. And therefore the Supreme Court holdings in *Montana Wilderness Association v. Board of Health and Environmental Sciences* (1976) and *Kadillak v. The Anaconda Company* (1979) do not apply in this case.
- X That court cases under the National Environmental Policy Act (NEPA) have held that NEPA is more than an environmental disclosure law--it was intended to effect substantive changes in decisionmaking.
- X That "it is not sufficient for the agency to note the presence of adverse environmental factors while denying authority to do anything about them".
- X That Montana's constitutional right to a clean and healthful environment provides the necessary authority to supplement an agency's decisionmaking authority.

The Department of State Lands and its successor, the Department of Environmental Quality, have implemented MEPA substantively for MMRA and the Strip and Underground Mine Reclamation Act since 1982.

The last case in which a ruling was made specifically on this issue was *Kilpatrick v. Dept. of Fish, Wildlife, and Parks* (1993). Kilpatrick sued FWP, on the basis that FWP was not authorized under MEPA, the game farm (now alternative livestock ranch) statutes, or the zoo/menagerie statutes to attach conditions to permits or licences that it issues. At issue was whether FWP could attach and enforce conditions under MEPA to permits/licences it issues in order to mitigate adverse impacts on the environment. Judge Sherlock held that although there is nothing in the game farm (now alternative livestock ranch) or zoo/menagerie statutes specifically authorizing FWP to attach conditions to permits, the issuance of a permit is an action governed by MEPA and that FWP was required to perform an EA before issuing a permit. ARM 17.4.607 states that EAs are intended to help an agency develop conditions, stipulations, or modifications to be made part of a proposed action. FWP was "well within the bounds of its authority to impose the eleven stipulations listed in the EA and attached to Plaintiff's [Kilpatrick's] permits". Judge Sherlock concluded that the stipulations attached to Kilpatrick's permit are valid and enforceable as reasonable measures to mitigate potentially adverse effects on the environment.

The state courts, in judicially reviewing MEPA generally, have made statements that the National Environmental Policy Act and MEPA are essentially procedural statutes. Set out below are seven court cases and highlighted court discussion on this issue.

The Supreme Court, in *Ravalli County Fish and Game Association v. Dept. of State Lands* (1995), citing federal precedent, noted that:

NEPA requires that an agency take a "hard look" at the environmental impacts of a given project or proposal. See *Kleppe v. Sierra Club* (1976), 427 U.S. 390, 410, n.21, 96 S.Ct. 2718, 2730, 49 L.Ed.2d 576, 590. NEPA is essentially procedural; it does not demand that an agency make particular substantive decisions. *Stryker's Bay Neighborhood Council v. Karlen* (1980), 444 U.S. 223, 227-28, 100 S.Ct. 497, 499-500, 62 L.Ed.2d 433, 437. MEPA requires that an agency take procedural steps to review "projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment" in order to make informed decisions. Section 75-1-201(1)(b)(iii), MCA; See Sec. 26.2.643, ARM.

The Montana Supreme Court, in *Montana Wilderness Association v. Board of Natural Resources and Conservation* (1982), also referred to federal precedent:

Trout Unlimited v. Morton (CCA 9, 1974), 509 F.2d 1276: We [the federal court] held that the §706(2)(D) standard was the proper one because NEPA is essentially a procedural statute. Its purpose is to assure that, by following the procedures that it prescribes, agencies will be fully aware of the impact of their decisions when they make them. The procedures required by NEPA, 42 U.S.C.A. section 4332(2)(C), are designed to secure the accomplishment of the vital purpose of NEPA. That result can be achieved only if the prescribed procedures are faithfully followed; grudging pro forma compliance will not do.

Judge Sherlock, in *Skyline Sportsmen's Association v. Board of Land Commissioners* (1999), noted:

This Court notes that the whole purpose of the Montana Environmental Protection Act is procedural. It is not to dictate a certain result. Thus, if the decision makers (here the Commissioners) have been fully informed, they are allowed to make a decision with which others may not agree. Here, one of Plaintiff's main concerns was the reduction in hunter opportunity. This matter was fully disclosed to the decision makers in the FEIS.

To determine if the agency followed the law, the Court notes that the MEPA is essentially procedural. It does not demand that an agency make a particular substantive decision. MEPA requires that an agency take

procedural steps to review actions of state government in order to make informed decision. *Ravalli Co. Fish and Game Assoc. v. Department of State Lands*, 273 Mont. 371, 377-78, 903 P.2d 1362, 1367 (1995).

Judge Honzel, in *Friends of the Wild Swan v. Dept. of Natural Resources and Conservation* (1998), noted that:

The Montana Supreme Court has held that MEPA is procedural, not substantive. See *Ravalli Co. Fish and Game Ass'n, Inc. v. Dep't of State Lands*, 273 Mont. 371, 377, 903 P.2d 1362, 1367 (1995) (citing *Stryker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 100 S. Ct. 497, 62 L. Ed. 2d 433 (1980)). The Court is required to give great deference to agency expertise in matters of substantive policy decisions. See *North Fork Preservation Ass'n v. Dep't of State Lands*, 238 Mont. 451, 778 P.2d 862 (1989).

In Count III, FWS alleges that DNRC failed to prepare a cumulative watershed analysis for the Middle Soup timber sale. However, no evidence was presented at the hearing regarding FWS's procedural challenge to DNRC's watershed analysis. As noted, MEPA is essentially procedural. "[I]t does not demand that an agency make particular substantive decisions." *Ravalli Co. Fish and Game Ass'n, Inc. v. Dep't of State Lands*, 273 Mont. 371, 377, 903 P.2d 1362, 1367 (1995). Since particular methods of forest management and watershed analyses are not prescribed by law, DNRC has the discretion to choose reasonable methods.

Judge Honzel, in *National Wildlife Federation v. Dept. of State Lands* (1994), states that:

The Montana Environmental Policy Act (MEPA) is a procedural act designed to ensure that decision makers and the public are fully apprised of the environmental consequences of government actions before public resources are committed to those actions. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989) (agencies must take a "hard look" at the environmental consequences of their actions).

Judge Honzel, in *Mott v. Dept. of State Lands* (1994), notes again that:

MEPA is a procedural statute designed to ensure that decision makers and the public are fully apprised of the environmental consequences of government actions before public resources are committed to those actions. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989). (Agencies must take a "hard look" at the environmental consequences of their actions.)

In *Westview People's Action Association v. Dept. of State Lands* (1990), Judge Harkin, citing federal precedent, noted:

In *Stryker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 62 L.Ed. 2d 433, 100 S.Ct. 497 (1980) the U.S. Supreme Court held that all the NEPA requires is some consideration of environmental consequences. It does not direct the discretion of any agency concerning the choice of action to be taken, or the weight to be given any environmental factors. Fundamental policy decisions of an administrative agency are not reviewable under MEPA.

There is no question that the state courts are split on the substantive vs. procedural issue. The 1999 Supreme Court ruling in the *Montana Environmental Information Center v. Dept. of Environmental Quality* case defines each Montanan's right to a clean and healthful environment. This defined right under the Constitution may or may not have a bearing on whether MEPA should be implemented substantively or procedurally. Only a court decision on this specific issue will shed some light on the Constitution's role in this matter.

Agency Perspectives

The MEPA Subcommittee requested a state agency attorney panel discussion on whether the agencies were implementing MEPA substantively, procedurally, or both. Although the Department of Transportation's attorney was not present, EQC staff asked MDT's opinion on the matter. **Table 6-1** sets out the agencies' responses.

As with the Legislature and the courts, the agencies are also inconsistent on the issue of implementing MEPA substantively or procedurally. Each of the agencies has its own interpretation. DEQ and FWP each implement MEPA both substantively and procedurally depending on the permitting or licensing act being implemented and the particular factual circumstances. DNRC and MDT strictly implement MEPA procedurally.

Since 1982, the former Department of State Lands, now DEQ, has implemented MEPA substantively under the metal mine reclamation laws in only two instances. One instance involved the Diamond Hill Mine. An EIS determined that there were some potential traffic problems based on the fact that the road was narrow and haul trucks would be entering the highway. The department imposed conditions as to placement of roadside flag people at certain places on the county road and the actual hours when the trucks could haul materials. This was clearly outside the agency's permitting authority. Another instance was the Stillwater Mine. Traffic stipulations required that for a period of years the mine would need to bus employees to the mine site from Absarokee. This was designed to mitigate traffic safety and wildlife impacts.

Table 6-1. Is MEPA Substantive or Procedural? Agency Responses

State Agency	Does your agency implement MEPA substantively?	Does your agency implement MEPA procedurally?	Should this issue be clarified one way or the other?
Department of Environmental Quality	Yes. For metal mine reclamation and the Strip and Underground Mine Reclamation Act	Yes. For water quality, air quality, hazardous waste, solid waste, public water supply, major facility siting, and underground storage tank	From a legal standpoint, if the issue were clarified it would avoid the potential for litigation.
Department of Natural Resources and Conservation	No	Yes	Clarification would minimize litigation.
Department of Fish, Wildlife, and Parks	Yes	Yes	It would depend on how MEPA was defined and what was meant by the terms. Someone who is disappointed in the regulatory scheme and did not think the environment was protected may not have the avenue to challenge through MEPA, but would then challenge the agency's action under a failure to abide by the constitutional requirement of a clean and healthful environment.
Department of Transportation	No	Yes	Not a strong feeling one way or the other.

According to FWP legal counsel, the Department has implemented MEPA substantively to condition game farm (alternative livestock ranch) licenses not more than three or four times. In the department's view these conditions did not constitute significant restrictions on the operation of the game farm or alternative livestock ranch. The alternative livestock industry disagrees with the department's view on this matter.

Federal Interpretation

Since *Kadillak*, if MEPA or the agencies' administrative MEPA rules do not provide adequate direction, Montana state courts will look to federal statutory, regulatory, and case law on the National Environmental Policy Act (NEPA) for guidance. Almost every Montana state court case cites some federal precedent to support its legal conclusions.

Judge Bennett, in *Cabinet Resource Group v. Dept. of State Lands* (1982), found federal precedent to support the conclusion that MEPA can be applied substantively (*Clavert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971); *Weinber v. Catholic Action of Hawaii*, 102 S.Ct. 197 (1981); *Environmental Defense Fund, Inc. v. Corps of Engineers, U.S. Army*, 470 F.2d 289 (8th Cir. 1972); *Environmental Defense Fund v. Tennessee Valley Authority*, 468 F.2d 1164 (6th Cir. 1972); *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974); *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693 (2nd Cir. 1972)). Having supported his conclusions with federal precedent, he went on to say that "in the event we could not find support for our conclusion in NEPA interpretation, the combination of MEPA and the above [Montana] constitutional sections would provide the necessary authority".

However, at the federal level, the United States Supreme Court has determined repeatedly that NEPA is essentially a procedural statute. (See the following cases: *Aberdeen & Rockfish R.R. v. Students Challenging Agency Regulatory Procedures*, 422 U.S. 289 (1975); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978); *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980); *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983); *Robertson v. Methow Valley Citizens Council*, 109 S.Ct. 1835 (1989).) Most of the commentators and law review articles agree, NEPA is viewed as a procedural statute (citations here are too numerous to list).

Other States' Interpretation

Of the 15 states, the District of Columbia, and the Commonwealth of Puerto Rico, only 5 jurisdictions (California, Minnesota, New York, Washington, and the District of Columbia) implement their SEPAs substantively. In some of the states (Washington and New York), the courts have determined that the SEPAs were action-forcing or substantive statutes. The other jurisdictions (Minnesota, District of Columbia, and California) have statutory action-forcing language.

Chapter 7: What Are the Costs and Benefits of the MEPA Process?

CHAPTER SUMMARY

- < Compliance with the purpose and policy of MEPA results in definite costs and less tangible benefits.
- < Actual or perceived costs and benefits of MEPA compliance were identified by state agencies. They were not quantified.
- < Some of the costs of complying with the purpose and policy of MEPA include the following:
 - < litigation costs
 - < agency costs
 - < agency time
- < Some of the benefits of complying with the purpose and policy of MEPA include the following:
 - < litigation issues
 - < decisionmaking framework
 - < public participation
 - < efficiency
 - < improved decisionmaking
 - < better information
- < Some of these costs and benefits are incurred by other MEPA participants, including permit applicants and citizens, but these other participants were not queried and their costs and benefits were not quantified. The costs and benefits of MEPA to the environment were also not identified or quantified.
- < Controversies over the costs and benefits of any policy or undertaking usually involve the issue of who or what pays the costs and who or what receives the benefits.
- < Agencies that conduct MEPA compliance mostly for agency-initiated actions are more likely to conclude that the costs of MEPA compliance can be quantified in terms of time and money than are permitting agencies that have incorporated the MEPA process into their decisionmaking process.
- < The Subcommittee concluded that it would not be an effective use of time to attempt to retroactively obtain quantifiable information regarding the

costs and benefits of MEPA compliance.

- < The Subcommittee requested agencies to review and comment on some proposed criteria by which the identified costs and benefits might be quantified or narratively described in the future.
- < Agencies agreed on some criteria that could be used to help identify costs and benefits of MEPA compliance in the future.
- < The development of future cost-benefit reporting criteria must be carefully considered.
- < Any MEPA cost-benefit accounting and reporting would be an additional cost of MEPA compliance but may result in some benefits.
- < Some agencies more than others would prefer to measure future MEPA costs and benefits narratively rather than quantifying them.

Chapter 7: What Are the Costs and Benefits of the MEPA Process?

Directive and Overview

The review and analysis of a government policy should include an examination of its costs and its benefits. The question can be summarized by asking if the value of the requirement to someone or something is worth the cost of complying with the requirement. There are two basic difficulties with a cost-benefit review of government policies--the answer depends on who you ask and whether or not the answers can be quantified. The Legislature recognized this difficulty when it directed the EQC, in SJR 18, to conduct a MEPA study that included a review and analysis of:

any identifiable costs and benefits to agencies, permit applicants, citizens, and the human environment resulting from compliance with the policy and purpose of MEPA

The study resolution implies that there are or there may be costs to state agencies, permit applicants, citizens, and the human environment that result from MEPA compliance. It also indicates that there are or there may be benefits to state agencies, permit applicants, citizens, and the human environment that result from MEPA compliance. The EQC study was able to identify some benefits and costs of MEPA through discussions with state agency MEPA practitioners, but the quantification of costs and benefits was an elusive goal.

In response to inquiries regarding the availability of cost-benefit studies of NEPA or mini-NEPAs in other states, the federal CEQ advised that it was unaware of any such report. A recent NEPA effectiveness report (CEQ, 1997) did not directly address the question of costs and benefits either. This issue has been the subject of many surveys and discussions resulting in considerable anecdotal information, but apparently no definitive study of the actual costs or benefits resulting from the implementation of state or federal environmental policy acts has been conducted. The EQC was advised that a detailed analytical study that quantified costs and benefits resulting from the implementation of MEPA would be a pioneering effort (Greczmiel, 1999).

EQC Study Effort - Identification of Costs and Benefits

Experienced MEPA representatives from seven state agencies cooperated with the EQC staff over a period of 3 months in an effort to identify what the costs and benefits of MEPA were and to develop some criteria by which they could be measured or described. Although the conclusions of this group represent MEPA costs and benefits from the agencies' point of view, some of the responses also reflect what the respondents believed to be the costs and benefits of MEPA from the perspective of the environment, the permit

or project applicant, and the public. The MEPA costs and benefits, possible measurable criteria, and agency comments are summarized in tables in the following discussion. The cost-benefit criteria that the agencies generally agreed could be identified and measured or described, with explanation, are **shown in the tables in bold**. Agency comments are necessarily abbreviated for this presentation.

Costs of MEPA Compliance

Litigation costs - One of the identifiable costs of MEPA compliance to agencies, permit or project applicants, and the public is the cost of litigating decisions made or not made by state agencies. Costs can be measured in terms of time and money. Whether an agency is defending a final MEPA decision on a project or defending a decision as to why a project was not subject to a MEPA action, there are certain costs to the agency, to the plaintiff, which is usually a segment of the public, and sometimes to the project applicant, if different from the agency. Whether a litigant wins or loses a MEPA case or whether or not a case is settled prior to argument, there will be some cost of litigation to all the parties. Some cases that involve a cause of action relating to MEPA implementation also involve additional other causes. The converse is also true. Splitting out the costs of litigation solely attributable to compliance with MEPA may be difficult in these cases.

Are the costs of litigation a significant cost of implementing MEPA and would there be litigation costs regarding agency decisionmaking in the absence of MEPA? Although there can be project legal costs to agencies, permit or project applicants, and the public beyond the actual litigation of a MEPA case in court, **Chapter 4** indicates that in the 29-year history of MEPA, a total of 27 MEPA cases have been resolved by state courts and that 9 more cases are currently pending before the courts. All of these cases resulted in litigation costs to the state as the defendant (usually) and to citizen groups or individuals as plaintiffs (usually). Many, but not all, also resulted in legal costs to private parties as permit or project applicants. The 27 cases that were resolved by the courts likely represent a significant share of MEPA litigation costs, but do not include all of the legal costs of implementing MEPA.

The agency work group reviewed criteria that may assist in describing or quantifying the costs of MEPA litigation. These criteria included tracking the number of MEPA cases litigated, quantifying the litigation costs of all parties, identifying the costs of additional MEPA review required as a result of MEPA litigation, and identifying the cost of implementing MEPA incorrectly that results in litigation costs (**Table 7-1**).

All seven of the state agencies in the work group suggested that the litigation costs of MEPA compliance might be quantified by tracking the number of MEPA cases litigated and by tracking all the costs of litigation once a case has been filed. The DEQ advised that the agency is frequently involved in litigation, that several different causes of action are often raised in a case that may also involve a MEPA issue, and that separating the legal costs attributable only to MEPA may be difficult in these cases. The DNRC recommends that all legal costs be included in any accounting. This includes case preparation, witness

fees, court costs, and others. The MEPA litigation costs of private parties would be difficult or impossible to obtain except that a partial accounting can be made in those instances in which a state agency is ordered to pay the costs of the plaintiff.

Table 7-1. Litigation Cost Issues ¹

POSSIBLE DESCRIPTIVE CRITERIA	IS THE CRITERION QUANTIFIABLE? (Y) (N)							ONLY NARRATIVE DESCRIPTION IS POSSIBLE/PREFERRED AND OTHER COMMENTS
	DOC	DEQ	FWP	AGRIC	DNRC Forest Mgmt	DNRC Trust Mgmt	MDT	
(1) Number of MEPA cases "lost" by the agency.	Yc	Y	Y	Y none	Y	Yc	Yc	DOC - Never had a MEPA case. DNRC Trust Land Mgmt - Define "win"; state may win some counts and lose others. MDT- A narrative would be helpful.
(2) Number of times decisions are litigated and defended, regardless of outcome.	Y	Y	Y	Y none	Yc	Y	Y	DNRC Forest Mgmt - Prefer this criterion to (1).
(3) Cost of litigation to state, proponent, opponent.	Y	N	Y	Y none	Yc	Yc	Y	DNRC Forest Mgmt - Include all costs; witness, court costs, etc. DNRC Trust Land Mgmt - OK for agency, not sure for others.
(4) Cost of initial MEPA review and cost of remedial MEPA review(s).	N	N	Yc	N	Yc	Nc	Yc	FWP - Requires establishing accounting entities and tracking costs. DNRC Forest Mgmt - Compare to Idaho. DNRC Trust Land Mgmt - Would require separation of MEPA specific from those that would still occur despite MEPA. MDT- Narrative would be preferred.
(5) Cost of implementing MEPA "incorrectly".	N	N	Nc	N	Nc	N	Yc	FWP and DNRC Forest Mgmt - A cost, but not sure how to quantify. MDT - Narrative explanation required.

¹CHART CODES Y=Yes; N=No; c=comment; Y?=maybe quantifiable; N?= probably not quantifiable; N/A= not applicable

Agency Costs - Another cost attributable to the implementation of MEPA is the cost to agencies of actually implementing the policy. This includes the costs of preparing the environmental review document, conducting project scoping of issues and impacts, gathering information, the publication, printing, and distribution of documents, conducting public involvement processes, document review and analysis, and others. Costs can be measured in terms of time and money.

In testimony before the 1999 Legislature on HB 142, DNRC provided an estimate of agency staff costs and effort that could be specifically tied to MEPA compliance efforts within various agency programs. Although these were rough estimates and it is uncertain how many of these agency costs would remain in the absence of MEPA, it is certain that MEPA compliance does cost agencies (and others) in terms of time and money. This estimate formed the basis for some of the cost-benefit criteria that was developed and reviewed by the agency work group.

Beyond agency costs, permit or project applicants and the public can incur costs associated with MEPA compliance. Costs can include the development of data and information for the preparation of environmental analysis documents, the review of documents, public participation efforts, and more. In the case of permitting, permit or project applicants are generally required to obtain and submit certain information as part of the statutory permitting process. Some statutes and rules require the submittal of a significant amount of information before an agency can begin its review of an application. The cost of providing this information may or may not be directly tied to the cost of MEPA compliance. The MEPA allows for the assessment of a fee against a permit or project applicant if the agency determines that an EIS will be necessary and that the agency costs to compile an EIS will exceed \$2,500. **Chapter 3** shows that a vast majority of MEPA effort involves the production of EA documents and that since 1985, a total of 60 projects have resulted in the production of an EIS. Approximately one-half of these EIS projects involved a permit or project applicant, while the other half were state-initiated actions.

The agency cost-benefit work group reviewed the following criteria that might be used to describe or quantify agency costs in terms of money or time (**Tables 7-2 and 7-3**).

Costs:

- X Determine agency staff and other budget costs attributable to MEPA compliance.
- X Identify agency cost savings were MEPA repealed.
- X Separate agency costs attributable solely to MEPA from those that would remain in carrying out permitting responsibilities or project decisionmaking.
- X Identify recoverable and nonrecoverable MEPA costs.
- X Determine numbers and costs of contracts for MEPA assessments.

Time:

- X Identify the number of times that a project proponent has litigated or threatened to litigate because of project delays due to MEPA.

- X Identify categories of projects that are delayed due to MEPA analysis and describe frequency of delay.
- X Estimate time savings in decisionmaking by project type if MEPA analysis were not required.
- X Track range of time (and frequency of occurrence) that it takes to conduct a project review in compliance with MEPA and an estimate of the same without MEPA by project type.
- X Estimate FTE that could be made available for other agency projects if MEPA analysis were not required.

Table 7-2. Agency Costs

POSSIBLE DESCRIPTIVE CRITERIA	IS THE CRITERION QUANTIFIABLE? (Y) (N)							ONLY NARRATIVE DESCRIPTION IS POSSIBLE/PREFERRED
	DOC	DEQ	FWP	AGRIC	DNRC Forest Mgmt	DNRC Trust Mgmt	MDT	AND OTHER COMMENTS
(1) Develop DNRC style FTE calculations attributable only to implementing MEPA.	Nc	Yc	Y?c	Yc	Yc	Yc	Y	DOC - grant applicants pay most costs. DEQ - Possibly. FWP - Prefer narrative explanation. Unknown how to separate costs of MEPA analysis from costs of permit/project analysis. Agriculture - Effort to gather data not cost-effective. DNRC Forest Mgmt - Could include all other costs like printing, legal, advertising, etc. DNRC Trust Land Mgmt - Accounting is subjective as to whether everything is attributable to MEPA or would still be done in the review process anyway.
(2) If MEPA were repealed, identify those agency costs that would be saved (FTE and \$).	Nc	N	Y?c	Y difficult	Yc	Y?c	Nc	DOC - Likely no change. FWP - See above. AGRIC - Multiple FTE provide some resources to MEPA reviews. DNRC Forest Mgmt - Include costs in addition to FTE like printing, etc. - See (1). DNRC Trust Land Mgmt - See (1). MDT- Narrative explanation preferred.

POSSIBLE DESCRIPTIVE CRITERIA	IS THE CRITERION QUANTIFIABLE? (Y) (N)							ONLY NARRATIVE DESCRIPTION IS POSSIBLE/PREFERRED
	DOC	DEQ	FWP	AGRIC	DNRC Forest Mgmt	DNRC Trust Mgmt	MDT	AND OTHER COMMENTS
(3) Identification of specific MEPA activities separate from permitting activities and identification of costs attributable to those MEPA activities; e.g., document preparation, document review, information gathering, public involvement, litigation.	N	N	Yc difficult	N	Yc	Y?c	N?c	FWP - Prefer narrative explanation. DNRC Forest Mgmt - Can quantify printing, FTE, legal, advertising, but would estimate costs of data gathering, public involvement, document review. DNRC Trust Land Mgmt - See (1). MDT - Maybe. Narrative explanation preferred.
(4) Identification and accounting of recoverable and nonrecoverable MEPA costs. Accounting or percentage estimate.	N	N	Y	Y difficult	N/A	N	Yc	MDT - Maybe. Narrative would be helpful.
(5) Contracts for environmental assessments; number and costs, both recoverable and nonreimbursable.	N/A	Yc	Y	Y	Yc	Y	Y	DEQ - Possibly, but not for nonreimbursable costs. DNRC Forest Mgmt - Only those portions of MEPA that are contracted out. MDT - None.

The agencies were asked which of these criteria could be quantified and which could be only narratively described. The agencies all agreed that it would be possible to quantify the costs of private contracts used by the agencies to gather information necessary for the production of MEPA documents, but this would not include nonreimbursable costs such as contract procurement and management and document review and comment. Agencies also believed that it might be possible to quantify costs or estimates of FTE allocated to MEPA implementation, but some concluded that it would be difficult to separate MEPA-only costs from other permit or project review costs. Most agreed that it would be difficult to identify what savings in time, money, or staffing could be made if MEPA project analysis were not required.

There appears to be a split between the agencies in their enthusiasm and ability to quantify the costs of MEPA compliance. Those agencies that conduct MEPA on agency-initiated actions, such as the DNRC forest management program and, to a lesser extent, the MDT highway program, tend to be able to separate and quantify costs attributable to MEPA. However, in those agencies that conduct MEPA review on actions that involve decisions on permitting, such as DEQ, FWP, and the DNRC Trust Land Management Division, the separation of agency permit review costs and MEPA costs seems to be

more difficult. The two efforts are often integrated as MEPA becomes part of the permitting decision and not a separate and distinct function.

The agencies all agreed that they could describe the categories of projects that are delayed to one extent or another as a result of the MEPA process. That information is presented in greater detail in **Chapter 8**. Most of the agencies agreed that it might be possible to estimate the time that could be saved in project decisionmaking if MEPA compliance were not required, but that an accurate quantification might be difficult.

Table 7-3. Agency Time Costs

POSSIBLE DESCRIPTIVE CRITERIA	IS THE CRITERION QUANTIFIABLE? (Y) (N)							ONLY NARRATIVE DESCRIPTION IS POSSIBLE/PREFERRED AND OTHER COMMENTS
	DOC	DEQ	FWP	AGRIC	DNRC Forest Mgmt	DNRC Trust Mgmt	MDT	
(1) Number of times a project proponent has litigated or threatened to litigate because of project delays due to MEPA analysis.	N/A	N	Y	Y	N/A	Yc	Y	DNRC Trust Land Mgmt -Mostly N/A. Agency is usually the project proponent.
(2) Categories of projects that are always, sometimes, or rarely delayed due to MEPA analysis.	N/A	Y	Y	Y	Yc	Yc	Y	DNRC Forest Mgmt - See information already provided to Subcommittee. DNRC Trust Land Mgmt - Currently. May change in future.
(3) Estimate of time savings in making decisions by project type if MEPA analysis were not required.	Yc	Y	?c	Y	Yc	?c	Yc	DOC - Negligible, most are NEPA anyway. FWP - Maybe. Prefer narrative explanation. DNRC Forestry - Would be an estimate with a range of variation. See Table 7-2(3). DNRC Trust Land Mgmt - Highly subjective. Prefer narrative explanation. MDT - Maybe. Narrative would be helpful.
(4) Range of time and frequency of occurrence that it takes to conduct a project review with MEPA analysis and estimate of same without MEPA by project type.	N/A	N	?c	Y	?c	?c	Y	FWP - Would require accounting entity if accuracy were of concern. Prefer narrative explanation. DNRC Forest Mgmt - Maybe. Time delays are related to litigation. DNRC Trust Land Mgmt - Would be difficult to separate time with and without MEPA.

POSSIBLE DESCRIPTIVE CRITERIA	IS THE CRITERION QUANTIFIABLE? (Y) (N)							ONLY NARRATIVE DESCRIPTION IS POSSIBLE/PREFERRED AND OTHER COMMENTS
	DOC	DEQ	FWP	AGRIC	DNRC Forest Mgmt	DNRC Trust Mgmt	MDT	
(5) Estimates of FTE that could be made available for other agency projects if MEPA analysis was not required.	N	N	?c	N/A	Yc	?c	Yc	FWP - Diffuse hours of work spread across multiple agency FTEs. Prefer narrative explanation. DNRC Forest Mgmt - Not applicable. Harvest limit restricts number of FTE. DNRC Trust Land Mgmt - Would be difficult to identify the lesser level of review with and without MEPA. MDT - Maybe. Narrative would be helpful.

Benefits of MEPA Compliance

Litigation Issues - If it is assumed that MEPA litigation occurs over issues that involve the real or perceived impacts of a project on the environment, then litigation may be viewed as a potential benefit to the environment. MEPA provides an opportunity or standing for others to challenge a governmental decision if they believe that a proper environmental analysis has not been conducted. In cases won by agencies, the court generally rules that a proper analysis of the environmental impacts of a proposal has occurred and that the decisionmaker was adequately informed of the impacts. In others, an agency may be directed to conduct an environmental analysis or to conduct a more adequate environmental analysis of the impacts of a proposal. Perceivably, any benefits that result from MEPA litigation accrue to the environment in terms of an adequate and proper MEPA analysis having been conducted or in terms of an additional review being required by the courts. Quantification of these benefits is very difficult, although they may possibly be described.

Two criteria were proposed to measure this benefit--identify the number of MEPA cases "won" by an agency and describe the projects that, following litigation, are modified or conditioned or in which impacts were mitigated. Agencies agreed that they could track MEPA cases won, but DNRC commented that litigation is not a benefit at all, as it costs all parties time and money, and that the worthiness of a project cannot be determined by an agency's success in court. With the exception of DNRC, the agencies agreed that it would be possible to identify projects that were altered as a result of litigation (**Table 7-4**).

Decisionmaking Framework - Another MEPA benefit identified by the work group was that the policy and its rules provide government with a framework for making decisions that could have impacts on the environment. The policy of MEPA requires agencies to take an interdisciplinary approach to decisionmaking and to consider a broad range of influences that their decisionmaking could have on the human environment. The framework anticipates, allows, and at times requires the participation of others, including the public, in

the government's decisionmaking process.

Table 7-4. Litigation Benefit Issues

POSSIBLE DESCRIPTIVE CRITERIA	IS THE CRITERION QUANTIFIABLE? (Y)(N)							ONLY NARRATIVE DESCRIPTION IS POSSIBLE/PREFERRED AND OTHER COMMENTS
	DOC	DEQ	FWP	AGRIC	DNRC Forest Mgmt	DNRC Trust Mgmt	MDT	
(1) Number of MEPA cases "won" by the agency.	Yc	Y	Y	Y	Yc	Yc	Y	DOC - in theory; no cases. DNRC Forest Mgmt - Project worthiness is not measured by success of agency in court. DNRC Trust Land Mgmt - Litigation is not a benefit. It costs each party time and money; win or lose. See comment in Table 7-1(1) for definition on split rulings.
(2) Description of projects that, following litigation, are modified or conditioned or in which impacts were mitigated.	N/A	Yc	Y	N/A	Nc	N	Y	DEQ - Possibly? DNRC Forest Mgmt - See above comment.

The number of "yes" decisions that were mitigated or conditioned as the result of an agency MEPA analysis was the criterion proposed for describing this MEPA benefit. The agencies were split on whether or not this could be done, with DNRC commenting that mitigating or conditioning an action was determined by statutory standards and resource standards and not by MEPA since DNRC considers MEPA as a procedural and not a substantive policy (**Table 7-5**).

Table 7-5. Decisionmaking Framework Benefit

POSSIBLE DESCRIPTIVE CRITERIA	IS THE CRITERION QUANTIFIABLE? (Y) (N)							ONLY NARRATIVE DESCRIPTION IS POSSIBLE/PREFERRED AND OTHER COMMENTS
	DOC	DEQ	FWP	AGRIC	DNRC Forest Mgmt	DNRC Trust Mgmt	MDT	
(1) Number of approval decisions that were mitigated or conditioned as a result of MEPA analysis.	N/A	Yc	Y	N/A	Nc	Nc	Y	DEQ - Possibly? DNRC Forest Mgmt - Narrative discussion would be required. DNRC Trust Land Mgmt - MEPA is procedural - not substantive. Mitigation or conditional decisions are based on resources and standards - not MEPA-based. It is impossible to speculate on what mitigation would or would not apply.

Public Participation - The MEPA rules include a public participation process for the review of project environmental assessments. Other statutes administered by state agencies may also require public participation. In these cases, the public participation processes were described as complementary and not as separate and conflicting. Public participation was identified by the agency work group as a benefit of MEPA. However, the benefits of public participation resulting from compliance with MEPA were determined by the work group to be difficult to quantify or measure in terms of time or money. There are costs, sometimes very significant costs, to an agency, to an applicant, and to the public of conducting a public participation process. With difficulty, some of these costs may be quantified in terms of time and money, but accounting for the benefits, which may accrue to some or all of the MEPA participants, could be even more difficult.

Possible criteria for measuring or describing this MEPA benefit include identifying those permitting statutes that had public participation requirements and those that did not (except for MEPA), identifying the frequency with which MEPA requirements resulted in a formal public participation process, describing the percentage of times that the MEPA process resulted in substantive public comments on a proposal, and categorizing projects by the frequency with which public comments are solicited and received and describing the benefit of those public responses to the proposal (**Table 7-6**).

If public participation is one of the benefits of compliance with MEPA, the purpose of the criteria was to attempt to identify how beneficial public participation actually was to the process. The agencies generally agreed that it would be possible to identify other statutes that included public participation requirements and that it could be possible to list how often MEPA resulted in a formal public participation process. Beyond that, the proposed criteria were determined to be too subjective and not specific enough to be of any value. If some standard is to be developed by which agencies can measure or definitively explain the value of public participation in their MEPA decisionmaking, the criteria must be more clearly defined. The MEPA public participation process is more fully described in **Chapter 9**.

Table 7-6. Public Participation Benefit

POSSIBLE DESCRIPTIVE CRITERIA	IS THE CRITERION QUANTIFIABLE? (Y)(N)							ONLY NARRATIVE DESCRIPTION IS POSSIBLE/PREFERRED AND OTHER COMMENTS
	DOC	DEQ	FWP	AGRIC	DNRC Forest Mgmt	DNRC Trust Mgmt	MDT	
(1) Identify permitting statutes with public participation requirements.	Y	Y	Yc	Y	Y	Y	Y	FWP - Not many.

POSSIBLE DESCRIPTIVE CRITERIA	IS THE CRITERION QUANTIFIABLE? (Y)(N)							ONLY NARRATIVE DESCRIPTION IS POSSIBLE/PREFERRED AND OTHER COMMENTS
	DOC	DEQ	FWP	AGRIC	DNRC Forest Mgmt	DNRC Trust Mgmt	MDT	
(2) Identify permitting statutes without public participation requirements except for MEPA requirements.	N/A	Y	Yc	Yc	N/A	Y	Y	FWP - Most. AGRIC - None.
(3) List frequency of public participation activities due only to MEPA or how often does MEPA trigger a formal public participation process?	N/A	Yc	Y	Y	Y	Y	Y	DEQ - Possibly, question needs to be more focused.
(4) What percentage of the time does MEPA result in substantive public comments?	Yc	Yc	Y?c	Nc	Yc	Yc	Y	DOC - in reality, seldom. Most comments on grant project are prior to application to the agency. DEQ - Revise criterion. The agency can identify the number of projects in which written public comments are received. FWP - Probably. Depends on definitions of this criterion. AGRIC - Unknown. DNRC Forest Mgmt - Subjective criterion. Agency and commenter may disagree on what is a substantive comment. DNRC Trust Land Mgmt - Need to define "substantive public comment".
(5) Categorize projects by frequency of solicitation of public comments and frequency and quality/quantity of public response to proposals.	-	Yc	Y	N/A	Y ? and Nc	Y?c	N?c	DEQ - Refer to the agency website. DNRC Forest Mgmt - May be able to categorize by frequency of solicitation but determination of quality and quantity of responses is too subjective and would be better explained narratively. DNRC Trust Land Mgmt - Maybe, but would be subjective - needs definition. MDT - Maybe but a narrative would be preferred.

Efficiency - The agency work group identified government efficiency as another benefit of the MEPA process. The discussion centered around the concept that MEPA required a systematic approach to environmental decisionmaking that included a review of a wide range of potential impacts or relationships involving the human environment. This was

believed to result in the opportunity for intra-agency and interagency input and cooperation in some cases. Also, when some earlier permitting processes had been narrowly focused and MEPA was not implemented, situations were described in which the Legislature had altered the permitting process to specifically require a level of review analogous or duplicative to that required by MEPA.

Criteria for quantifying or describing the efficiency of MEPA included a listing of those statutes that were enacted following MEPA and that duplicate or go beyond MEPA analysis requirements, a description of situations in which MEPA facilitates the coordinated review of permits or actions within and between agencies, and an identification of those formal or informal agreements established between agencies that help facilitate projects (**Table 7-7**). Agencies agreed that it would be possible to identify statutes that duplicate or go beyond MEPA analysis requirements. The DNRC Trust Land Management Division did not believe that it would be possible to describe or identify any coordinated permit reviews or cooperative efforts or agreements that were precipitated by MEPA although it is party to several agreements. This criterion requires additional clarification and description if it is to be effective. After identifying agency efficiency as a MEPA benefit, some agencies appeared to have difficulty with the concept or in identifying anything specific.

Table 7-7. Efficiency Benefit

POSSIBLE DESCRIPTIVE CRITERIA	IS THE CRITERION QUANTIFIABLE? (Y) (N)							ONLY NARRATIVE DESCRIPTION POSSIBLE/PREFERRED AND OTHER COMMENTS
	DOC	DEQ	FWP	AGRIC	DNRC Forest Mgmt	DNRC Trust Mgmt	MDT	
(1) List statutes that have been enacted following MEPA (1971) that duplicate or go beyond MEPA analysis requirements.	Y	Y	Y	Yc	N/A	Yc	Y	AGRIC - None. DNRC Trust Land Mgmt - MEPA does not have analysis requirements - it's procedural and only includes process requirements.
(2) Describe or list situations in which MEPA facilitates the coordinated review of multiple permits within agencies or where permit reviews are coordinated between agencies.	Y	Yc	Y	Yc	N	c	Y	DEQ - This is currently attempted with all EPA reviews. AGRIC - None. DNRC Trust Land Mgmt - Narrative only. Coordination occurs with or without MEPA.
(3) List or identify formally or informally established agency cooperative efforts.	Y	Yc	Y	Yc	N	c	Y	DEQ - Need clarification. Does this refer to cooperative efforts at an agency level or at a project level? AGRIC - None. DNRC Land Trust Mgmt - Many agreements (MOUs, MOAs) but not necessarily MEPA-driven.

Improved Decisionmaking - This is one of the commonly accepted justifications for MEPA, and it was identified as one of MEPA's benefits by the agency work group. If the purpose of MEPA is to "look before you leap" in order to analyze the potential environmental impacts of a proposed state action and to include others in the decisionmaking process, it would seem that improved decisionmaking would be the result of that effort. Although it was identified as a benefit, methods by which to measure or describe the benefits of improved decisionmaking were lacking (**Table 7-8**).

Table 7-8. Improved Decisionmaking Benefit

POSSIBLE DESCRIPTIVE CRITERIA	IS THIS CRITERION QUANTIFIABLE? (Y) (N)							ONLY NARRATIVE DESCRIPTION IS POSSIBLE/PREFERRED
	DOC	DEQ	FWP	AGRIC	DNRC Forest Mgmt	DNRC Trust Mgmt	MDT	AND OTHER COMMENTS
(1) Number or frequency (percentage) of projects altered/improved as a result of the MEPA process.	N/A	N	Y?c difficult	N/A	Nc	c	Yc	FWP - Would require reviewing every project. Prefer narrative. DNRC Forest Mgmt - Projects are designed to comply with substantive laws. MEPA doesn't require any mitigation, only that actions be considered and disclosed to the public. DNRC Trust Land Mgmt - Criteria (1) - (4) are highly subjective and would be best addressed narratively. Some projects are altered/improved/dropped due to MEPA but more are changed due to other factors. MDT - Narrative would be necessary.
(2) Environmental impacts most frequently avoided or mitigated as a result of the MEPA process generally or by project category.	N/A	Yc	Y	N/A	Yc	see (1)	Y	DEQ - Possibly, but more clarification is needed. DNRC Forest Mgmt - See (1). Most or all mitigations would be done without MEPA due to compliance with substantive environmental laws.
(3) Number or frequency (percentage) of project applications not pursued following MEPA analysis.	N/A	Yc	Yc	N/A	Yc	see (1)	N/A	DEQ - Cannot recall any examples. FWP - Small number. DNRC Forest Mgmt - A minimal number. Distinguish between projects terminated by agency and by courts.
(4) Number or frequency (percentage) of project applications amended following MEPA analysis.	N/A	Nc	Yc difficult	N/A	Yc	see (1)	N/A	DEQ - Agency tries to include all applicable permits in the MEPA analysis.. FWP - See (1). DNRC Forest Mgmt - Quantify supplemental EAs, EISs.

Some of the criteria that might be useful in measuring or describing this benefit included the number of or frequency with which projects were altered or improved as a result of the MEPA process. Most agencies believed that this criterion would not be usable and, if so, a narrative description would be preferred over a quantitative description (FWP and MDT). Another criterion might be a description or quantification of those environmental impacts most frequently avoided or mitigated as the result of a MEPA analysis. Agencies believed that this might be a usable criterion with more clarification (DEQ) or that mitigations or alterations occur in spite of MEPA analysis as MEPA is not substantive (DNRC). All agencies thought that it would be possible to identify the number of or frequency of projects that were dropped or not pursued as a result of a MEPA analysis. Most agencies believed that the number would be small. Most agencies rejected a criterion that would describe the number of or frequency of project applications that were amended following a MEPA analysis as a method of measuring whether or not MEPA resulted in improved decisionmaking. The DNRC forest management program suggested quantifying the number of supplemental environmental reviews that were prepared while stating that the MEPA process has little to do with the determination that a supplement was necessary. Comments from the DNRC divisions on the subject of improved decisionmaking through MEPA consistently maintained that project changes, alterations, modifications, or mitigations were not primarily the result of any MEPA analysis but were due to other factors or standards.

Better Information - The quest for and gathering of additional or better information about a project and its impacts was identified as a MEPA benefit. As directed in MEPA, agencies are to utilize a systematic, interdisciplinary approach to decisionmaking and consult with others having jurisdiction or expertise with respect to environmental impacts relating to an action under review.

Two criteria were proposed to the agency cost-benefit work group for consideration regarding how to measure MEPA's ability to provide agencies with better information (**Table 7-9**). No agency agreed that it would be possible to identify or quantify the

Table 7-9. Better Information Benefit

POSSIBLE DESCRIPTIVE CRITERIA	IS THIS CRITERION QUANTIFIABLE? (Y) (N)							ONLY NARRATIVE DESCRIPTION IS POSSIBLE/PREFERRED AND OTHER COMMENTS
	DOC	DEQ	FWP	AGRIC	DNRC Forest Mgmt	DNRC Trust Mgmt	MDT	
(1) Frequency of times a project is modified/improved due to information provided by sources outside the agency as a result of the MEPA process.	N	N	Yc Difficult	N	Nc	c	Yc	FWP - Would require reviewing each project. DNRC Forest Mgmt - Modified may not equal improved. Every action is modified to some degree between start to finish. DNRC Trust Land Mgmt - Criteria (1) and (2) are highly subjective - it is difficult to separate information gained through the MEPA process from that gained through the normal agency review process. MDT - Narrative needed.
(2) Categorize the projects that most frequently benefit from information provided as a result of the MEPA process.	Y	Y	Y	Yc	N/Ac	c above	Y	AGRIC - Noxious weed projects. DNRC Forest Mgmt - All projects are the same. Hard to tell if one timber sale benefits over another due to MEPA.

frequency of times that a project is modified or improved because of information provided to the agency from sources outside the agency as a result of the MEPA process. One problem seems to be that if projects were altered, some agencies may not agree that they were improved. Also, agencies apparently aren't able to determine where the impetus for altering a project comes from--inside the agency, other agencies, the applicant, or the public.

However, all agencies agreed that it would be possible to categorize the projects that most frequently benefit from information provided as a result of the MEPA process. DNRC generally had reservations as to whether or not the MEPA process resulted in providing better information to the agency and whether this should be listed as a benefit of MEPA. The agency maintains that it has "normal agency review processes" in its statutes, rules, or policies that provide it with the ability to conduct project assessments and that to separate information gained through those processes from that obtained through the MEPA process is difficult at best.

Prospective Efforts

After reviewing the information developed by the agency cost-benefit work group, the Subcommittee concluded that it would not be possible to conduct a thorough quantitative review and analysis of identifiable costs and benefits to all participants that result from compliance with the policy and purpose of MEPA. The question of costs and benefits has only been asked of state agencies familiar with implementing MEPA. The identification of

MEPA costs and MEPA benefits to others, such as permit or project applicants, the public, and the environment, has not been addressed, although some of the agency cost-benefit categories and criteria are applicable to these other MEPA participants.

Another difficulty in conducting a thorough analysis of MEPA costs and benefits is that obtaining quantifiable data would be very difficult and time-consuming. The agencies' general responses to the criteria are indicative of this problem. So how can the question of MEPA's effectiveness in terms of its costs and benefits be answered now and in the future? The Subcommittee has identified some MEPA costs and some MEPA benefits through the assistance of the agency work group. It has discussed the possible development of measurable criteria or tracking standards so that the costs and benefits of MEPA compliance might be gauged in the future through a reporting requirement.

The Subcommittee requested and received responses from the agencies about what they thought might be quantifiable criteria for future use. The agencies have provided some answers to the questions and offered their preliminary comments (**Tables 7-1 through 7-9**). The DNRC Trust Land Management Division advised the Subcommittee that all of the proposed reporting criteria evaluated by the agency work group would make the MEPA process more burdensome and urged that any new reporting requirement be simple. The agency referenced the current requirement that EAs and EISs prepared in compliance with MEPA be submitted to the EQC and asked whether that procedure was used or useful in determining the efficiency or effectiveness of MEPA. The documents are presently entered into a central database for tracking (see **Chapter 3**) but are not routinely reviewed or analyzed by staff or the EQC.

Regarding the DNRC suggestions and the comments of several of the other state agencies, it will be important to carefully consider what additional information, if any, may be required in the future in order to measure the costs and benefits resulting from compliance with MEPA. A useful reporting criterion should include the following characteristics:

- T should be inexpensive and easy to identify and track;
- T should be clearly defined and comparable between projects and agencies;
- T must be useful and describe or quantify a MEPA cost or a MEPA benefit;
- T must clearly identify the recipients of the costs and benefits; and
- T must be supported by MEPA practitioners and participants.

Chapter 8: MEPA Timeliness and Efficiency

CHAPTER SUMMARY

- < The EQC MEPA Subcommittee chose to analyze the issue of when and where agencies are having difficulty meeting timeframes.
- < The Montana Environmental Policy Act does not have any statutory timeframes for preparing MEPA documents or conducting an environmental review process.
- < The only reference to time in MEPA is that an agency must determine, within 30 days of receiving a completed application for a project that triggers MEPA, whether or not an EIS will be required and, if so, whether or not fees will be assessed to the applicant. This can be problematic.
- < There are timeframe references found in the MEPA Model Rules that relate to the public participation process, emergency actions, final decisions, and EIS fees.
- < Timeframes that agencies may have difficulty meeting are those that are legislatively established in various permitting statutes and in agency regulations and agency policies.
- < Not all permitting statutes have time limits.
- < Some permitting statutes have extension provisions to allow for additional time, some do not.
- < Most permitting statutes do not have "penalties" for missing deadlines, others require a permit to be issued if a deadline is missed.
- < For the majority of projects subject to MEPA review, state agencies report that they "sometimes" have difficulty meeting statutory deadlines.
- < For a few activities, such as air quality permits, game farm (now alternative livestock ranch) permits, oil and gas leases, and the Major Facility Siting Act, agencies report that they "often" or "always" have difficulty meeting timeframe deadlines.
- < Significant reasons for review delays are related to the size and complexity of the project and the degree of public interest and involvement. "Complex things aren't simple."

- < Agency resources are a factor in the time it takes to comply with MEPA, but this was not identified as the most significant factor.
- < For mines that received permits over the past 10 years, the average time for processing a complete metal mine operating permit application through the MEPA process was 15 months. For all metal mine operating permit applications over the last 10 years, the MEPA review time ranges from 1 month to infinity, depending on the applicant.
- < Some EISs take less time than some EAs.
- < For the 23 state land timber sales that were subject to an EA process and that were sold in fiscal year 1999, the average project and MEPA review time was 13 months. For the two timber sale projects that were subject to an EIS process, the average project and MEPA review time was 21 months.
- < All game farm (now alternative livestock ranch) permit applications reviewed by the state in the past 30 months were the subject of an EA under MEPA, and all were completed very nearly within the 120-day statutory timeframe for EAs.

Chapter 8: MEPA Timeliness and Efficiency

Introduction

One study goal of SJR 18 is to evaluate the MEPA process to ensure that it results in state agencies making timely and efficient decisions on projects that are subject to environmental review under the Montana Environmental Policy Act. A criticism of the MEPA process is that it can result in project or permitting delays. Any legislative policy that requires a public review, however detailed, of potential environmental impacts that could result from state government decisions will necessarily take some additional time over a policy that does not require such an analysis. The issue is whether or not that additional time or delay is unreasonable and whether or not state agencies are able to make decisions in a timely and efficient manner.

The EQC's initial 1999 solicitation of comments on MEPA issues resulted in 14 comments that relate directly to the topic of MEPA timeliness and efficiency. Additional concerns and comments regarding MEPA timeliness were directed at the issue of public participation, which is discussed in more detail in **Chapter 9**. Of the 14 specific comments regarding the efficiency and timeliness of agencies' environmental review process, document preparation, and decisionmaking, 4 came from agencies and 5 each came from permit or project interests and from citizen groups.

Most of the 14 comments referred to the existing specific decisionmaking timeframes within permitting statutes or rules or the lack thereof. Organizations representing permit applicants generally suggested that specific statutory time limits should be imposed for permit review, environmental review, and judicial review with clear standards established describing when those limits may be exceeded. Citizen groups suggested that some existing time limits should be repealed, that some timeliness problems may occur from the insufficiency of initial project applications, and that projects that are also subject to federal NEPA review have no deadlines, which may result in delays attributed to MEPA. State agencies expressed concerns about conducting environmental reviews within specific timeframes and about conducting environmental reviews in a changing environment that would then require supplementing the environmental review.

The EQC prioritized these issues and selected one to review in depth: "categorize when and where agencies are having a problem meeting timeframes". This issue presumes that agencies have statutory or regulatory timeframes in their decisionmaking processes, which is not always the case, and it assumes that agencies have problems meeting these timeframes. It also includes elements of several of the other comments made on this topic by agencies, project proponents, and citizen groups. The issue asks for a categorization of "when and where" agencies have difficulties, but not necessarily "why". However, the EQC review did touch on this question as well.

Categories of Projects and Timeliness

MEPA itself does not include any reference to timeframes for conducting an environmental review of a proposed action, except that an agency must determine within 30 days of receipt of a completed application whether or not an EIS will be necessary and, if so, whether fees will be assessed to the applicant. The Department of Fish, Wildlife, and Parks has commented that this statutory requirement can be problematic to an agency in those instances when an EA is prepared that later concludes that an EIS is necessary or when a court ultimately rules that an EIS was necessary and more than the 30 days have transpired.

The MEPA Model Rules specifically mention timeliness in the following situations:

- X how much time is to be allowed for public comment on the draft and final EIS (30 or 60 days);
- X how long an agency must wait after an EIS is completed before it makes its final decision (15 days);
- X when an agency must notify the Governor and the EQC of conflicts between MEPA and other statutes and after taking emergency action without complying with MEPA (30 days);
- X when a public hearing on a draft EIS is required (20 days after a qualified request); and
- X when an agency determines that an EIS is required and fees will be assessed against the project proponent (30 days after application is complete).

There are additional time deadlines in the rules for reviewing EIS cost estimates and for refunding EIS fee overpayments to the applicant.

Otherwise, the "MEPA" timeframes that restrict agencies are actually found in some, but not all, of the activity-specific statutes. Most involve the issuance of a permit. The following is a list or description of those statutes as provided by the agencies in response to an EQC survey question - "Please identify the statutes that make it difficult to conduct a MEPA analysis or an adequate MEPA analysis because of timeframe restrictions."

Department of Fish, Wildlife, and Parks

The agency administers several permitting statutes that include statutory deadlines for permitting actions. For example, the department has 30 days from the receipt of an application for a game bird farm license or a fur farm license to notify the applicant of its decision to approve or deny the application. However, only the game farm (alternative

livestock ranch) statute (section 87-4-409(4), MCA) was specifically identified as causing the agency occasional difficulty in meeting statutory deadlines due to MEPA compliance issues.

(4) Within 120 days of the acceptance of a complete application, the department shall notify the applicant of its proposed decision to approve, approve with stipulations, or deny the application. If the department determines that the preparation of an environmental impact statement is required by Title 75, chapter 1, and by department rules adopted pursuant to the Montana Environmental Policy Act, then the department has an additional 180 days to act on the completed application.

Additionally, the agency described the general situation in which heightened public controversy or the complexity or difficult impact analyses of a particular permit or project may cause occasional delays in reviewing projects. Delays are related more to the individual circumstances surrounding the particular project rather than attributable to a general class of projects or a particular statute.

The agency identified one area in which the MEPA process consistently causes delays in project reviews. The agency often seeks information from other agencies, and other agencies seek information from FWP regarding potential impacts on resources within the management role and mission of the agency (fish, wildlife, endangered species, etc.). Often the short internal or statutory timeframes for response are insufficient to either provide or obtain the requested information or analysis. This is a problem that relates to the availability of agency resources and baseline information.

Department of Environmental Quality

The agency identified the following permitting statutes as those that have time limits for conducting a permit review, which may make it difficult to conduct an adequate MEPA analysis within the same time limits.

Clean Air (Section 75-2-211(9), MCA) 75 days from receipt of an application to decision with mutually agreeable 30-day extensions; 180 days if an EIS is required

Water Quality (Section 75-5-403, MCA)

MPDES Permits 60 days for the initial review, 30-day cycles thereafter, with no maximum

MGWPCS Permits 30-day review cycles, no maximum

Storm Water Plan Approvals 60 days for the initial review, 30-day cycles thereafter, no maximum

Authorizations to Degrade preliminary decision must be issued within 180 days, unless an EIS is prepared, in which case there is no time limit

Public Water Supply (Section 75-6-101, et seq., MCA) 60-day response time for each plan submitted for review

Motor Vehicle Recycling and Disposal (Section 75-10-516, MCA) two 30-day county commissioner reviews; MEPA review does not have a time limit

Underground Storage Tank (Section 75-11-501, et seq., MCA) 30 days, by administrative rule, from the receipt of a completed application to the decision

Major Facility Siting (Sections 75-20-216 and 75-20-232, MCA) 60 days for the initial review; 30 days for subsequent review; EIS review in 365 days; and EA review in 180 days

Sanitation in Subdivisions (Section 76-4-125, MCA) 60 days for the initial review, 60 days for each subsequent review, plus a comment period under nondegradation for all subdivisions that do not hook up to public sewer system; 120 days from complete application to EIS

Strip and Underground Mine Reclamation (Section 82-4-231, MCA)

New Permits completeness review in 90 days, adequacy review in 120 days, then 45 days for findings and a notice of decision; 365 days if an EIS is required

Operating Permit Modifications see "New Permits"

Metal Mine Reclamation (Section 82-4-337, MCA)

New Permits 60 days for the initial review, 30 days for each subsequent review; concurrent review for data needs to resolve MEPA issues; 365 days or negotiated extension for an EIS; and EA prepared in 30 days or negotiated extension, not to exceed 75 days

Operating Permit Modifications significant impacts reviewed per new permit procedure; nonsignificant procedures reviewed in 30 days

Exploration License no explicit time limit for significant impacts; 30-day review policy to approve or deny nonsignificant impacts

Exploration Project Approvals no explicit time limit for significant impacts; 30-day review policy to approve or deny nonsignificant impacts

New Small Miner Cyanide Operating Permits see "New Permits" for significant impacts; 30-day review policy to approve or deny nonsignificant impacts

Opencut Mine Reclamation (Section 82-4-432(4), MCA) new contracts and modifications, 30 days to review, with a 30-day extension

Department of Natural Resources and Conservation

The agency submitted four responses to the timeframe issue survey, one from each of the Trust Land Management Division programs. The agency generally does not have statutory deadlines within which it must act that restrict its ability to manage and lease state trust lands. In conducting reviews of permit applications or in reviewing proposals for various land management uses, the MEPA process can cause delays in cases when controversies arise about the impacts of the specific proposal. Generally, these delays impact the applicant or the proponent of the action and can occasionally result in problems identified by the agency, such as additional trespass upon state lands, projects being

dropped, decreased revenue to the trust land beneficiaries, and secondary impacts to the proponents, including missed deadlines for enrolling in federal farm subsidy programs.

The agency identified two specific state requirements that can make compliance with MEPA problematic. The agency interprets section 77-5-223, MCA, as requiring the department to prepare for sale from state forest lands the annual sustainable yield, currently calculated as 42.2 million board feet of timber. Efforts to comply with this statute can be complicated by MEPA process delays and occasional litigation over particular timber sale proposals. Also, the department conducts quarterly sales of oil and gas leases by agency rule, (ARM 36.25.205). The processing of oil and gas lease applications, including the MEPA analysis process, to meet these internal agency timeframes often results in overtime efforts on behalf of the MEPA document authors and responders.

Department of Transportation

No state or federal statutory time restrictions or limitations were identified by the agency. Most projects are federally funded and are subject to federal NEPA analysis. For those that are subject to state MEPA review, no statutory limitations were found. Large complex multimillion-dollar construction projects typically take longer than relatively simple construction, reconstruction, or maintenance projects. For a variety of reasons, MDT generally finds it necessary to address more MEPA-related issues, concerns, and opportunities for projects undertaken in western Montana than elsewhere.

Department of Commerce

The Department did not believe that it was having any difficulty meeting timeframes due to MEPA or NEPA compliance requirements. Programs subject to MEPA analyses include the federally funded community development block grant (CDBG) program and the state-funded treasure state endowment program (TSEP).

Before federal CDBG funds are released for proposed housing or public facility projects, federal rules require NEPA compliance by the grant recipients. Before DOC releases CDBG funds, it makes a formal determination regarding the potential environmental impacts of the proposed project in accordance with MEPA using the NEPA environmental assessment produced by the grant recipient and a consolidated NEPA-MEPA format that is said to address both laws.

Under the state-funded TSEP program, DOC ranks proposals under a competitive scoring system. The Legislature selects and approves all TSEP projects for funding. Since section 75-1-201, MCA, exempts legislative actions from MEPA, DOC maintains that an environmental analysis of impacts from TSEP proposals is not required because technically, the decision to approve and fund the project is legislative. Nevertheless, in keeping with the intent of MEPA, DOC requires all TSEP applicants to complete an environmental checklist for their project as part of the application. DOC can utilize the information generated to affect the project scoring and to advise legislators regarding potential environmental impacts of proposals prior to legislative approval.

Department of Livestock

No response. No known statutory limitations.

Department of Agriculture

No statutory limitations or restrictions were identified by the agency. No permitting functions were identified. The agency responded that before a contract or grant is awarded under the noxious weed trust fund program, internal procedures require the grant applicant to submit project information necessary for the agency to complete an environmental assessment for the project. Any delays in awarding grants are the result of incomplete information from the grant applicant.

Summary

In reviewing state agencies' current implementation of MEPA, the question of where agencies are having difficulties or could have difficulties in meeting timeframes is answered specifically by the Department of Environmental Quality and the Department of Fish, Wildlife, and Parks. Statutory or regulatory deadlines in the permitting programs of these agencies are where most problems could occur in the event of a lengthy or controversial MEPA process. When agency-imposed rules or policy deadlines are contributing to the agencies' ability to comply with MEPA, agencies can make the appropriate adjustments unilaterally.

The statutory deadlines established for the issuance of a permit or the taking of a state action can be inflexible, as in the case of the maximum 60 day review for a gravel pit permit application, or negotiable, as in the permitting statutes for metal mine permits and water quality permits. In situations in which the statutory deadlines include a nonnegotiable maximum deadline for permit review, rulings by the Supreme Court in *Kadillac v. The Anaconda Company (1979)* for metal mines and by the Fourth Judicial District in *Westview People's Action Association v. Dept. of State Lands (1990)* for gravel pits state that the specific statute takes precedence and that the MEPA review must be conducted within the statutory timeframes. *Kadillac* resulted in the Legislature extending the previous 60 day time limit for reviewing metal mine permits and major permit modifications to 365 days with an ability to negotiate with the applicant for further extensions. The open-cut (gravel pit) permit time limit remains fixed at 60 days.

Frequency of Delay Due to MEPA

How many problems are the agencies having in meeting timeframes because of MEPA compliance? In response to this question, the agencies provided the information shown in **Table 8-1**. The agencies were asked to describe projects that were subject to MEPA and whether it was rarely, sometimes, often, or always difficult to meet project timeframes due to MEPA compliance. The agencies were asked to differentiate between agency-initiated projects, such as highway construction, land leases, timber sales, and state facility

construction projects, and agency permitting actions. For the vast majority of the projects, agencies reported that they "sometimes" had difficulty meeting timeframes. The definition of "sometimes" is subjective, and there was no effort made by the agencies or the EQC to numerically quantify how often "sometimes" occurred.

There was no notable difference regardless of whether a project was initiated by an agency or was the result of an agency permitting action. Generally speaking, the DEQ permitting programs are working within statutory timeframes and the DNRC programs are responding to needs of the permit applicant or to internal agency policies.

Agencies noted that they "often" had difficulty meeting timeframes in the implementation of the Major Facility Siting Act (DEQ), the game farm (alternative livestock ranch) permitting laws (FWP), and the state timber sale and oil and gas leasing program (DNRC). The comments regarding the Major Facility Siting Act are speculative as there has not been much recent activity. However, 1999 legislative changes have reduced the time for conducting a permit review from 22 months to 12 months, and the agency is presuming future difficulties based on past experience.

The only situations in which an agency identified that it "always" had difficulty meeting timeframes due to compliance with MEPA are in the DEQ air quality permit program and in comments from FWP in terms of its ability to provide and obtain professional and technical advice on MEPA projects in a timely manner. The DEQ air quality permit program advised that it has not missed any statutory deadlines for issuing permits, but that it is very often or always difficult and that the quality or thoroughness of the permit review may suffer due to time constraints. This may be related to the complexity of the project, the controversy surrounding a project, the availability of information, staffing resources, or a combination of all the above.

Table 8-1. Frequency of Delay - MEPA

Please categorize the type of projects for which it is "Rarely, Sometimes, Often, or Always" difficult to meet timeframes because of MEPA (please separate agency projects from permitting actions).

	<u>Agency Projects</u>	<u>R</u>	<u>S</u>	<u>O</u>	<u>A</u>	<u>Statute/Requirement</u>
	sewers - infrastructure funding	X				
	<u>Agency Permitted Projects</u>					
DEQ	coal mining permits		X			82-4-101 Strip and Underground Mine
	air quality permits					X 75-2-101 Clean Air
	water quality permits		X			75-5-101 Water Quality
	sanitation in subdivisions		X			76-4-101 Sanitation in Subdivisions
	hard-rock permits					
	major new permits		X			82-4-301 Metal Mine Reclamation
	amendments		X			
	major facility siting			X		75-20-101 Maj Fac Siting Act
	opencut mine reclamation	X				82-4-401 Opencut Reclamation
	underground storage tanks	X				75-11-501 Underground Storage Tank
	motor vehicle disposal	X				75-10-501 Motor Vehicle Recycling and Disposal
MDT	highway construction	X				
FWP	game farm permits			X		87-4-409(4) Game farms (Alternative Livestock Ranches)
	responding to other agencies				X	
	<u>Agency Projects</u>					
	commercial development		X			none - prog. policy, applic. needs
	land sales		X			none " " "
	timber sales			X		77-5-223 & HB 2 p. C-10, line 24
	oil/gas leasing			X		agency rule - ARM 36.25.205
	other mineral leasing		X			none - lessee expectations
	existing min. lease reviews			X		none - lessee expectations
DNRC	<u>Agency Permitted Projects</u>					
	improvement authorizations		X			none - applic. needs
	land breaking requests		X			none " " "
	range renovations		X			none " " "
	livestock class changes		X			none " " "
	land leases					
	cabin sites		X			none - prog. policy, applic. needs
	commercial		X			none - " " "
	right-of-way deeds		X			none - " " "
	improvement authorizations		X			none - " " "
AGRI	noxious weed grants	X				none

COMMERCE - not applicable - NEPA compliance for CDBG grants, legislative exemption for TSEP

Permit Turnaround Estimates

As another indication of how MEPA relates to the permit timeframe issue, DNRC, FWP, and DEQ were asked to provide examples of their permit applications for review. Section 2-15-115, MCA, which became effective October 1, 1999, requires agencies to provide a notice to the applicant of its estimated turnaround time for acting on completed permit applications. FWP responded that its applications state the time set forth in the permitting statute and provided no examples. **Table 8-2** includes a partial listing of permits issued by DEQ and DNRC and the estimated turnaround time for issuance of the permit.

Several permit applications include disclaimers to the estimated turnaround times, stressing that the timeframes assume the receipt of a complete application and allowing for a range of time depending on the environmental review required.

Table 8-2. Permit Turnaround Estimates

DNRC Permits (a selection)	
<u>Permit or Lease</u>	<u>Estimated Turnaround Time</u> (if application is complete)
State Land Use License Application	60-90 days
Easement Across State Lands	90-120 days
with EA Checklist	60-90 days
with EA	60-180 days
with EIS	indeterminate
Grazing or Crop Lease Assignments	30 days
Oil and Gas Lease Application	N/A but in time for quarterly lease sales if possible
Mineral Lease of State Lands	30-60 days
Nonmechanized Mineral Prospecting	30-60 days
Assignment of Oil and Gas Lease	14 days
Oil and Gas Exploration Permit	60 days
DEQ Permits (a selection)	
<u>Permit</u>	<u>Estimated Turnaround Time</u> (if application is complete)
WATER PROTECTION BUREAU	
Ground water Pollution Control Permit	180 days (30 days for general permit)
MT Pollutant Discharge Elimination System - Discharge Permit	
Short Form 2-A; nonindustrial discharges	180 days (30 days for general permit)
Short Form C; ground water discharge to surface water	30 days
Short Form S; portable suction dredge discharges	30 days
Consolidated NPDES permits	180 days or more if complex
Short-term exemption - emergency remediation/pesticides	30-60 days
Short-term narrative standard for turbidity from construction (318/3A)	30-60 days

AIR AND WASTE MANAGEMENT BUREAU

Asbestos

project abatement and removal	7-10 working days (by rule)
training course approval	45 working days
annual abatement permit	45 working days

Air Quality Permit

stationary sources	60 days or up to 180 days for EIS (by law)
portable sources	60 days or up to 180 days for EIS (by law)

ENVIRONMENTAL MANAGEMENT BUREAU (Metal Mines)

Exploration License	30 days
Operating Permit	60 days completeness review, 30 days deficiency reviews, 30 days for an EA, and 365 days for an EIS. Extensions possible (by law).

INDUSTRIAL AND ENERGY MINERALS BUREAU (Gravel and Coal)

Opencut Reclamation Permit	30 days plus 30 day extension (by law)
Strip or Underground Mining	
5-year permit renewal	240-300 days (by law)
Initial permit	averages 4 years or more
Assignment of existing permit	75 days
Prospecting permit	60 days
Prospecting permit renewal	120-150 days
Prospecting permit assignment	60 days

COMMUNITY SERVICES BUREAU (Drinking Water, Wastewater, and Solid Waste)

Water/Wastewater Operator Permit Application	14 to 21 days
Solid Waste License	
Class II Transfer station (household waste)	365 days
Class III landfill (inert, wood, tires)	365 days
Class IV landfill (construction debris plus group III)	365 days
Septic Tank Cleaner License	0 days
Wrecking Yard License	90-120 days

Timeliness Issues - Causes

In addition to asking when and where agencies may be having difficulties meeting timeframes, the EQC asked agencies to categorize the reasons why MEPA review may take longer than anticipated in certain instances. The Department of Commerce and the Department of Fish, Wildlife, and Parks provided narrative responses that are discussed previously in this chapter. Other agency responses to criteria that were provided by the EQC are shown in **Table 8-3**. The agencies were asked to rank the criteria in terms of how each criteria related to the time it takes to comply with MEPA, from no or low impact (1) to significant or high impact (10). Some of the criteria were not relevant, and others were significant for nearly every agency.

Table 8-3. MEPA Timeliness - Reasons for Delay

	DEQ	Dept of Agriculture	Department of Natural Resources				MDT	FWP	Commerce
			Agric and Grazing Mgmt	Special Use Mgmt	Forest Mgmt	Minerals Mgmt			
Project size/ complexity	10	5	10	10	8	10	10	(narrative response)	(narrative response)
Project impacts-number/ significance	10	na	10	10	6	5	10		
Degree of public interest	8	na	7	10	5	10	10		
Organized/ funded project opposition present	9	na	10	10	10	5	10		
Extent of public notification efforts	5	na	5	10	5	5	5		
Availability of reliable baseline data	10	5	5	5	5	5	5		
Project application completeness	6	5	7	10	na	1	-		
Who is proposing the action; project viability	1	na	5	5	1	1	5		
Available agency resources for MEPA review	7	5 - employee turnover can be a problem	7	5	8	10	5		
MEPA document type required for project	5	na	8	5	5	10	5		
Agency is the project proponent	n/a	na	5	1	1	5	5		
Project is subject to an agency permitting action	8	na	-	1	10 USFS, USFWS, rights-of-way	1	-		

	DEQ	Dept of Agriculture	Department of Natural Resources				MDT	FWP	Commerce
			Agric and Grazing Mgmt	Special Use Mgmt	Forest Mgmt	Minerals Mgmt			
If the agency has any discretion in approving or denying the project	1	na	-	1	na	-	1		
Geographic considerations; project location	7	na	1	5	9	1	7		
Planning considerations; presence or absence of land use planning	4	na	2	1	2	na	5		
Potential for litigation over the final decision	1	na	10	10	10	5	5		

BELOW : ADDITIONAL SITUATIONS THAT DETERMINE LENGTH OF TIME TO CONDUCT THE MEPA PROCESS AS PROVIDED BY THE AGENCIES

Delays due to federal agency workloads, actions, decisions, and permits	9				X see above-permitting				
Complex issues	10								
Sensitive and complex project locations	10								
Complex alternatives	10								
Complex interagency relationships	10								
Response time of the project applicant	5								
Political sensitivities and considerations					10				

Most agencies and programs identified the following situations as significant contributors to the length of time required for complying with MEPA: project size and complexity, project impacts and their significance, degree of public interest in the project, and the presence of an organized project opposition. Depending on the agency, other significant time-factor criteria included how extensive the public notification efforts were for a project, the availability of reliable baseline information, the completeness of the project application, the availability of agency resources to process projects, the type of MEPA evaluation that is required for a project, whether or not the project is subject to a permitting action by a federal agency, the project location, the potential for litigation over the agency's final decision, the complexity of project issues, alternatives, and interagency relationships, the sensitivity of project locations, and other political sensitivities and considerations. One agency responder succinctly described the relationship between a project and the time it takes to conduct an agency MEPA review as "complex things aren't simple".

There are differences in agency missions and objectives that are reflected in the responses to this question. For example, DEQ, with its permitting responsibilities, identified the project complexity and size, the number and significance of project impacts, the degree of public interest, the presence of an organized project opposition, the availability of reliable baseline information, federal permitting requirements, the overall complexity of the project, complex alternatives, interagency relationships, and the sensitivity of the project's location as key criteria that influence the timely processing of permits.

The DNRC forest management program, with its timber management objectives, identified project size and complexity, the presence of an organized project opposition, federal permitting requirements, project location, potential for litigation, and political sensitivities and considerations as the most significant criteria affecting project timeliness. It may be illustrative to note that 3 of the 4 responding DNRC programs identified the potential for litigation over the final agency decision to be a significant factor in the time it takes to comply with MEPA, whereas the DEQ permitting agency discounted this criteria as not significant. Also, most agencies (with the exception of the DNRC minerals management program) ranked the resources available to the agencies to conduct MEPA reviews to be a significant factor but not the most significant factor in determining the amount of time it takes to comply with MEPA.

A Closer Look - Metal Mine Permitting, State Land Timber Sales, and Game Farm (Alternative Livestock Ranch) Permitting

Prior to and during the course of the MEPA study, the EQC was made aware that MEPA issues involving metal mine permitting, timber sales on state lands, and game farm (alternative livestock ranch) permitting were of particular concern to the public, agencies, and permit or project proponents. These three activities are the responsibility of three different state agencies. **Chapter 3** shows that these activities have been the subject of considerable MEPA effort, and **Chapter 4** indicates that they have also been the subject

of substantial MEPA litigation. The EQC decided to review the MEPA compliance process for these three activities in more detail in order to gather more information on the timeliness issue--does the MEPA process result in timely and efficient decisionmaking?

Metal Mine Permits

The EQC requested and received information from DEQ that listed the metal mine operating permit applications that were processed by the agency (or by the Department of State Lands prior to agency reorganization in 1995) between January 1990 and December 1999 (**Table 8-4**). The table lists 22 metal mine permit projects by name and describes what the particular application was for, when the application was received, and when the application was deemed complete in accordance with state law and rule, lists what type of environmental review/MEPA document type was prepared, lists when the record of decision was made by the agency, when the permit was issued, and what the elapsed time for conducting the MEPA review was, and notes any explanatory comments particular to the project. The elapsed time for MEPA review is defined in the table as that time from when the agency deemed the application complete to when it made a final decision on the permit.

The timelines for MEPA review range from 1 month to an indefinite time in the case of the McDonald Seven-Up Pete application, which was halted when the applicant failed to pay the agency costs of EIS preparation, in the case of the New World mining project near Cooke City, which was purchased by the federal government, and in the cases of the Rock Creek-ASARCO mine and General Quarry programmatic environmental reviews, which are still pending. For the remaining 18 projects, the average elapsed time for MEPA review is 15 months, and the mean for these projects is 11 months. Delays between the final agency decision and the issuance of a permit are usually the result of the applicant not providing the required bonding.

The time between the filing of an initial application and the agency's determination that an application is complete may be from 3 months to several years as shown in columns 3 and 4 of **Table 8-4**. The EQC reviewed detailed information on the process for determining application completeness in the case of four permits; two from large mine projects and two from smaller operations. This information is shown in **Table 8-5**.

An application for a metal mine operating permit or for major amendments to an existing operating permit must be reviewed for completeness within 60 days of receipt by the agency. Incomplete applications are returned to the applicant with deficiencies listed (deficiency letter). The applicant has no deadline by which to respond. Once the applicant responds to the deficiency letter, the agency has 30 days to respond to the applicant's response and so on until a complete operating permit application is provided (sections 82-4-337 and 82-4-342, MCA). The operating permit application must include those items specified in section 82-4-335, MCA, which include the proposed reclamation plan.

**TABLE 8-4. Status of MEPA Review for Metal Mine Permit Applications Received
January 1990 Through December 1999 - DEQ**

Project	Description	Initial Application	Applica- tion Complete	MEPA Document - type/date completed	Record of Decision	Date Permit Issued	Time for MEPA Review*	Comments
Majesty	Open pit gold	2-97	9-98	EA / 10-98	10-98	10-98	1 month	Converted from existing small miner
Sweetwater Garnet	Garnet, gold, silver	1-95	8-95	EA / 9-95	11-95	11-95	3 months	
South Beal	Open pit gold & silver	1-92	3-93	EIS / 6-93	7-93	7-93	4 months	
Diamond Hill	Underground gold & silver	1-95	1-96	EIS / 3-96	5-96	5-96	4 months	
Conda	Rock quarry	4-96	8-96	EA / 9-96	1-97	1-97	5 months	Expand fine material storage area
East Boulder	Underground platinum & palladium	6-98	11-98	EA / 3-99	5-99	5-99	6 months	Expand permit area to construct & operate water treatment facilities
Stillwater Under the River Crossing	Underground platinum & palladium	4-95	7-95	EIS / 2-96	2-96	2-96	7 months	Tunnel under the Stillwater River to connect parts of existing mine
Dillon Vermiculite	Vermiculite	10-96	8-98	EA / 4-99	4-99		8 months	Permit issuance pending receipt of bond
Stillwater Expansion (SMC2000)	Underground platinum & palladium	12-90	10-91	EIS / 9-92	9-92	9-92	11 months	Expansion of existing mine
Gem River	Placer sapphire & gold	4-96	4-98	EA / 5-98	2-99		10 months	Permit issuance pending receipt of bond
Barretts Regal Mine	Open pit talc	9-96	5-97	EA / 6-98	8-98	8-98	15 months	Mine expansion minor revision
Stillwater Expansion (Hertzler Impoundment)	Underground platinum & palladium	4-96	1-97	10-98	11-98	11-98	23 months	New tailing impoundment added to existing mine
<i>Golden Sunlight</i>	<i>Open pit gold & silver</i>	<i>10-95</i>	<i>3-96</i>	<i>EIS / 4-98</i>	<i>6-98</i>	<i>7-98</i>	<i>27 months</i>	<i>Renewal and expansion of existing permit</i>
East Boulder	Underground platinum & palladium	2-90	8-90	EIS / 5-92	12-92	4-93	28 months	Draft EIS, Supplemental Draft EIS, and Final EIS prepared; Forest Service ROD 2-93; bond submitted 4-93
Stansbury	Vermiculite	6-87	6-90	EIS / 5-93	6-93		36 months	Permit issuance pending receipt of bond
Noranda Montanore	Underground copper and silver	3-89	11-89	EIS/ 10-92	11-92	5-93	36 months	Joint USFS decision - Forest Service ROD 5-93
<i>Zortman Expansion</i>	<i>Open pit gold & silver</i>	<i>2-92</i>	<i>7-93</i>	<i>3-96</i>	<i>10-96</i>	<i>10-96</i>	<i>39 months</i>	<i>Expansion of existing mine</i>
Cominco	Garnet placer mine	2-92	5-92	EA / 6-92		4-95	-	
McDonald - Seven Up Pete	Open pit gold	11-94	3-96	EIS /			-	EIS work suspended 7-98 due to failure to pay MEPA fees; application dormant
New World	Open pit gold	11-90	4-93	EIS /			-	Application withdrawn
Rock Creek - ASARCO	Underground copper & silver	10-92	7-93	EIS /			-	Original permit application submitted 5-87, deemed complete 11-89, placed on hold by applicant 9-90, reactivated 10-92. Draft EIS, Supplemental Draft EIS on revised proposal prepared, Final EIS pending
General quarry	Programmatic review for small quarries		8-99	EA / 10-99			-	Responding to comments before finalizing

* Time for MEPA review is defined as time between the dates for "application complete" and "record of decision".
Italics -- means that federal permitting was also required. See page 138.

Following the receipt of a complete application for an operating permit, the agency has 30 days to review the adequacy of the proposed reclamation plan or 60 days from receipt of the initial operating permit application if the agency doesn't notify the applicant of any completeness deficiencies. Failure to notify the applicant of deficiencies or inadequacies in the operating permit application or the proposed reclamation plan within statutory time periods requires the state to issue the permit upon receipt of the bond.

These time limits may be extended through negotiation with the applicant for a period not to exceed 75 additional days in order to determine if an EIS is required, extended 365 days to conduct a reasonable review of a major operation, or extended by department declaration for up to 180 days for site inspections due to adverse weather. The applicant may waive the negotiated deadlines.

The information in **Table 8-4** and **Table 8-5** shows a wide range of time that it takes to process a metal mine operating permit. Some EIS projects are completed in 4 to 7 months (South Beal, Diamond Hill, and Stillwater under river crossing), and some EA projects take 8 to 11 months (Dillon Vermiculite and Barretts Regal Mine). **Table 8-5** indicates that although there may be a period of time that elapses from when the agency notifies the applicant that an application is not complete to when the applicant provides the requested information, once the agency has the information, the applicant is promptly notified.

The reasons for the variation in the timeframes due to MEPA compliance are likely related to factors like those listed in **Table 8-3**. The total elapsed time from the initial application to final permit issuance may include other factors not related to MEPA compliance.

Table 8-5. Metal Mine Permitting - Application Completeness Review; Selected Permits

Project	Description	Initial Application	DEQ's Deficiency Letter	Applicant's Response	Application Complete	Comments
Majesty	Open pit gold	2-28-97	4-10-97	8-31-98	9-18-98	Converted from small miner
Stillwater Expansion (SMC2000)	Underground platinum & palladium	12-7-90	1-25-91	3-27-91	10-9-91	Expansion of existing mine
			4-26-91	5-13-91		
			6-14-91	7-8-91		
			8-13-91	9-10-91		
Gem River	Placer sapphire & gold	4-29-96	6-5-96	5-30-97	4-16-98	Permit issuance pending receipt of bond
			6-30-97	12-23-97		
			1-23-98	3-17-98		
Golden Sunlight	Open pit gold & silver	10-25-95	10-26-95		3-22-96	Renewal & expansion of existing permit
			11-8-95			
			11-14-95	12-4-95		
			1-2-96	1-16-96		
			2-15-96	2-23-96		

Source: Department of Environmental Quality

State Land Timber Sales

The EQC reviewed information provided by the DNRC forest management program that listed the 26 timber sales that were made on state lands during fiscal year 1999 (**Table 8-6**). The information shows the name of the timber sale project, a description and location of the sale, a point in time when the agency determined that the project should go forward (project scoping), the type of MEPA document prepared and the date of its completion, the date of the record of decision, the date of the sale, the elapsed time for MEPA review, and any explanatory comments.

The information shows that EISs were produced for two timber sale projects that were sold in fiscal year 1999--the Mid-Fork Blacktail and the Cyclone/Coal I and II sales. These EISs took 20 and 22 months respectively from the initial scoping of the project to the record of decision date. The Mid-Fork Blacktail project review was completed in September 1997, it was sold 11 months later in August 1998, and it was the subject of a court challenge in February 1999 and a District Court ruling in September 1999. The Cyclone/Coal project review was completed in November 1998. It was sold 8 months later in July 1999. DNRC is required to have its timber sale projects approved by the State Land Board before they are sold. This can result in additional administrative delays as well as delays resulting from citizen concerns brought before the State Land Board.

The environmental review of the remaining 24 fiscal year 1999 timber sale projects included the preparation of an EA MEPA document. The elapsed time for these reviews range from 2 months to 2 years and 9 months. The elapsed time for the MEPA review is defined here as the time between the initial public advertising or notice of intent to propose a timber sale ("public scoping") and the record of decision/MEPA document completion date. The average time for review of the 23 EA timber sale projects (excluding the outlier Flat Pardee sale) is 13 months, and the mean is 12 months. It is not known how much of this time is actually dedicated to MEPA document preparation for the project and how much is devoted to other agency efforts and priorities. Since there is no permittee involved awaiting a state decision and no statutory deadlines within which the agency must perform its work, these timeframes may not accurately reflect MEPA-only review efforts.

Table 8-6. DNRC Timber Sales for Fiscal Year 1999

Project Name	Description	Project (Scoping) ¹	MEPA Document Type Date Completed	Record of Decision/ Finding Date	Date of Sale	Elapsed Time for MEPA Review ²	Comments
Spring Rock	462 acre t.s. near Olney	11/96	EA - 12/97	12/97	7/1/98	13 mos	
Avon South #2	277 acre t.s. near Avon	3/94	EA - 2/96	12/96	7/14/98	2 yrs 9 months	Second of two sales covered by this EA.
Beaver Ball	282 acre t.s. near Grass Range	9/96	EA - 5/97	5/97	7/15/98	8 mos	No bids the first time. Sold at a later time.
Potter Creek	166 acre t.s. near Lewistown	1/95	EA - 3/96	3/96	7/15/98	14 mos	Purchaser forfeited. Resold.
Mid-Fork Blacktail	1,129 acre t.s. near Dillon	1/96	EIS - 9/97	9/97	8/13/98	1 yr 8 mos	Complaint filed 2/25/99. District Court decision 9/16/99. Logging approved on all but 33 acres.
2% Cable	237 acre t.s. near Sula	6/95	EA - 12/95	12/95	8/18/98	6 months	Third of three sales covered by this EA.
Potomac	1,208 acre t.s. near Bonner	3/94	EA - 6/95	6/95	8/20/98	1 yr 3 mos	Third of three sales covered by this EA.
Stewart/Butcher	173 acre t.s. near Trego	3/97	EA - 3/98	3/98	9/1/98	12 mos	
Two Crow	344 acre t.s. near Pablo	5/95	EA - 1/98	1/98	10/28/98	2 yrs 8 mos	Public controversy. Conservation license granted for portion of sale.
Kirby	96 acre t.s. near Busby	6/98	EA - 8/98	8/98	12/8/98	2 mos	
Pine Ridge	176 acre t.s. near Pompeys Pillar	8/98	EA - 11/98	11/98	1/7/99	3 mos	
Middle Bench	256 acre t.s. near Grassrange	7/97	EA - 4/98	4/98	12/21/98	9 mos	Litigation filed. Injunction not granted.

¹ First public advertisement or notice of intent to propose timber sale

² Column equals time from "project initiation/scoping" to "record of decision/finding date". It does not include litigation time or time to actual sale.

Project Name	Description	Project (Scoping) ¹	MEPA Document Type Date Completed	Record of Decision/ Finding Date	Date of Sale	Elapsed Time for MEPA Review ²	Comments
Sheep Creek	90 acre t.s. near White Sulphur Spr.	6/98	EA - 12/98	12/98	1/20/99	6 mos	
Yank Creek	43 acre t.s. near Hardy	1/96	EA rev 12/97	11/97	1/25/99	1 yr 10 mos	
Cook Bear	909 acre t.s. near Plains	3/96	EA - 12/97	12/97	3/4/99	1 yr 9 mos	
Magpie	429 acre t.s. near Dixon	Early 1996	EA - 1/98	4/98	4/6/99	2 yrs 2 mos	
Aspen	366 acre t.s. near Ekalaka	4/95	EA - 6/95	4/96	4/6/99	12 mos	Purchaser forfeited sale. Resold.
Cadwell	465 acre t.s. near Broadus	4/97	EA - 12/97	12/97	4/28/99	8 mos	
Rhodes Draw	393 acre t.s. near Kalispell	11/97	EA - 2/99	2/99	4/28/99	1 yr 3 mos	
Tarkzeau	388 acre t.s. between Tarkio & Superior	11/97	EA - 5/98	6/98	6/1/99	7 mos	
East Parrot	199 acre t.s. near Roundup	8/98	EA - 3/99	3/99	6/1/99	7 mos	
<i>Painted Rocks</i>	<i>207 acre t.s. near Darby</i>	<i>7/96</i>	<i>EA - 2/98</i>	<i>3/98</i>	<i>6/15/99</i>	<i>1 yr 7 mos</i>	
<i>Cyclone/Coal I & II</i>	<i>495 acre t.s. near Columbia Falls</i>	<i>1/97</i>	<i>EIS - 11/98</i>	<i>11/98</i>	<i>6/17/99 6/00</i>	<i>1 yr 10 mos</i>	<i>First of two sales covered by this EIS.</i>
Tarkzeau Stewardship	315 acre t.s. between Tarkio & Superior	11/97	EA - 5/98	6/98	6/30/99	7 mos	Stewardship contract.
Boyer Fire Salvage	278 acre t.s. near Plains	11/98	EA - 4/99	4/99	6/24/99	5 mos	Salvage sale.
Flat Pardee	829 acre t.s. near Superior	6/94	EA - 3/98	5/98	6/29/99	4 yrs	Delay due to agency priorities.

Italics -- federal permitting was also required. See page 138.

It is difficult to make conclusions about the reasons for the differences in the project timeframes based only on the information in **Table 8-6**. There appears to be no obvious relationship between the time it takes to process a project and its size or the type of MEPA review document prepared. For example, the 43-acre Yank Creek timber sale near Hardy, south of Great Falls, took 22 months to review and prepare an EA, and the 495-acre Cyclone/Coal timber sale near Columbia Falls took 22 months to review and prepare an EIS according to the information provided. However, there does seem to be one identifiable trend shown in the table. Timber sales on state lands east of the continental divide average 9 months with a mean of 8 months for the environmental review/sale preparation process. This is less than the overall average and may reflect the impact of those criteria listed by the program in **Table 8-3**. There the agency cited project size, presence of an organized project opposition, federal permitting requirements (wetlands, endangered species), geographic considerations, potential for litigation, and political considerations as the primary causes of MEPA review delays. For sales from state lands around Grass Range, Lewistown, Busby, Pompeys Pillar, White Sulphur Springs, Hardy, Ekalaka, Broadus, and Roundup, these elements may not be present in comparison to timber sales in other parts of the state. Other factors may also be involved if this trend is, in fact, a reliable conclusion, such as differences in environmental impacts and economics between the regions.

Game Farm (Alternative Livestock Ranch) Permits

The EQC heard concerns from FWP and others regarding the processing and permitting of alternative livestock ranch (ALR or game farm) permits. In response to an EQC request, the FWP provided the information shown in **Table 8-7**, which lists the permit applications processed by the agency in the 30 months between June 1997 and December 1999. The agency shows that it prepared 28 EA MEPA documents on 28 applications. As noted previously, the agency is required to act on a completed application within 120 days unless an EIS is required, in which case another 180 days may be allowed to conduct the review. There is no penalty provided or automatic permit issuance required for failure to meet these timeframes. The 120-day limit was increased in 1993 from a previous 60-day time limit. **Table 8-7** indicates that in most every case, the FWP is able to complete its MEPA and permit review within the 120-day timeframe.

MEPA Delays Due to Federal Agency Involvement

Delays due to "federal agency workloads, actions, decisions, and permits" and whether or not the project was also "subject to a (federal) permitting action" were noted by both DEQ and DNRC as significant reasons for delay in the implementation of MEPA (**Table 8-3**). As noted earlier in this chapter, **Table 8-4** lists metal mine operating permit applications reviewed by DEQ between January 1990 and December 1999 and **Table 8-6** lists timber sale projects on state lands for fiscal year 1999.

Table 8-7. Alternative Livestock Ranch Applications and MEPA Dates - FWP - June 1997 Through December 1999

Project name	Description	Date of application	Date application complete - (MEPA start date)	MEPA document - type/date prepared	Record of decision - date	Elapsed time for MEPA review (column 6 minus column 4)	Comments
Mesaros Elk Ranch	500 acre ALR Cascade County	7/25/99	8/4/99	EA	12/2/99	120 days	Appeal of final decision by Montana Wildlife Federation.
Samuelson Elk Ranch	50 acre ALR Powder River County	5/19/99	7/14/99	EA	11/5/99	114 days	
Gregory Elk Ranch	320 acres ALR Rosebud County	4/9/99	4/26/99	EA	8/18/99	114 days	
Kafka Big Sandy	65 acre ALR Hill County	12/11/98	1/4/99	EA	5/10/99	126 days	
Kafka Diamond K #2	869 acre ALR Hill County	12/11/98	1/4/99	EA	5/10/99	126 days	
Ludwig Elk Ranch	350 acre ALR Carter County	12/28/98	1/6/99	EA	4/29/99	113 days	
Nadon Elk Ranch	19 acre ALR Lincoln County	11/20/98	11/27/98	EA	3/24/99	97 days	
Janicki	35 acre ALR Flathead County	9/25/98	10/24/98	EA	2/19/99	118 days	
Spoklie (Tobie Creek)	81 acre ALR Flathead County	9/18/98	10/16/98	EA	2/10/99	117 days	Original application 2/9/98 with acceptance 3/9/98 – change in boundaries resulted in new application 9/18/98.
Kvapil/Wertz	34 acre ALR Flathead County	7/22/98	8/19/98	EA	12/16/98	119 days	Applicant appealed stipulations placed on license – currently the case is still pending.
Kafka/Schubarth	1,100 acre ALR Hill County	7/9/98	7/9/98	EA	10/16/98	99 days	Original application 3/5/98 accepted 3/16/98 – after discussion with applicant, new application 7/9/98.
Dinsdale	25 acre ALR Carbon County	6/23/98	7/22/98	EA	11/23/98	124 days	
Levengood	10 acre ALR Flathead County	4/15/98	5/9/98	EA	9/11/98	125 days	
Hager	37 acre ALR Teton County	3/6/98	3/16/98	EA	7/13/98	119 days	

Project name	Description	Date of application	Date application complete - (MEPA start date)	MEPA document - type/date prepared	Record of decision - date	Elapsed time for MEPA review (column 6 minus column 4)	Comments
Beebe	5 acre ALR Lincoln County	9/19/97	10/21/97	EA	2/13/98	115 days	
Raaum	75 acre ALR Roosevelt County	10/1/97	10/10/97	EA	2/4/98	117 days	
Ayers #2	22 acre ALR	8/12/97	8/25/97	EA	12/29/97	126 days	
Reeves	58 acre ALR Broadwater County	7/21/97	7/30/97	EA	11/24/97	117 days	
Buhmann	29 acre ALR Blaine County	7/8/97	7/8/97	EA	10/24/97	108 days	
McCart	228 acre ALR	5/30/97	6/12/97	EA	11/3/97	144 days	
Tutvedt	38 acre ALR Flathead county	5/23/97	6/23/97	EA	10/14/97	113 days	
Zelenka	96 acre ALR Pondera County	5/5/97	6/5/97	EA	9/24/97	80 days	
Shelton	13 acre ALR Cascade County	4/15/97	5/2/97	EA	9/8/97	129 days	
Neuman	35 acre ALR Teton County	4/10/97	5/2/97	EA	9/10/97	131 days	
Perry	25 acre ALR Silver Bow County	3/25/97	4/23/97	EA	8/14/97	105 days	
Ridgley	80 lacre ALR Sanders County	4/4/97	5/6/97	EA	9/30/97	107 days	
Backes	28 acre ALR Flathead County	3/13/97	4/13/97	EA	8/7/97	116 days	
Stetson	14 acre ALR Flathead County	1/27/97	2/26/97	EA	6/16/97	141 days	

Source: FWP

DEQ was asked to identify which of the mining projects listed in **Table 8-4** also involved a federal agency in the decisionmaking process and which permit applications were delayed as a result of this federal involvement. **Table 8-8** shows (X) that 17 of the 22 applications involved a federal agency in the decisionmaking but in only two cases did that involvement result in a delay in the MEPA process (Golden Sunlight and Zortman-Landusky). Both cases involved Corps of Engineers decisions regarding federal Clean Water Act 404 permits (dredge and fill). The two cases in which MEPA delays resulted in part from delays due to federal participation in the decision are shown as italicized in **Table 8-4**.

Similarly, DNRC was requested to identify fiscal year 1999 timber sales in which federal involvement or permitting was involved and to identify when that involvement added to the length of time it took to implement the MEPA process. Unlike the DEQ mine permits for projects that are often located on federal lands and necessarily involve federal agencies, at least in the role of landlord, DNRC state land timber sales do not require significant federal involvement. DNRC staff advised that, typically, federal involvement in state timber sale decisions is limited to obtaining federal permits to access state timber lands. Use of existing roads is less problematic than a situation in which a new road must be constructed. DNRC identified 2 fiscal year 1999 timber sales out of the 26 listed in **Table 8-6** that had a federal agency involvement--the Painted Rocks and the Cyclone/Coal sales. They are shown in italics in **Table 8-6**. Neither environmental review process was reportedly delayed as a result of federal agency requirements.

Staff from both DEQ and DNRC stated that, currently, some environmental reviews are slowed due to the need for biological opinions from the U.S. Fish and Wildlife Service regarding threatened and endangered species. DNRC has experienced delays on some fiscal year 2000 timber sales due to the need for this review, and DEQ noted that the Rock Creek-ASARCO-Sterling MEPA process is currently awaiting, in part, a biological opinion by the federal agency.

Table 8-8. Federal Permitting Involvement in Montana Metal Mine Permitting

Project	BLM	Forest Service	Corps of Engineers	National Park Service
Majesty				
Sweetwater Garnet				
South Beal		X		
Diamond Hill	X			
Conda	X			
East Boulder		X		
Stillwater Under the River Crossing				

Project	BLM	Forest Service	Corps of Engineers	National Park Service
Dillon Vermiculite	X			
Stillwater Expansion (SMC2000)		X		
Gem River		X	X	
Barretts Regal Mine				
Stillwater Expansion (Hertzler Impoundment)		X	X	
Golden Sunlight	X		X (delay)	
East Boulder		X		
Stansbury	X		X	
Noranda Montanore		X	X	
Zortman Expansion	X		X (delay)	
Cominco			X	
McDonald – Seven Up Pete			X	
New World		X	X	X
Rock Creek – ASARCO-Sterling		X	X	
General Quarry				

Source DEQ April, 2000

Finally, DEQ staff advised that MEPA analysis delays are not typically the result of any cooperative-lead agency involvement, such as a process involving a joint state-federal EIS. Delays are more often the result of the need to address comments and issues raised by secondary agencies, such as the EPA, the U.S. Fish and Wildlife Service, and, in the case of the Rock Creek-ASARCO-Sterling mine, the state of Idaho DEQ.

Chapter 9: An Evaluation of Public Involvement Under MEPA

CHAPTER SUMMARY

This chapter was written and prepared by the Montana Consensus Council, a state agency independent from the EQC. The findings and recommendations herein are those of the Montana Consensus Council and are in no way binding on the EQC.

The EQC MEPA Subcommittee chose to evaluate public involvement processes convened under MEPA. The Montana Consensus Council conducted a survey of 280 stakeholders. Ninety-three people responded to the survey.

Eight clear themes emerge from a careful reading of the survey responses:

- (1) The idea of public involvement under MEPA is good public policy. But the practice of public involvement under MEPA could be improved.
- (2) Members of the general public are uninterested in most MEPA projects or do not believe that their input will make a difference. Some people do not understand the purpose of MEPA and how it works. Consequently, few independent citizens participate in MEPA processes, which tend to be dominated by project proponents and organized interest groups.
- (3) The objectives of public involvement under MEPA need to be clarified. This will help agencies, project proponents, stakeholders, and the general public develop a common understanding of the purpose of MEPA and MEPA-driven public involvement.
- (4) The quality of public involvement processes varies widely from case to case and from agency to agency. There should be a consistent, structured approach among all state agencies.
- (5) Montanans have opportunities to participate in state agency decisions, but public notification about upcoming MEPA projects needs to be improved, and state agencies should do more to encourage public participation.
- (6) The quality of public comment needs to be improved. Comments should be substantive and based on the best available information, but agencies need to provide better, more timely information to educate

citizens. They must also show serious consideration for comments and recognize that less tangible environmental values (such as social, cultural, aesthetic, and natural values) are just as substantive as economic values and scientific information.

(7) Although state agencies seek public input and advice, they don't always listen to what is said. The process of incorporating public comment into MEPA analysis, making tradeoffs among competing interests, and integrating public input and scientific information should be more transparent, participatory, and interactive.

(8) Public involvement is a critical ingredient of MEPA. The associated costs and perceived delays in the decisionmaking process are outweighed by the benefits of informing the public, gathering input, and securing public understanding of and support for projects.

The Montana Consensus Council offers six recommendations to improve the implementation of public involvement under MEPA. These recommendations are based on a mandate within Article II, Section 8 of the 1972 Montana Constitution, which states that "The public has the right to expect government agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law," and on guidelines on public participation in governmental operations found in section 2-3-101, MCA.

- (1) Amend the MEPA statute to clarify the value of public involvement under MEPA.
- (2) To further clarify the value and purpose of public involvement under MEPA, amend the model MEPA rules to include a statement of values for public participation.
- (3) Amend the MEPA model rules to provide a consistent approach to public involvement under MEPA across agencies and projects.
- (4) Amend the MEPA model rules to encourage "best practices" for public involvement under MEPA.
- (5) Amend the MEPA model rules to improve public awareness of MEPA and opportunities to participate.
- (6) Amend the MEPA model rules to provide a more transparent, participatory, and interactive process to integrate public input and scientific information.

This chapter was written and prepared by the Montana Consensus Council, a state agency independent from the EQC. The findings and recommendations herein are those of the Montana Consensus Council and are in no way binding on the EQC.

Chapter 9: An Evaluation of Public Involvement Under MEPA

The point of public involvement is that by adding the value-rich perspectives of the public to the information-rich perspectives of the experts, we can create wiser policies.

*Adapted from Daniel Yankelovich
The Magic of Dialogue*

Introduction

The 1999 Montana Legislature, through Senate Joint Resolution No. 18, directed the Environmental Quality Council (EQC) to “conduct an interim study of the Montana Environmental Policy Act” (MEPA). As part of this study, subsection (1)(c) of the joint resolution asked EQC to examine the degree to which MEPA “results in government accountability” and “Montanans are informed of and participate in state agency decisions”. Subsection (3)(e) directs EQC to consider “whether citizens are effectively participating in the MEPA decisionmaking process”.

The Montana Consensus Council, a small state agency that specializes in designing fair, effective, and efficient public involvement and consensus-building processes, agreed to work with EQC to evaluate the public involvement processes convened under MEPA, consistent with the expectations outlined in SJR 18. This report presents the results of that effort.

Methodology

During the past two years, the Montana Consensus Council has developed, in consultation with colleagues across the country, several state-of-the-art survey instruments for evaluating participant satisfaction with public involvement and consensus-building processes.¹ Building on this work, and on a review of the literature on evaluating public involvement processes,² the Consensus Council drafted a survey for evaluating public involvement under MEPA. The survey was based on indicators of success gleaned from the literature review and the best practices for conducting public involvement. A draft survey was circulated to professional colleagues, EQC staff, and EQC members for their input and advice.

In January 2000, we mailed the survey to about 280 people, including citizens, project proponents, Montana state agencies, local government offices, federal agencies, conservation groups, law firms, and the university system (see Section H). The mailing list was compiled by EQC and includes people and organizations who participated in or commented on past MEPA-related actions.

By the end of January 2000, we had received only 55 responses, so we mailed cards to people who had not yet responded, asking them to complete the survey and return it. As of February 23, 2000, we received 96 surveys, 3 of which were left blank. The numbers that follow in this report do not always add up to 93 because not everyone responded to every part of the survey. Percentages may not add up to 100 because of rounding.

We took people at their word when they wrote on the survey that they were representing themselves as private citizens, rather than some organization or other affiliation. Readers should also recognize that individual responses from agencies and other organizations may not represent an official position.

Of the 93 completed surveys, 17 percent were filled out by state agency staff and administrators—the people responsible for conducting public involvement under MEPA. The remaining 83 percent were filled out by the people MEPA-driven public involvement is meant to serve, including citizens, conservation groups, and representatives of business and industry (project proponents). See Section H for a more detailed list of respondents.

- X Conservation organizations—22 (24%)
- X Independent citizens—21 (23%)
- X Representatives of business and industry—17 (18%)
- X Local and federal agencies, the university system, church-affiliated groups, and law firms—17 (18%)
- X State agencies—16 (17%)

Although this study likely captures the input and advice of people and organizations that account for a significant majority of those who participate in MEPA-driven public involvement processes, other perspectives may not be represented here. Survey respondents are not a random sample of Montanans; the findings in this report represent the thoughts and views of a relatively narrow, vested set of interests—people who have participated in or commented on past MEPA-related actions. Of the 93 people who filled out all or most of the survey, 37 said they had participated in 1 to 5 MEPA-driven public involvement processes, 17 said 6 to 10 processes, and 35 said 10 or more processes. Three people reported that they had not participated in any such process. Their survey responses were presumably based on personal interest as outside observers or as potential participants in the future.

Sixty-five survey respondents (72 percent) said they were basing their responses on a synthesis of many experiences with MEPA processes. Several people said that their frame of reference included processes that combined MEPA and the National Environmental Policy Act. Some people also based their responses on experiences with how MEPA-driven public involvement is typically conducted, while others based their responses, at least in part, on an idealized vision of how they think public involvement *should* be conducted under MEPA.

Key Themes

Eight clear themes emerge from a careful reading of the survey responses. These themes are presented here as a synthesis of what people said in responding to the survey.

1. **The idea of public involvement under MEPA is good public policy. But the practice of public involvement under MEPA could be improved.**

Of the 93 people who completed surveys, 88 percent responded favorably toward the idea of public involvement in MEPA-driven decisions. Public involvement is good policy, they said, because it:

- T Brings additional and often valuable information to light that might not be heard otherwise.
- T Can help produce better proposals and decisions.
- T Provides important opportunities to exchange information among stakeholders, project proponents, and responsible agencies.
- T Creates opportunities for public disclosure of proposed projects, potential impacts, and alternatives.
- T May identify problems and build understanding about projects and potential impacts while there is still time to consider alternatives, including mitigation.

Many people, however, also said that the practice of public involvement under MEPA does not always live up to its promise. A common comment was, “MEPA is fine, but agencies need to improve the way public involvement under MEPA is implemented.” Survey respondents cited a number of areas they say need improvement, including:

- T Better public notification of upcoming projects.
- T A more consistent and structured approach to public involvement from one agency to the next.
- T Broader recognition by agencies that social, cultural, aesthetic, and natural values are as substantive as economic and scientific data.
- T A better effort by agencies to clearly show how public comment is incorporated into decisionmaking.

Some survey respondents (11 people, or 11 percent) were less enchanted with the idea of public involvement in MEPA-driven decisions. They said that public involvement is costly and time consuming, and it adds little value because comments tend toward rhetoric and emotion rather than science and substance. They said that the key issues and concerns are often known in advance, and little or no new information is gained from public involvement. Several people said that public comment tends to be one-sided—against proposed projects—and that people with an ax to grind can delay or block projects, or make them unprofitable, at no cost to themselves.

- 2. Members of the general public are uninterested in most MEPA projects, or do not believe that their input will make a difference. Some people do not understand the purpose of MEPA and how it works. Consequently, few independent citizens participate in MEPA processes, which tend to be dominated by project proponents and organized interest groups.**

Most survey respondents (72 percent) said that people do participate in MEPA-driven public involvement, but that participation varies widely (and sometimes unpredictably) from project to project. Several survey respondents said that of the numbers of people submitting comments may vary, but it's usually the same people and groups that participate. Widespread public participation is uncommon. One person said that conservation groups are effective "watch dogs" for the general public.

In general, more people participate when a proposed project requires an environmental impact statement (EIS), when significant environmental resources or values may be affected, when the proposed project would be located near a population center, and when interest groups stir up a controversy. Several people said that some agencies conduct "checklist" environmental assessments (EAs), which tend to minimize opportunities for public involvement. They also said that public participation is discouraged when notices of proposed projects and their location are described only in technical or legal terms.

Several people said that one possible obstacle to more widespread participation is that the general public needs more and better information about MEPA's purpose, how public involvement is conducted, and about proposed projects and the responsible agency's decision-making process.

- 3. The objectives of public involvement under MEPA need to be clarified. This will help agencies, project proponents, stakeholders, and the general public develop a common understanding of the purpose of MEPA and MEPA-driven public involvement.**

Survey responses revealed an apparent split over the purpose or intent of MEPA. Some people said that the purpose of MEPA is for the agency to adequately examine and disclose to the public the environmental impacts of a proposed action and its alternatives. This may create opportunities for agencies and proponents to gain an understanding of the different goals each may have in permitting a project, but such opportunities are secondary, a byproduct of the process rather than its primary aim. This view of the process emphasizes the agency's role as an information source and decisionmaker.

Other people said MEPA's purpose is to discover the interests and concerns of stakeholders and the general public regarding a proposed project. They said this gives decisionmakers the benefit of interdisciplinary and public review of a proposal so that all the pros and cons are fleshed out. This view of the process emphasizes the public's role as an information source and advisor to decisions that affect public resources and the human environment.

Even among state agencies this split is apparent. Some agency staff use the opportunities created by MEPA to engage in a dialogue with the public and stakeholders. “That’s what it’s all about,” said one employee with the Montana Department of Transportation. “To bring folks together, to understand, to provide those we serve with products they want.” Others said that public comments do help inform agencies, but an actual face-to-face conversation is better. Public meetings, they said, are conducive to such exchanges.

Others state agency personnel are less inclined toward hosting such dialogue. They see their role as recipients of comments from project proponents and opponents, not as a bridge between the two. “MEPA does not facilitate dialogue between stakeholders,” said one agency administrator at DNRC.

This split has generated apparent frustration over the lack of a clear, generally accepted purpose for public involvement under MEPA. To develop a purpose that would be agreeable to most project proponents, responsible agencies, and Montana citizens, we should first clarify the objectives of public involvement under MEPA.

When asked to rank the importance of six different objectives for public involvement under MEPA, people ranged widely in their responses. Five of the six objectives received ten or more votes for ranking highest in importance (**Table 9-1**). And although a clear majority (62 percent) of people ranked “Resolve conflict among competing interests” as least important, three people ranked this objective highest. Several people commented that ranking these objectives was difficult because *all* of them are important.

The fact that the rankings are scattered relatively evenly among five of the six objectives suggests either that people expect public involvement under MEPA to serve more than one purpose, or that, at least in some peoples’ minds, the objectives of public involvement are not clear. Is public involvement under MEPA intended simply as an opportunity for agencies to provide information and education? Or is the intent to seek public input and advice? At the far end of the public involvement continuum, should we expect the process to resolve conflicts among competing interests?

Overall, survey respondents clearly ranked three objectives highest in importance (**Table 9-1**). They are:

- 1st: “Increase the quality of the project and final decisions.”**
- 2nd: “Seek public input and advice.”**
- 3rd: “Provide information and education.”**

Interestingly, if we look at the four main categories of respondents, the split described above becomes more apparent. For citizens representing themselves, the three most important objectives were the same as for the overall group, and conservation groups simply flipped the first and second objectives. State agencies and representatives of business and industry (project proponents), however, said the most important objective

was to provide information and education. Both of these groups also gave a high ranking to promoting mutual understanding of substantive issues.

Most people gave a strong last place ranking to “Resolve conflict among competing interests.” Apparently most people do not expect MEPA to be a conflict-resolution process, nor are most agencies eager to accept such a task.

Table 9-1. Ranking the Importance for Objectives of Public Involvement Under MEPA. The numbers in this table indicate the number of times each objective was ranked 1, 2, 3, etc. For example, “Seek public input and advice” was ranked first 27 times, second 21 times, third 18 times, and so on.

Public involvement objectives under MEPA	Ranking 1 (highest)	2	3	4	5	6 (lowest)
Provide information and education.	19	18	23	11	10	5
Seek public input and advice.	27	21	18	11	7	1
Promote mutual understanding of the substantive issues.	10	16	13	26	15	2
Increase the quality of the project and final decisions.	32	20	7	12	7	6
Foster trust, communication, and understanding among stakeholders, including agencies.	14	7	10	12	22	18
Resolve conflict among competing interests.	3	3	5	12	14	53

4. The quality of public involvement processes varies widely from case to case and from agency to agency. There should be a consistent, structured approach across all state agencies.

Many people said that there are as many formats for public involvement as there are state agencies conducting them. This often leads to confusion and misunderstandings among stakeholders, including project proponents. In the survey, we asked state agencies whether they possessed written policies and procedures for public involvement under MEPA. The departments of Fish, Wildlife and Parks (DFWP); Natural Resources and Conservation (DNRC); and Agriculture all said they refer to the Administrative Rules of Montana. DFWP also provided copies of several interoffice memoranda on MEPA compliance and an EA checklist. The Department of Transportation (MDT) said it has a public involvement handbook. The Department of Environmental Quality (DEQ) reported that staff are currently drafting written policy. And the Department of Military Affairs said it follows guidelines in Army Regulation 200-2 on the environmental effects of Army actions.

Survey respondents offered several ideas on how to make public involvement more consistent and uniform from one agency to the next.

- X Make public notification requirements uniform.
- X Require public meetings in all MEPA processes.
- X Set a standard EA and EIS comment period for all agencies. (Most suggested a 30-day comment period for all EAs and 60-day for all EISs. One person said a minimum 90-day period should be required for all MEPA projects.)
- X Make it easier for project sponsors to work with one or two responsible agencies, rather than many.

Many people also said that the public involvement process should be easier to understand and take part in, that it should be more structured. They suggested a variety of strategies for doing this, some of which would streamline the structure while others would add new components, such as facilitation and additional documentation.

- X Make sure public involvement is **facilitated** by an impartial third party—unstructured processes go awry.
- X Use small groups—focus groups, advisory committees, field tours—to encourage a detailed, informed discussion of the issues and alternatives at hand. This saves time and money, and improves the quality of the decision-making.
- X Agencies should provide better summaries—balanced, science based, with references cited—on the issues and decisions at hand.
- X Agencies should summarize all public comments and distribute copies to all participants, so people know they have been heard.
- X Agencies should agree on standard definitions of “significant” and “cumulative impacts.”
- X Avoid unnecessary delays by fixing a finite time for comments and responses. Hold people and organizations responsible for delays by making them liable for any costs incurred.
- X Require agencies to respond only to substantive comments.
- X Publish success stories of how public involvement has improved projects and decision making.

5. Montanans have opportunities to participate in state agency decisions, But public notification about upcoming MEPA projects needs to be improved, and state agencies should do more to encourage public participation.

Most people (69 percent of survey respondents) generally agree that stakeholders have opportunities and are encouraged to participate in public involvement processes under MEPA. Legal notices are published in newspapers, they said, and state agencies take public comments in writing and also directly at meetings. Several people pointed out that participation does require some initiative from the stakeholders to find out about a project proposal and the request for comments. One respondent from business and industry said that environmental groups effectively track MEPA projects and act as citizen watchdogs when members of the general public do not participate.

Even among the people who felt that opportunities for participation were adequate, however, many said that agencies need to do more than run small legal notices in local newspapers. Such notices, they said, typically fill an inch or two of column space, are buried within the newspaper, and are easy to miss. “Legal notices may meet the letter of the law,” said one respondent, “but they’re not enough.”

Suggestions for improving public notice included working with reporters to generate feature stories, posting notices on a central MEPA web site, doing public service announcements on radio and television, and setting up a telephone hot line with project announcements and information on how to submit comments. Some complained that the legal descriptions of property given in most notices are difficult to understand, and the public would be better served by “real world” descriptions in plain language.

Twenty-three survey respondents (26 percent) said that opportunities and encouragement for public involvement were not adequate. Many of these people said that public notification and encouragement varies widely from one state agency to the next, and that this lack of consistency or uniformity is a problem in itself. “Unless a group is signed up to receive MEPA notices, it’s almost impossible to find out what is going on,” one respondent reported.

Several people said that in some cases agencies have done a good job of contacting stakeholders and providing ample opportunities for comment, but sometimes agencies act as though they want to discourage public involvement. One person alleged that the Montana Department of Transportation “skips MEPA notice requirements by getting a categorical exclusion from MEPA and then following NEPA, which has its own notice requirements. It is therefore frustrating and impossible to follow MEPA compliance at MDT.” A number of independent citizens and people representing conservation groups complained about what they characterized as the ongoing inadequacy of public involvement processes conducted by the Oil and Gas Conservation Division at DNRC. Oil and Gas proposals, said one respondent, have been “particularly clandestine.”

Several people said that agencies may provide opportunities for public involvement, but seldom do they actually *encourage* participation. Several people said that many incentives (workload, budget and staff constraints, and political pressure) drive agencies to streamline the MEPA process, so it’s better for them to minimize public involvement. A few people also said that “stakeholders” is too narrow a term—that MEPA is about *public* participation. Too often, they said, agencies want to involve only those with an economic interest in the proposed project. They worried that when agencies are responsible for identifying stakeholders, they may “stack the deck,” resulting in a surfeit of one-sided comments.

State agencies, on the other hand, said that they do a good job of providing opportunities and encouragement for stakeholder participation in public involvement processes under MEPA. Some agency personnel said that they “go beyond what is necessary” to involve the public. Several state agency respondents said that a news release was adequate

notice. In contrast, one state agency official with DNRC said that a properly conducted public involvement process should include public scoping, informational meetings, and hearings. Another person at DNRC said that citizen interests are not often incorporated, and organized special interest groups dominate the public involvement process—a concern voiced by other state agencies and other survey respondents. Finally, two agency responses (both from DNRC) indicated some frustration that the process may be too open to public participation, one questioning how the term *stakeholders* should be defined: “Anyone with an interest—or someone that is truly impacted by a proposed action?”

- 6. The quality of public comment needs to be improved. Comments should be substantive and based on the best available information. But agencies need to provide better, more timely information to educate citizens. They must also show serious consideration for comments and recognize that less tangible environmental values (such as social, cultural, aesthetic, and natural values) are just as substantive as economic values and scientific information.**

Several people within state agencies and business and industry, and one independent citizen, said that the bulk of public comments are often not substantive or relevant, and suggested that when projects are highly technical, few members of the general public are knowledgeable enough to understand them. But most citizens and people representing conservation groups said that project proponents and responsible agencies do not always provide good, timely information on which to base comments. Often, they said, the information is unnecessarily technical, legal, or otherwise hard to understand. People complained that, in some cases, project proponents and agencies do not fully disclose the nature of the project or its potential impacts. Public comment, said one person, is only as good as the information provided by the project proponents and agencies.

People also said that most agencies show a bias toward scientific and economic data, too often dismissing substantive comments based on social, cultural, aesthetic, and natural values. Public comment, they said, doesn’t have to come from experts or economically vested interests to produce valuable improvements to the proposed project. People said that agencies and project proponents should make a good faith effort to fully disclose all relevant information to the public, and do so before the formal public involvement process begins. Several people also said that public comment would improve if more time was allowed to review and comment on draft EAs and EISs.

- 7. Although state agencies seek public input and advice, they don’t always listen to what is said. The process of incorporating public comment into MEPA analysis, making trade-offs among competing interests, and integrating public input and scientific information should be more transparent, participatory, and interactive.**

Survey respondents were divided down the middle when asked whether responsible agencies fairly and accurately incorporate public comments into decisions. Forty-four

percent said that, in general, agencies do fairly and accurately incorporate comments, while 42 percent disagreed (14 percent were indifferent). Interestingly, state, local, and federal agencies said that comments are fairly and accurately incorporated, while most conservation groups, business and industry, and citizens disagreed.

Written comments in response to this question indicated a range of expectations for incorporating public comment under MEPA. Some people said that MEPA does not require “fair and accurate” incorporation of comments into the decision. Under MEPA, they argued, an agency must provide the rationale for its decision, which should in effect document the “fairness” of the decision. Others said that agencies must show that public comment was seriously considered. They voiced frustration over instances in which they say agency decisions disregarded substantive information from public comment. Between these two poles, many people said that stakeholders, the agencies, and project proponents all bear responsibility for improving the relevance and content of public comment.

For substantive comments to be acknowledged and incorporated into the analysis and decision, agencies, project proponents, and other stakeholders must be willing to engage in a genuine exchange of information, a process of mutual learning. Apparently, opportunities for such an exchange do exist. Most people (77 percent) agreed with the statement that “The stakeholders, including project proponents and the responsible agency, have an opportunity through public involvement processes under MEPA to learn about each other’s interests and concerns.”

Nevertheless, many people cited difficulties, chief among them a tendency toward rhetoric and posturing that overshadows genuine discussion and disclosure of real issues. People also said that agencies and stakeholder groups may be locked into their positions and are unwilling to listen to and seriously consider what others have to offer. Representatives of conservation groups said that mutual learning would be made easier if public involvement occurred earlier in the process, allowing comment on the purpose and need of the proposed action. This might also prevent the “us versus them” mentality that sometimes arises when agencies and project proponents begin working together long before the public is involved. Finally, comments from state agencies indicated that fostering dialogue is low on the long list of agency priorities. Existing staffing levels make it difficult to implement all aspects of MEPA because of the time required to prepare MEPA documents.

8. Public involvement is a critical ingredient of MEPA. The associated costs and perceived delays in the decision-making process are outweighed by the benefits of informing the public, gathering input, and securing public understanding of and support for projects.

The survey asked people whether they agreed or disagreed that public involvement under MEPA is timely, cost-effective, and efficient. About 56 percent of respondents agreed that the public involvement process is timely. About 48 percent agreed that it is cost-effective,

while only about 40 percent agreed that it is efficient. The “indifferent” check-off drew more responses for this statement than for any other statement in the survey (16 percent for timely, 32 percent for cost-effective, and 25 percent for efficient). This may reflect a low interest or level of concern with these qualities—several people noted that public involvement was so essential that it shouldn’t be measured by its cost-effectiveness or efficiency. Others said that only the agencies know how much such processes cost and how much time is involved, so they felt unqualified to answer. Some people said these qualities depend to a high degree on which agency is involved, and others said it depends on the nature of the project.

The survey also asked people to rank 10 issues related to public participation under MEPA in order of their importance. Interestingly, the two lowest rankings were “Delays associated with public involvement,” and “The costs associated with public involvement.” Several people said that delays and costs associated with public involvement are outweighed by the benefits of informing the public, gathering input, and securing public understanding of and support for projects.

Most survey respondents (74 percent) agreed that public input improves the proposed project and results in better decisions. Some said that this was “obvious” or “always” the case. Others said that the degree of improvement varies from project to project, depending in part on the complexity of the project. A few people said that public input does not result in better projects and decisions, but only because the agencies disregard the input. They said that public comments often provide valuable information and a broader perspective on how to improve projects, and agencies need to include such input in their decisions.

Recommendations From the Montana Consensus Council

The following preliminary recommendations for improving public involvement in MEPA-driven decision making are based on the findings of the survey and on the Montana Consensus Council’s extensive experience in designing participatory and collaborative processes for public decision making.

- 1. Amend the MEPA statute to clarify the value of public involvement under MEPA (see themes 3 and 8).**
 - A. Public participation in state government decision making is mandated under Montana’s constitution and statutes. Article II, Section 8 of the 1972 Montana constitution states that “The public has the right to expect government agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.” Pursuant to this constitutional mandate, the legislature has provided guidelines on public participation in governmental operations in section 2-3-101, MCA. MEPA requires that agencies make information on proposed

actions available to the public, with the intent of promoting informed decision making.

- B. The results of the survey indicate that most people believe that public involvement is a critical ingredient for the successful implementation of MEPA.
- C. Public participation, however, is not mentioned in the “Purpose” section of MEPA (section 75-1-102, MCA). Further, survey results indicate that the value and purpose of MEPA-driven public involvement need to be clarified.
- D. Therefore, the legislature should amend the law to include a statement of the value of public involvement under MEPA.

2. To further clarify the value and purpose of public involvement under MEPA, amend the model MEPA rules to include the following statement of values for public participation (adapted from the International Association for Public Participation) (see themes 3 and 8).

- A. The public should have a say in decisions about actions that affect people’s lives.
- B. Public participation should be based on the premise that the public’s contribution will influence the decision.
- C. The public participation process communicates the interests and meets the process needs of all participants.
- D. The public participation process seeks out and facilitates the involvement of people who are potentially affected.
- E. The public participation process involves participants in defining how they participate.
- F. The public participation process provides participants with the information they need to participate in a meaningful way.
- G. The public participation process communicates to participants how their input affected the decision.

3. Amend the MEPA model rules to provide a consistent approach to public involvement under MEPA across agencies and projects (see theme 4).

- A. Encourage agencies to develop a public participation plan for every EA and EIS; in other words, provide an opportunity for some type of public involvement on all EA and EIS projects (see “How to Design an Effective Public Involvement Strategy”).
- B. Encourage agencies to use the Montana Consensus Council, a state agency that specializes in public participation and conflict resolution, to help develop public participation plans.
- C. Require a public meeting or some other type of opportunity for citizens to interact with the agency and the project proponent on all EISs.
- D. Require a 30-day public comment period on all EAs.

- E. Require a 60-day public comment period on all EISs, unless a longer period is requested in writing by the project proponent or a group of citizens. If a request is made to extend the public comment period, the agency must justify its decision in writing to extend or deny the request.
- 4. Amend the MEPA model rules to encourage “best practices” for public involvement under MEPA (see themes 1, 4, and 5).**
- A. Insert “A Checklist of Strategies for Public Participation Under MEPA”—into the MEPA model rules.
 - B. Insert “Public Participation Tools and Strategies”—into the MEPA model rules.
- 5. Amend the MEPA model rules to improve public awareness of MEPA and opportunities to participate (see themes 2 and 5).**
- A. Create a web site dedicated to MEPA. Contents should include notices of proposed projects, active comment deadlines and submission addresses, and information on how to be an effective participant.
 - B. Develop a single interagency brochure on public involvement opportunities under MEPA. Include suggestions on how to provide effective comments.
 - C. Require agencies to distribute press releases or feature stories on every proposed project that requires an EIS. These stories should explain the nature and timing of the proposed project, anticipated environmental impacts, the agency’s role and responsibility, and opportunities to participate. Encourage agencies to reach beyond print media to radio, television, and the web.
- 6. Amend the MEPA model rules to provide a more transparent, participatory, and interactive process to integrate public input and scientific information (see theme 7).**
- A. Section XI, 2-3 of the MEPA model rules require agencies to include in EISs “a list of all sources of written and oral comments on the draft EIS, including those obtained at public hearings, and, unless impractical, the text of comments received by the agency (in all cases, a representative sample of comments must be included);” and “the agency’s responses to substantive comments, including an evaluation of the comments received and disposition of the issues involved.”
 - B. Based on the results of the survey, however, citizens--including project proponents, interest groups, and independent citizens--are not satisfied with the degree to which their input and advice is reflected in agency decisions.
 - C. Require some type of public involvement activity that allows the public to validate the agency’s attempt to fairly and accurately incorporate public input and scientific information--for example, use a task force of citizens, project proponents, and agency officials to review and incorporate public

comments; or use a feedback panel to review the agency's attempt to incorporate public comment.

How to Design an Effective Public Involvement Strategy

(Adapted with permission from James L. Creighton, *Involving Citizens in Community Decision Making*, Program for Community Problem Solving, 1992.)

Public involvement may be needed when:

- T The decision will have a significant impact.
- T The decision will affect some people more than others.
- T The decision will affect a vested interest or use.
- T The decision involves a subject that is already controversial.
- T The decision will need support for implementation.

When in doubt:

- T Check with others who have worked on similar issues.
- T Ask the stakeholders.
- T Conduct focus groups.
- T Design checkpoints.

Identify "the public" — specific people and organizations that may have an interest in or be affected by the project or decision.

Identify the goal of public involvement: What do you hope to accomplish with public involvement? What role should the public play in the decision?

- T Help review the purpose and need for the project?
- T Provide information?
- T Develop and evaluate potential alternatives or mitigations?
- T Generate support for the decision?

Determine the decision rule: How will decisions be made? What role does the public play in the decisionmaking process?

- T Does the agency retain exclusive authority to make the final decision?
- T Or does the public participate in the decision-making process?

Consider various methods for involving the public. Choose a method that meets the objectives of the agency and the needs of the stakeholders. Common public involvement methods include:

- T Surveys and questionnaires.
- T Interviews.

- T Focus groups.
- T Open houses.
- T Advisory councils and task forces.
- T Public hearings.

Plan how to provide the public with the information needed to generate meaningful participation and comment.

Consider opportunities for ongoing public involvement throughout the life of the project.

Develop a strategy to monitor, evaluate, and improve the effectiveness of the public involvement process.

A Checklist of Strategies for Public Participation Under MEPA

Key Project Steps	Collaborative Possibilities
Project Conception	<input type="checkbox"/> Consult an experienced facilitator or mediator to help determine what type of collaboration may be appropriate. <input type="checkbox"/> If you choose to use some form of collaborative process, include time, money, and staff in your project plan and budget.
Pre-project Analysis	<input type="checkbox"/> Ask an impartial third party to assess the issue, situation, or conflict. <input type="checkbox"/> Identify stakeholders, issues, and options on how to proceed.
Develop Proposed Action	<input type="checkbox"/> Consult stakeholders—including citizens, other agencies, and other officials—in developing and seeking agreement on a proposed action. <input type="checkbox"/> Interview parties one-on-one; convene stakeholder groups; convene a broad-based multi-party group to discuss issues and concerns. <input type="checkbox"/> Foster mutual learning through joint fact-finding and exchanging information.
Scoping	<input type="checkbox"/> Consider different processes for gathering public input and advice (public meetings, open houses, surveys, stakeholder meetings, study circles, etc.). <input type="checkbox"/> Use an impartial facilitator to convene and manage large, controversial public meetings.
Validate the Issues	<input type="checkbox"/> Based on public input and advice, consult stakeholders to foster a common understanding of the MEPA-significant issues.
Develop Alternatives	<input type="checkbox"/> Convene a working group of stakeholders to develop alternatives. <input type="checkbox"/> Encourage citizens and other stakeholders to develop their own alternative. <input type="checkbox"/> Use stakeholders as a sounding board to ensure that the range of alternatives responds to MEPA issues and unresolved issues.
Identify Preferred Alternatives	<input type="checkbox"/> Use expert panels and stakeholder groups to help analyze alternatives. <input type="checkbox"/> Use agreed-upon criteria to evaluate alternatives. <input type="checkbox"/> Clarify the distinction between facts (science) and values (goals or desired future conditions).
Analyze EA or DEIS Public Comments	<input type="checkbox"/> Convene a working group of stakeholders to review public comments, clarify dominant themes, validate or revise MEPA issues, and identify criteria for the selected alternative.
Select Alternative	<input type="checkbox"/> Before the responsible official announces the selected alternative, he/she may consult stakeholders to confirm the decision and rationale.
Appeal	<input type="checkbox"/> Resolve outstanding issues through informal, non-adversarial processes of negotiation and mediation.
Litigation	<input type="checkbox"/> Consult Department of Justice and the Office of the Attorney General. <input type="checkbox"/> Seek opportunities for settlement negotiations, mediation, and/or arbitration.
Post Decision	<input type="checkbox"/> Convene a working group to monitor and evaluate implementation, and to suggest appropriate changes to the plan of action.

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Public Participation Tools and Strategies

(Adapted from *Public Participation Workshop: Tools, Strategies, and Resources*, the Jefferson Center, 2000.)

To Inform and Educate

Advertisements
Public Service Announcements
Feature Stories
Mailing List
Newsletters
Poster Campaign
Report Summaries
Teleconferencing
Videos
Bill Stuffers
E-mail
Electronic Bulletin Board
Web Site
Fliers and Brochures
Telephone Hot Line
Interactive Displays and Kiosks
Community Information Staffer
Briefings with Key Individuals
Field Demonstrations
Class or Seminar

To Seek Public Input and Advice

Action Center
Brainstorm Session
Charette
Coffee Klatsch
Conference or Retreat
Drop-in Center
Electronic Town Meeting
Town Meeting
Fair
Field Tour or Site Visit
Forum
Games and Contests
Listening Bureau

Nominal Group Workshop
Open House
Open Meeting
Participation Style Radio or TV Show
Televote
Planning Workshop
Public Hearing
Samoan Circle
Working Meeting
Focus Group
Interviews
Log of Citizen Contacts
Ombudsman
Monitoring Media Stories
Survey or Questionnaire
Blue Ribbon Panel
Critics Committee
Depolarizing Committee
Eager Beaver Committee
Feedback Panel
Oversight Committee
Task Force
Deliberative Poll
Search Conference

To Seek Agreement

SimuReal
Study Circles
Working Group
Citizens Jury
Citizens Panel
Bridge Committee
Citizen Commission
Thumbs Up, Thumbs Down Committee
Negotiating Committee
Consensus-building Forum

Agencies and Organizations that Responded to the Survey

Conservation Groups

Bear Creek Council
Big Hole Watershed Committee
Citizens for A Better Flathead
Fishing Outfitters Association of Montana
Friends of the Rocky Mountain Front
Friends of the Wild Swan
Gallatin Valley Land Trust
Greater Yellowstone Coalition
Keep Montana Clean and Beautiful
Medicine River Canoe Club
Montana Audubon
Montana Ecosystem Defense Council
Montana Environmental Information Center
Montana River Action Network
Montana Trout Unlimited
Montana Wilderness Association
Montana Wildlife Federation
Public Lands Access Association

Citizens Representing Themselves

Unidentified (2)
Billings (1)
Bozeman (2)
Great Falls (6)
Helena (1)
Indiana (1)
Kalispell (1)
Miles City (1)
Missoula (3)
St. Regis (1)
Stockett (1)

Businesses and Industries

ASARCO
EHS Services
Express Pipeline
Exxon Mobile Billings Refinery
IMP
Land and Water Consulting, Inc.
Montana Alternative Livestock Producers

Montana Building Industry Association
Montana Farm Bureau
Montana Logging Association
Montana Power Company
Montana Refining Company
Montana Resources
Montana Stockgrowers Association
Montana Wood Products Association
WBI Holdings, Inc.
Western Environmental Trade Association
WGM Group

Federal Agencies

U.S. Bureau of Land Management
U.S. Department of Agriculture, Natural Resource Conservation Service
U.S. Environmental Protection Agency

Local Government

Butte-Silver Bow Local Government
Extension Service
Gallatin County Commissioner
Jefferson County
Missoula Health Department
Ravalli County Planning Board

Other

Browning Law Firm
Gough, Shanahan, Johnson, and Waterman
Montana Association of Churches
Montana Catholic Conference
University of Montana School of Law

State Agencies

Montana Department of Agriculture
Montana Department of Environmental Quality
Montana Department of Fish, Wildlife and Parks
Montana Department of Military Affairs
Montana Department of Natural Resources and Conservation
Montana Department of Transportation
Montana Natural Resource Information System

Endnotes

¹ “Montana group tries scorecard approach,” Will Harmon. In *Consensus*, January 1999. Participant Satisfaction Scorecard, Montana Consensus Council, 1998. For a copy of the scorecard, call the Council at (406) 444-2075.

² Thomas C. Beierle and David M. Konisky, *Public Participation in Environmental Planning in the Great Lakes Region* (Resources for the Future, Washington, D.C., 1999); Judith Ennis, “Evaluating Consensus Building,” in Lawrence Susskind, ed., *Consensus Building Handbook* (Sage Publications, 1999); S. Goldenberg and S. Frideres, “Measuring the Effects of Public Participation Programs,” in *Environmental Impact Assessment Review* 6(3)(1986): 273-281; J.B. Rosener, “Citizen Participation: Can We Measure its Effectiveness?” in *Public Administration Review* 5(1978); and Martin Schweitzer, et. al., “Evaluating Public Participation Efforts,” in *International Association for Public Participation* (first quarter, 1999); O’Connor Center for the Rocky Mountain West and Institute for Environment and Natural Resources, co-sponsors, *Reclaiming NEPA’s Potential: Can Collaborative Processes Improve Environmental Decision Making?* (March 2000).

Chapter 10: Improving the MEPA Process – EQC Findings and Recommendations

Introduction

This chapter is a summation of EQC's conclusions (findings) based on the information generated in **Chapters 1 through 9** and the EQC's solutions (recommendations) that are logically linked to the findings. The findings and recommendations are organized by Senate Joint Resolution No. 18 study goals and tasks.

Key Findings/Recommendations of the SJR 18 MEPA Study

- 1.0 ***SJR 18 Goal #1: Evaluate and improve the MEPA process.***
- 1.1 **General Finding:** Throughout its interim deliberations and as repeatedly noted in **Chapters 1 through 9** and the Appendices, the EQC has found that the MEPA process can be improved.
- 1.2 **Specific Findings:** Set out below are the EQC's specific findings on improving the MEPA process.
- 2.0 ***SJR 18 Goal #2: Ensure that the MEPA process results in state agencies making timely, efficient, informed, cost-effective, legally defensible, and ultimately better decisions.***
- 2.1 **Does the MEPA process result in state agencies making timely decisions?**
 - (1) **General Finding:** MEPA timeliness can be improved.
 - (2) **Specific Findings:**
 - (a) In reviewing hard-rock mine permits, timber sales, and game farm (alternative livestock ranch) permits, timeliness was an issue only in a small number of activities, but the delays in those small number of significant activities were substantial (for examples, see **Chapter 8**).
 - (b) Improvement in the public participation process (i.e., availability of information, education, notification, consistent public comment deadlines, active solicitation of public comment) will improve timeliness.

- (c) Project size and complexity, project impacts and their significance, degree of public interest in the project, and presence of an organized project opposition are all factors that significantly contribute to the length of time required to comply with MEPA and the permitting statutes.
- (d) For most agency projects, permits, and activities, the state agencies do not have a problem meeting statutory deadlines.
- (e) Some frustration over timeliness issues may be due to agency-required mitigation measures contained within an environmental review document. If the permit applicant thinks that the mitigation is unreasonable, the permitting process can be delayed (see **Chapter 8**).

(3) **Recommendations:**

- (a) The state agencies, through administrative rulemaking, should increase the draft EIS public comment period from 30 days to 60 days.
- (b) The state agencies, through administrative rulemaking, should require that the EA comment period be a minimum of 30 days, unless the agency makes a specific finding that a 30-day comment period is not necessary.
- (c) The comment periods in (3)(a) and (3)(b) above can be extended for good cause at the state agency's discretion.
- (d) The comment periods in (3)(a) and (3)(b) above may be shortened in order to meet state agency statutory deadlines, but in no case shall the comment period be less than 30 days for an EIS.

2.2 **Does the MEPA process result in state agencies making efficient decisions?**

- (1) **Finding:** A majority of all state agency MEPA actions are tied to a permitting process. Coordination and efficiency issues are dependent on and intertwined with the permitting process.
- (2) **Recommendation:**
 - (a) The EQC and the state agencies should investigate (through an interim study) the possibility of a one-stop-shopping process for

permits and the MEPA process. This could improve the efficiency of both the permitting process and the MEPA process.

- (b) Agencies should be required to consult with the applicant regarding alternatives and give due weight and consideration to the applicant's comments.
- (c) An EQC interim study should review and analyze the implementation of project alternative analyses under MEPA.

2.3 **Does the MEPA process result in state agencies making more informed decisions?**

- (1) **Finding:** Based on information in **Chapters 3, 4, and 9**, in most cases, the MEPA process results in informed agency decisions. There is no evidence that MEPA results in less information.
- (2) **Recommendations:** See 2.1(3) above.

2.4 **Does the MEPA process result in state agencies making cost-effective decisions?**

- (1) **General Finding:** As noted in detail in **Chapter 7**, a retroactive cost-benefit analysis of the MEPA process would be very time-consuming and would probably not reveal useful information due to reliance on old and incomplete records, the passage of time, and a lack of institutional memory. Given this finding, the EQC was unable to determine whether the MEPA process has resulted in cost-effective decisions.
- (2) **Specific Findings:**
 - (a) The agencies' general responses in conducting a thorough analysis of MEPA costs and benefits indicated that obtaining quantifiable data would be very difficult and time-consuming.
 - (b) Prospective information on the costs and benefits of MEPA would be useful in helping future legislatures, state agencies, and Montanans generally to critically evaluate the effectiveness of the MEPA policy and process.
 - (c) Determining project costs in order to assess the amount of MEPA fees on an EIS varies from agency to agency.

- (d) Based on the public comment received, it is not practical to devise an accounting system to identify all of the costs and benefits of MEPA implementation at this time.

(3) **Recommendations:**

- (a) The state agencies, through administrative rulemaking, should develop uniform guidelines for determining project costs for EISs.
- (b) The EQC in an interim study should review the MEPA statutory fee schedule.

2.5 **Does the MEPA process result in state agencies making legally defensible decisions?**

- (1) **General Finding:** Generally, the MEPA process has resulted in state agencies making legally defensible decisions. It appears that the more complete the environmental document, the more likely the state is to prevail in litigation.

(2) **Specific Findings:**

- (a) As of the date of this report, there have been 27 MEPA court cases-- 7 have gone to the Supreme Court, and the state has won 5. Of the 20 District Court cases, the state has won 12. The state wins most of the cases when the question is whether the MEPA analysis was complete. The state tends to lose more cases when the state has failed to do an EIS. No evidence has been received that the cases were frivolous. Most of the District Court cases are decided in the First Judicial District.
- (b) From 1971 to 1989, 13 (or 49%) of the MEPA cases were litigated. Fourteen (or 51%) of the MEPA cases have been litigated between the years 1990 and 2000. This indicates a trend that litigation has increased over time. However, there has also been an increase in MEPA documents produced over the last 10 years. In the last 10 years, of the 17,376 MEPA document records filed with the EQC, only 14 of those database records have been litigated.
- (c) There is no information to suggest that legal appeals of agency decisions have not been timely.
- (d) The most commonly litigated MEPA issue (17 out of 27 MEPA cases) is whether the state agency should have conducted a MEPA

analysis, usually an EIS and whether the state agency made a proper significance determination of the impacts.

- (e) MEPA training should decrease litigation.

(3) **Recommendations:**

- (a) The state agencies should routinely notify the EQC of MEPA litigation, and the EQC should systematically monitor MEPA litigation and attempt to address any trends that result from the litigation.
- (b) The EQC staff and/or the professional development staff at the Department of Administration should provide the agencies and the general public with MEPA implementation training and responsible use of MEPA between legislative sessions.
- (c) The EQC should (in the 2001-02 interim) solicit additional comment from state agencies and the general public on the adequacy of the significance criteria and other definitions in the agencies' MEPA administrative rules (see also 6.0) .

2.6 **Does the MEPA process result in state agencies making ultimately better decisions?**

- (1) **General Finding:** “Yes”, the MEPA process is resulting in state agencies making ultimately better decisions (see EQC findings under 2.1, 2.3, 2.5, 3.0).

(2) **Specific Findings:**

MEPA training and public workshops would help agencies make better decisions.

- (3) **Recommendations:** See 2.5(3)(b) above.

3.0 ***SJR 18 Goal #3: Ensure that the MEPA process results in government accountability and that Montanans are informed of and participate in state agency decisions.***

- 3.1 **General Finding:** The idea of public involvement under MEPA is good public policy. Public involvement is a critical ingredient of MEPA. The practice of public involvement under MEPA needs to be improved.

3.2 **Specific Findings:**

- (1) In general, more people participate when a proposed project requires an EIS, when significant environmental resources or values may be affected, when the proposed project would be located near a population center, or when interest groups raise public awareness. Some people do not understand the purpose of MEPA and how it works. According to the survey respondents in the Consensus Council survey in **Chapter 9**, few individual citizens participate in MEPA processes, which tend to be dominated by project proponents and organized interest groups.
- (2) The quality of public involvement processes varies widely from case to case and from agency to agency. Montanans have opportunities to participate in state agency decisions, but public notification about upcoming MEPA projects is often inadequate.
- (3) The objectives of public involvement under MEPA and related permitting statutes are unclear. Clarification of the objectives would help agencies, project proponents, stakeholders, and the general public develop a common understanding of the purpose of MEPA and MEPA-driven public involvement.
- (4) In response to the Consensus Council survey explained in **Chapter 9**, state, local, and federal agencies said that public comments are fairly and accurately incorporated, while most conservation groups, business and industry, and citizens disagreed. Respondents in the latter group indicated that the general public did not believe that their input would make a difference.
- (5) Although state agencies seek public input and advice, it is unclear how or whether input is utilized in the agency's analysis and decision.

3.3 **Recommendations:**

- (1) State agencies should incorporate in their MEPA administrative rules the following MEPA public participation objectives ranked in order of importance:
 - (a) Increase the quality of the project and final decisions;
 - (b) Seek effective public input and advice;
 - (c) Provide information and education.
- (2) To achieve the three objectives in (1), there should be a consistent, structured approach to process and notification in MEPA activities among all state agencies.

- (3) The state agencies, through administrative rulemaking, should increase the draft EIS public comment period from 30 days to 60 days.
- (4) The state agencies, through administrative rulemaking, should require that the EA comment period be a minimum of 30 days, unless the agency makes a specific finding that a 30-day comment period is not necessary.
- (5) The comment periods in (3) and (4) above can be extended for good cause at the state agency's discretion.
- (6) The comment periods in (3) and (4) above may be shortened in order to meet state agency statutory deadlines, but in no case shall the comment period be less than 30 days for an EIS.
- (7) It should be made easier for project sponsors to work with one or two responsible agencies, rather than many. See also 2.2(2)
- (8) The quality of public comment needs to be improved. Comments should be substantive and based on the best available information. More specific agency guidance on effective comments should be provided in the administrative rules. State agencies also need to provide better, more timely information (earlier in the process) to educate citizens. The state agencies, in addition to seriously considering scientific and economic data, must recognize that less tangible environmental values (such as social, cultural, aesthetic, and natural values) are as worthy of consideration.
- (9) The process of incorporating public comment into MEPA analysis, making tradeoffs among competing interests, and integrating public input and scientific information should be more transparent, participatory, and interactive. State agencies should amend the MEPA administrative rules to require some type of annual public involvement activity that allows the public to validate the agency's attempt to fairly and accurately incorporate public input and scientific information--for example, use a task force of citizens, project proponents, and agency officials to review and incorporate public comments or use a feedback panel to review the agency's attempt to incorporate public comment.
- (10) To further clarify the value and purpose of public involvement under MEPA, state agencies should amend their MEPA administrative rules to include the following statement of values for public participation:
 - (a) The public should have a say in decisions about actions that affect people's lives.

- (b) Public participation should be based on the premise that the public's contribution will influence the decision.
 - (c) The public participation process communicates the interests and meets the process needs of all participants.
 - (d) The public participation process seeks out and facilitates the involvement of people who are potentially affected.
 - (e) The public participation process involves participants in defining how they participate.
 - (f) The public participation process provides participants with the information they need to participate in a meaningful way.
 - (g) The public participation process communicates to participants how their input affected the decision.
- (11) State agencies should be encouraged to use "best practices" for public involvement under MEPA and should report back to the EQC on the use of those "best practices".
- (a) Agencies should use "A Checklist of Strategies for Public Participation Under MEPA" from **Chapter 9** of this report.
 - (b) Agencies should use "Public Participation Tools and Strategies" from **Chapter 9** of this report..
- (12) State agencies should amend their MEPA administrative rules (if necessary) to improve public awareness of MEPA and opportunities to participate.
- (a) The EQC should create a website dedicated to MEPA that includes established links to agency MEPA websites. If state agencies do not have MEPA websites they should create them. Contents should include notices of proposed projects, active comment deadlines and submission addresses, status of project implementation, and information on how to be an effective participant.
 - (b) The EQC and the Consensus Council should develop a single interagency brochure on public involvement opportunities under MEPA. It should include suggestions on how to provide effective comments.
 - (c) Require, through administrative rulemaking, that agencies distribute press releases or feature stories on every proposed project that

requires an EIS. These stories should explain the nature and timing of the proposed project, anticipated environmental impacts, the agency's role and responsibility, and opportunities to participate. Encourage agencies to reach beyond print media to radio, television, and the web.

4.0 ***SJR Task: That the EQC, in consultation with any affected parties, seek to identify whether the current implementation of MEPA is achieving its intended purpose in fulfilling the policy set forth in statute.***

- (1) **General Finding:** Due to a lack of economic and environmental trend information, the EQC is unsure whether the implementation of MEPA is achieving its intended purpose as stated in section 75-1-103, MCA. However, the MEPA process has helped heighten public and agency awareness and involvement in matters that affect the environment.
- (2) **Recommendations:** The EQC, with the assistance of state agencies and the Montana University System, needs to develop sound and measurable economic and environmental trend and benchmark information so that the state can measure whether MEPA's purposes, as set out in section 75-1-103, MCA, have been met.

5.0 ***SJR Task: Review and analyze existing implementation of MEPA.***

- (1) **Findings:**
 - (a) The EQC has openly and comprehensively evaluated the existing implementation of the MEPA process. The review and analysis of the existing implementation of MEPA is found in this report.
 - (b) MEPA is applied procedurally by the state agencies except in limited circumstances, under the metal mine reclamation laws, the Strip and Underground Mine Reclamation Act, and the alternative livestock ranch statutes as required by statute or court decisions. It would be a policy decision on the part of the Legislature as to whether MEPA is substantive, procedural, or both.
- (2) **Recommendations:**
 - (a) The Legislature should define whether MEPA is a substantive or procedural law, or both, and the Legislature should address the laws in which MEPA is being implemented substantively and provide the agencies with additional authority under those laws to address regulatory gaps. See also the recommendations under the other study goals and tasks.

- (b) The EQC (in an interim study) should study the use of programmatic EISs and EAs. Agencies should report to the EQC as a part of the interim study on the agencies' historical use of programmatic reviews and the agencies' evaluation of the potential for increased use of programmatic reviews.

6.0 ***SJR 18 Task: Review and analyze issues raised and debated in House Bill No. 142 and Senate Bill No. 413.***

(1) **Findings:**

- (a) Some of the state agencies have experienced frustration in implementing definitions in the MEPA administrative rules. The MEPA administrative rules that agencies are operating under have not been revised since 1988.
- (b) It is a policy decision whether agencies should be given flexibility and discretion on a case-by-case basis or whether there should be bright line threshold definitions for triggering a MEPA analysis and determining the scope of that analysis.
- (c) Based on the information presented to the EQC, the EQC was unable to conclude that new evidence has been a significant issue in MEPA litigation in Montana.
- (d) For HB 142, section 75-1-201(3)(b), MCA, needs to be amended to include the term "issues" to ensure internal consistency between subsections (3)(a) and (3)(b) of that section.
- (e) As of the date of this report, when questions of definitions have been litigated, the state courts have upheld the state's implementation of the definition of cumulative impacts in 6 out of 8 cases and the state's implementation of the definition of alternatives in 3 out of 4 cases (**Chapter 4**).

(2) **Recommendations:**

- (a) Nonlead agency directors should review and approve any of the staff comments of that agency that an action is significant.
- (b) The EQC should (in the 2001-02 interim) solicit additional comment from state agencies and the general public on the adequacy of the significance criteria and other definitions in the agencies' MEPA administrative rules and whether those definitions should be in statute. The next EQC should consider the following:

Some of the definitions in the agencies' MEPA administrative rules may need to be clarified, and some of the terms within the definitions may need to be defined. The Consensus Council could establish a collaborative process to identify problematic definitions and to generate workable definitions. At a minimum, this group could review the following definitions:

- (i) cumulative impacts generally, including “preimpact statement studies, concurrent actions”
 - (ii) detailed statement (an EIS)
 - (iii) proposal for project/major (action)
 - (iv) significantly affect /significance criteria
 - (v) material change
 - (vi) project costs for the purposes of assessing EIS fees to an applicant
 - (vii) compensation for those areas affected by an action
 - (viii) issues
 - (ix) other terms that the group of stakeholders thinks should be determined
- (c) The EQC should draft cleanup legislation amending section 75-1-201(3)(b), MCA, to include the term "issues" to ensure internal consistency between subsections (3)(a) and (3)(b) of that section.

7.0 ***SJR 18 Task: Review and analyze any identifiable costs and benefits to agencies, permit applicants, citizens, and the human environment resulting from compliance with the policy and purpose of MEPA.***

- (1) **General Finding:** See 2.4 above
- (2) **Specific Findings:** See 2.4 above
- (3) **Recommendations:** See 2.4 above

8.0 ***SJR 18 Task: Review and analyze suggestions for improving the MEPA process.***

General Finding: The EQC held public hearings in Libby, Great Falls, Helena, Missoula, and Billings with a turnout of 132 individuals. The EQC actively solicited issues and suggestions from interested and affected parties across Montana. This effort resulted in 242 identified issues and suggestions for improvement (see **Appendix C**) that guided the EQC's SJR 18 review effort. The EQC also sent out 250 surveys to Montanans that attempt to evaluate the effectiveness of MEPA's public participation process. The EQC has incorporated many of the comments and suggestions for improvement into its findings and recommendations.

9.0 ***SJR 18 Task: Review and analyze whether citizens are effectively participating in the MEPA decisionmaking process.***

- (1) **General Finding:** See 3.0 above
- (2) **Specific Findings:** See 3.0 above
- (3) **Recommendations:** See 3.0 above

10.0 ***SJR 18 Task: Review and analyze the successful and efficient implementation of other similar national and state laws.***

- (1) **General Finding:** Fifteen states, including Montana, and the District of Columbia, and the Commonwealth of Puerto Rico have adopted state environmental policy acts similar to the federal NEPA. Other states have enacted specific statutes requiring environmental reviews of specific activities or activities in specific areas.
- (2) **Specific Findings:**
 - (a) Montana's MEPA is very similar to the federal NEPA. Seven other states are more inclusive than MEPA or NEPA in that they require environmental review of both state and local actions.
 - (b) Six of the seventeen "state" environmental policy acts do not require environmental review of permits issued by the state.
 - (c) Of the eleven jurisdictions that require an environmental review of government permitting actions, only Montana, Massachusetts, South Dakota, and Wisconsin limit this review to state permitting action only.

- (d) Five states, Connecticut, Massachusetts, Minnesota, New York, and Wisconsin, use standardized thresholds or categories to determine what the level of environmental analysis should be.

(3) **Recommendations:** None

- 11.0 ***SJR 18 Task: That EQC actively solicit the participation of Montana citizens, groups, and individuals whose state-regulated activities are subject to MEPA review, of state and local officials, and of any other persons or groups with interest in the outcome of the study.***

General Finding: The EQC held public hearings in Libby, Great Falls, Helena, Missoula, and Billings with a turnout of 132 individuals. The EQC actively solicited issues and suggestions from interested and affected parties across Montana. This effort resulted in 242 identified issues and suggestions for improvement (see **Appendix C**) that guided the EQC's SJR 18 review effort. The EQC also sent out 250 surveys to Montanans that attempt to evaluate the effectiveness of MEPA's public participation process. The EQC also sent this report out for a 30-day public comment period and received public comment on the report and its findings and recommendations.

- 12.0 ***SJR 18 Task: That state agencies responsible for implementing MEPA fully cooperate and assist the EQC in this study.***

General Finding: All of the agencies responsible for MEPA implementation have provided assistance with this study. Specifically, the EQC would like to thank DEQ, DNRC, FWP, MDT, DA_g, DOC, and DOL for their assistance.

- 13.0 ***SJR 18 Task: That the EQC, prior to September 30, 2000, be requested to prepare a report of its findings and conclusions and identify options and make recommendations, including legislation if appropriate, to the Governor and to the 57th Legislature.***

General Finding: This study report fulfills this study task.

Acronyms

AG	ATTORNEY GENERAL
AL	ALTERNATIVE LIVESTOCK
ALR	ALTERNATIVE LIVESTOCK RANCH
ARM	ADMINISTRATIVE RULES OF MONTANA
CDBG	COMMUNITY DEVELOPMENT BLOCK GRANT
CE	CATEGORICAL EXCLUSION
CEQ	COUNCIL ON ENVIRONMENTAL QUALITY (NATIONAL)
DAg	DEPARTMENT OF AGRICULTURE
DEA	DRAFT ENVIRONMENTAL ASSESSMENT
DEIS	DRAFT ENVIRONMENTAL IMPACT STATEMENT
DEQ	DEPARTMENT OF ENVIRONMENTAL QUALITY
DHES	DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES
DNRC	DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
DOC	DEPARTMENT OF COMMERCE
DOL	DEPARTMENT OF LIVESTOCK
DOT	DEPARTMENT OF TRANSPORTATION (MDT)
DSL	DEPARTMENT OF STATE LANDS
EA	ENVIRONMENTAL ASSESSMENT
EIS	ENVIRONMENTAL IMPACT STATEMENT
EPA	ENVIRONMENTAL PROTECTION AGENCY
EQC	ENVIRONMENTAL QUALITY COUNCIL
FEA	FINAL ENVIRONMENTAL ASSESSMENT
FEIS	FINAL ENVIRONMENTAL IMPACT STATEMENT
FONSI	FINDING OF NO SIGNIFICANT IMPACT
FTE	FULL-TIME EMPLOYEE/EQUIVALENT
FWP	FISH, WILDLIFE, AND PARKS
FWS	FRIENDS OF THE WILD SWAN
GYC	GREATER YELLOWSTONE COALITION
HB	HOUSE BILL
MA	MONTANA AUDUBON
MCA	MONTANA CODES ANNOTATED
MCA	MONTANA CONTRACTORS ASSOCIATION
MDT	MONTANA DEPARTMENT OF TRANSPORTATION
MEA	MITIGATED ENVIRONMENTAL ASSESSMENT
MEIC	MONTANA ENVIRONMENTAL INFORMATION CENTER
MEPA	MONTANA ENVIRONMENTAL POLICY ACT
MGWPCS	MONTANA GROUND WATER POLLUTION CONTROL SYSTEM

MMRA	METAL MINE RECLAMATION ACT
MPDES	MONTANA POLLUTANT DISCHARGE ELIMINATION SYSTEM
MSA	MONTANA STOCK GROWERS ASSOCIATION
MSPA	MONTANA SUBDIVISION AND PLATTING ACT
MWF	MONTANA WILDLIFE FEDERATION
MWPA	MONTANA WOOD PRODUCTS ASSOCIATION
NEPA	NATIONAL ENVIRONMENTAL POLICY ACT
NPRC	NORTHERN PLAINS RESOURCE COUNCIL
PEA	PROGRAMMATIC ENVIRONMENTAL ASSESSMENT
PEIS	PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT
PERC	POLITICAL ECONOMY RESEARCH CENTER
REA	REVISED ENVIRONMENTAL ASSESSMENT
ROD	RECORD OF DECISION
SB	SENATE BILL
SEA	SUPPLEMENTAL ENVIRONMENTAL ASSESSMENT
SEIS	SUPPLEMENTAL ENVIRONMENTAL IMPACT ASSESSMENT
SEPA	STATE ENVIRONMENTAL POLICY ACT
SJR	SENATE JOINT RESOLUTION
TSEP	TREASURE STATE ENDOWMENT PROGRAM
TU	TROUT UNLIMITED
WETA	WESTERN ENVIRONMENTAL TRADE ASSOCIATION

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Appendix A

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING THAT THE ENVIRONMENTAL QUALITY COUNCIL CONDUCT AN INTERIM STUDY OF THE MONTANA ENVIRONMENTAL POLICY ACT.

WHEREAS, with the enactment of the Montana Environmental Policy Act (MEPA) 28 years ago, the Legislature intended to ensure that state agencies think about the consequences of their actions before they act and that Montanans be informed of and be allowed to participate in state agencies' decisions that affect Montanans and the quality of Montana's human environment; and

WHEREAS, although the purposes of MEPA are laudable, MEPA itself has not been comprehensively reviewed and the implementation of MEPA has not been extensively analyzed and updated since 1988; and

WHEREAS, the 56th Legislature has debated the need for significant policy changes to MEPA; and

WHEREAS, many legislators and interested parties concluded that the magnitude and complexity of MEPA implementation and policy issues deserve careful and deliberative study; and

WHEREAS, the Environmental Quality Council (EQC) has longstanding and statutorily required involvement in MEPA issues and has demonstrated strong bipartisan expertise in analyzing and reviewing MEPA policy and implementation.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

- (1) That the EQC be requested to give priority to the study of MEPA with the goals of:
 - (a) evaluating and improving the MEPA process;
 - (b) ensuring that the MEPA process results in state agencies making timely, efficient, informed, cost-effective, legally defensible, and ultimately better decisions; and
 - (c) ensuring that the MEPA process results in government accountability and that Montanans are informed of and participate in state agency decisions.
- (2) That the EQC, in consultation with any affected parties, seek to identify whether the

current implementation of MEPA is achieving its intended purpose in fulfilling the policy set forth in statute.

(3) That the study consider a broad range of MEPA issues, including but not limited to a review and analysis of:

(a) the existing implementation of MEPA;

(b) the issues raised and debated in House Bill No. 142 and Senate Bill No. 413 during the 56th legislative session;

(c) any identifiable costs and benefits to agencies, permit applicants, citizens, and the human environment resulting from compliance with the policy and purpose of MEPA;

(d) suggestions for improving the MEPA process;

(e) whether citizens are effectively participating in the MEPA decisionmaking process; and

(f) the successful and efficient implementation of other similar national and state laws.

(4) That the EQC actively solicit the participation of Montana citizens, groups and individuals whose state-regulated activities are subject to MEPA review, state and local officials, and any other persons or groups with interest in the outcome of the study.

(5) That state agencies responsible for implementing MEPA fully cooperate and assist the EQC in this study.

(6) That the EQC, prior to September 30, 2000, be requested to:

(a) prepare a report of its findings and conclusions; and

(b) identify options and make recommendations, including legislation if appropriate, to the Governor and to the 57th Legislature.

-END-

Appendix B

Montana Environmental Policy Act

Part 1 General Provisions

75-1-101. Short title. Parts 1 through 3 may be cited as the "Montana Environmental Policy Act".

History: En. Sec. 1, Ch. 238, L. 1971; R.C.M. 1947, 69-6501.

75-1-102. Purpose. The purpose of parts 1 through 3 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 or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans, to enrich the understanding of the ecological systems and natural resources important to the state, and to establish an environmental quality council.

History: En. Sec. 2, Ch. 238, L. 1971; R.C.M. 1947, 69-6502; amd. Sec. 1, Ch. 352, L. 1995.

75-1-103. Policy. (1) The legislature, recognizing the profound impact of human activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances, recognizing the critical importance of restoring and maintaining environmental quality to the overall welfare and human development, and further recognizing that governmental regulation may unnecessarily restrict the use and enjoyment of private property, declares that it is the continuing policy of the state of Montana, in cooperation with the federal government, local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which humans and nature can coexist in productive harmony, to recognize the right to use and enjoy private property free of undue government regulation, and to fulfill the social, economic, and other requirements of present and future generations of Montanans.

(2) In order to carry out the policy set forth in parts 1 through 3, it is the continuing responsibility of the state of Montana to use all practicable means consistent with other essential considerations of state policy to improve and coordinate state plans, functions, programs, and resources so that the state may:

(a) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(b) ensure for all Montanans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

(c) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(d) protect the right to use and enjoy private property free of undue government regulation;

(e) preserve important historic, cultural, and natural aspects of our unique heritage and maintain, wherever possible, an environment that supports diversity and variety of individual choice;

(f) achieve a balance between population and resource use that will permit high standards of living and a wide sharing of life's amenities; and

(g) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(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, and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

History: En. Sec. 3, Ch. 238, L. 1971; R.C.M. 1947, 69-6503; amd. Sec. 2, Ch. 352, L. 1995.

75-1-104. Specific statutory obligations unimpaired. Nothing in 75-1-103 or 75-1-201 shall in any way affect the specific statutory obligations of any agency of the state to:

(1) comply with criteria or standards of environmental quality;

(2) coordinate or consult with any other state or federal agency; or

(3) act or refrain from acting contingent upon the recommendations or certification of any other state or federal agency.

History: En. Sec. 6, Ch. 238, L. 1971; R.C.M. 1947, 69-6506.

75-1-105. Policies and goals supplementary. The policies and goals set forth in parts 1 through 3 are supplementary to those set forth in existing authorizations of all boards, commissions, and agencies of the state.

History: En. Sec. 7, Ch. 238, L. 1971; R.C.M. 1947, 69-6507.

75-1-106. Private property protection -- ongoing programs of state government. Nothing in 75-1-102, 75-1-103, or 75-1-201 expands or diminishes private property protection afforded in the U.S. or Montana constitutions. Nothing in 75-1-102, 75-1-103, or 75-1-201 may be construed to preclude ongoing programs of state government pending the completion of any statements that may be required by 75-1-102, 75-1-103, or 75-1-201.

History: En. Sec. 4, Ch. 352, L. 1995.

Part 2 Environmental Impact Statements

75-1-201. General directions -- environmental impact statements. (1) The legislature authorizes and directs that, to the fullest extent possible:

(a) the policies, regulations, and laws of the state must be interpreted and administered in accordance with the policies set forth in parts 1 through 3;

(b) all agencies of the state, except the legislature and except as provided in subsection (2), shall:

(i) use a systematic, interdisciplinary approach that will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking that may have an impact on the human environment;

(ii) identify and develop methods and procedures that will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking, along with economic and technical considerations;

(iii) identify and develop methods and procedures that will ensure that state government actions that may impact the human environment are evaluated for regulatory restrictions on private property, as provided in subsection (1)(b)(iv)(D);

(iv) include in each recommendation or report on proposals for projects, programs, and other major actions of state government significantly affecting the quality of the human environment a detailed statement on:

(A) the environmental impact of the proposed action;

(B) any adverse environmental effects that cannot be avoided if the proposal is implemented;

(C) alternatives to the proposed action;

(D) any regulatory impacts on private property rights, including whether alternatives that reduce, minimize, or eliminate the regulation of private property rights have been analyzed. The analysis in this subsection (1)(b)(iv)(D) need not be prepared if the proposed action does not involve the regulation of private property.

(E) the relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity; and

(F) any irreversible and irretrievable commitments of resources that would be involved in the proposed action if it is implemented;

(v) study, develop, and describe appropriate alternatives to recommend courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources;

(vi) recognize the national and long-range character of environmental problems and, when consistent with the policies of the state, lend appropriate support to initiatives, resolutions, and programs designed to maximize national cooperation in anticipating and preventing a decline in the quality of the world environment;

(vii) make available to counties, municipalities, institutions, and individuals advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(viii) initiate and use ecological information in the planning and development of resource-oriented projects; and

(ix) assist the environmental quality council established by 5-16-101;

(c) prior to making any detailed statement as provided in subsection (1)(b)(iv), the responsible state official shall consult with and obtain the comments of any state agency that has jurisdiction by law or special expertise with respect to any environmental impact involved. The responsible state official shall also consult with and obtain comments from any state agency with respect to any regulation of private property involved. Copies of the statement and the comments and views of the appropriate state, federal, and local agencies that are authorized to develop and enforce environmental standards must be made available to the governor, the environmental quality council, and the public and must accompany the proposal through the existing agency review processes.

(d) a transfer of an ownership interest in a lease, permit, license, certificate, or other entitlement for use or permission to act by an agency, either singly or in combination with other state agencies, does not trigger review under subsection (1)(b)(iv) if there is not a material change in terms or conditions of the entitlement or unless otherwise provided by law.

(2) The department of public service regulation, in the exercise of its regulatory authority over rates and charges of railroads, motor carriers, and public utilities, is exempt from the provisions of parts 1 through 3.

(3) (a) In any action challenging or seeking review of an agency's decision that a statement pursuant to subsection (1)(b)(iv) is not required or that the statement is inadequate, the burden of proof is on the person challenging the decision. Except as provided in subsection (3)(b), in a challenge to the adequacy of a statement, a court may not consider any issue or evidence that was not first presented to the agency for the agency's consideration prior to the agency's decision. A court may not set aside the agency's decision unless it finds that there is clear and convincing evidence that the decision was arbitrary or capricious or not in compliance with law.

(b) When new, material, and significant evidence is presented to the district court that had not previously been presented to the agency for its consideration, the district court shall remand the new evidence back to the agency for the agency's consideration and an opportunity to modify its findings of fact and administrative decision before the district court considers the evidence within the administrative record under review. Immaterial or insignificant evidence may not be remanded to the agency. The district court shall review the agency's findings and decision to determine whether they are supported by substantial, credible evidence within the administrative record under review.

History: En. Sec. 4, Ch. 238, L. 1971; R.C.M. 1947, 69-6504; amd. Sec. 1, Ch. 391, L. 1979; amd. Sec. 1, Ch. 473, L. 1987; amd. Sec. 1, Ch. 566, L. 1989; amd. Sec. 1, Ch. 331, L. 1995; amd. Sec. 3, Ch. 352, L. 1995; amd. Sec. 177, Ch. 418, L. 1995; amd. Sec. 67, Ch. 545, L. 1995; amd. Sec. 1, Ch. 223, L. 1999.

75-1-202. Agency rules to prescribe fees. Each agency of state government charged with the responsibility of issuing a lease, permit, contract, license, or certificate

under any provision of state law may adopt rules prescribing fees which shall be paid by a person, corporation, partnership, firm, association, or other private entity when an application for a lease, permit, contract, license, or certificate will require an agency to compile an environmental impact statement as prescribed by 75-1-201. An agency must determine within 30 days after a completed application is filed whether it will be necessary to compile an environmental impact statement and assess a fee as prescribed by this part. The fee assessed under this part shall be used only to gather data and information necessary to compile an environmental impact statement as defined in parts 1 through 3. No fee may be assessed if an agency intends only to file a negative declaration stating that the proposed project will not have a significant impact on the human environment.

History: En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(1).

75-1-203. Fee schedule -- maximums. (1) In prescribing fees to be assessed against applicants for a lease, permit, contract, license, or certificate as specified in 75-1-202, an agency may adopt a fee schedule which may be adjusted depending upon the size and complexity of the proposed project. A fee may not be assessed unless the application for a lease, permit, contract, license, or certificate will result in the agency incurring expenses in excess of \$2,500 to compile an environmental impact statement.

(2) The maximum fee that may be imposed by an agency may not exceed 2% of any estimated cost up to \$1 million, plus 1% of any estimated cost over \$1 million and up to \$20 million, plus 1/2 of 1% of any estimated cost over \$20 million and up to \$100 million, plus 1/4 of 1% of any estimated cost over \$100 million and up to \$300 million, plus 1/8 of 1% of any estimated cost in excess of \$300 million.

(3) If an application consists of two or more facilities, the filing fee must be based on the total estimated cost of the combined facilities. The estimated cost must be determined by the agency and the applicant at the time the application is filed.

(4) Each agency shall review and revise its rules imposing fees as authorized by this part at least every 2 years.

History: En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(2), (7); amd. Sec. 47, Ch. 112, L. 1991; amd. Sec. 41, Ch. 349, L. 1993.

75-1-204. Application of administrative procedure act. In adopting rules prescribing fees as authorized by this part, an agency shall comply with the provisions of the Montana Administrative Procedure Act.

History: En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(4).

75-1-205. Use of fees. All fees collected under this part shall be deposited in the state special revenue fund as provided in 17-2-102. All fees paid pursuant to this part shall be used as herein provided. Upon completion of the necessary work, each agency will make an accounting to the applicant of the funds expended and refund all unexpended funds without interest.

History: En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(5); amd. Sec. 1, Ch. 277, L. 1983.

75-1-206. Multiple applications or combined facility. In cases where a combined facility proposed by an applicant requires action by more than one agency or multiple applications for the same facility, the governor shall designate a lead agency to collect one fee pursuant to this part, to coordinate the preparation of information required for all environmental impact statements which may be required, and to allocate and disburse the necessary funds to the other agencies which require funds for the completion of the necessary work.

History: En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(6).

75-1-207. Major facility siting applications excepted. No fee as prescribed by this part may be assessed against any person, corporation, partnership, firm, association, or other private entity filing an application for a certificate under the provisions of the Montana Major Facility Siting Act, chapter 20 of this title.

History: En. 69-6518 by Sec. 1, Ch. 329, L. 1975; R.C.M. 1947, 69-6518(3).

Part 3 Environmental Quality Council

75-1-301. Definition of council. In this part "council" means the environmental quality council provided for in 5-16-101.

History: En. by Code Commissioner, 1979.

75-1-302. Meetings. The council may determine the time and place of its meetings but shall meet at least once each quarter. Each member of the council is entitled to receive compensation and expenses as provided in 5-2-302. Members who are full-time salaried officers or employees of this state may not be compensated for their service as members but shall be reimbursed for their expenses.

History: En. Sec. 10, Ch. 238, L. 1971; amd. Sec. 6, Ch. 103, L. 1977; R.C.M. 1947, 69-6510.

75-1-311. Examination of records of government agencies. The council shall have the authority to investigate, examine, and inspect all records, books, and files of any department, agency, commission, board, or institution of the state of Montana.

History: En. Sec. 15, Ch. 238, L. 1971; R.C.M. 1947, 69-6515.

75-1-312. Hearings -- council subpoena power -- contempt proceedings. In the discharge of its duties the council shall have authority to hold hearings, administer oaths, issue subpoenas, compel the attendance of witnesses and the production of any papers, books, accounts, documents, and testimony, and to cause depositions of witnesses to be taken in the manner prescribed by law for taking depositions in civil actions in the district court. In case of disobedience on the part of any person to comply with any subpoena issued on behalf of the council or any committee thereof or of the refusal of any witness to testify on any matters regarding which he may be lawfully

interrogated, it shall be the duty of the district court of any county or the judge thereof, on application of the council, to compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from such court on a refusal to testify therein.

History: En. Sec. 16, Ch. 238, L. 1971; R.C.M. 1947, 69-6516.

75-1-313. Consultation with other groups -- utilization of services. In exercising its powers, functions, and duties under parts 1 through 3, the council shall:

(1) consult with such representatives of science, industry, agriculture, labor, conservation organizations, educational institutions, local governments, and other groups as it deems advisable; and

(2) utilize, to the fullest extent possible, the services, facilities, and information (including statistical information) of public and private agencies and organizations and individuals in order that duplication of effort and expense may be avoided, thus assuring that the council's activities will not unnecessarily overlap or conflict with similar activities authorized by law and performed by established agencies.

History: En. Sec. 17, Ch. 238, L. 1971; R.C.M. 1947, 69-6517.

75-1-314. Reporting requirements. (1) The departments of environmental quality, agriculture, and natural resources and conservation shall biennially report to the council the following natural resource and environmental compliance and enforcement information:

(a) the activities and efforts taking place to promote compliance assistance and education;

(b) the size and description of the regulated community and the estimated proportion of that community that is in compliance;

(c) the number, description, method of discovery, and significance of noncompliances, including those noncompliances that are pending; and

(d) a description of how the department has addressed the noncompliances identified in subsection (1)(c) and a list of the noncompliances left unresolved.

(2) When practical, reporting required in subsection (1) should include quantitative trend information.

History: En. Sec. 1, Ch. 38, L. 1997.

75-1-323. Staff for environmental quality council. The legislative services division shall provide sufficient and appropriate support to the environmental quality council in order that it may carry out its statutory duties, within the limitations of legislative appropriations. The environmental quality council staff is a principal subdivision within the legislative services division. There is within the legislative services division a legislative environmental analyst. The legislative environmental analyst is the primary staff person for the environmental quality council and shall supervise staff assigned to the environmental quality council. The environmental quality council shall select the legislative environmental analyst with the concurrence of the legislative council.

History: En. Sec. 12, Ch. 238, L. 1971; R.C.M. 1947, 69-6512; amd. Sec. 68, Ch.

545, L. 1995.

75-1-324. Duties of environmental quality council. The environmental quality council shall:

(1) gather timely and authoritative information concerning the conditions and trends in the quality of the environment, both current and prospective, analyze and interpret the information for the purpose of determining whether the conditions and trends are interfering or are likely to interfere with the achievement of the policy set forth in 75-1-103, and compile and submit to the governor and the legislature studies relating to the conditions and trends;

(2) review and appraise the various programs and activities of the state agencies, in the light of the policy set forth in 75-1-103, for the purpose of determining the extent to which the programs and activities are contributing to the achievement of the policy and make recommendations to the governor and the legislature with respect to the policy;

(3) 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;

(4) conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(5) document and define changes in the natural environment, including the plant and animal systems, and accumulate necessary data and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(6) make and furnish studies, reports on studies, and recommendations with respect to matters of policy and legislation as the legislature requests;

(7) analyze legislative proposals in clearly environmental areas and in other fields in which legislation might have environmental consequences and assist in preparation of reports for use by legislative committees, administrative agencies, and the public;

(8) consult with and assist legislators who are preparing environmental legislation to clarify any deficiencies or potential conflicts with an overall ecologic plan;

(9) review and evaluate operating programs in the environmental field in the several agencies to identify actual or potential conflicts, both among the activities and with a general ecologic perspective, and suggest legislation to remedy the situations; and

(10) perform the administrative rule review, program evaluation, and monitoring functions of an interim committee for the:

(a) department of environmental quality;

(b) department of fish, wildlife, and parks; and

(c) department of natural resources and conservation.

History: En. Sec. 14, Ch. 238, L. 1971; R.C.M. 1947, 69-6514; amd. Sec. 42, Ch. 349, L. 1993; amd. Sec. 69, Ch. 545, L. 1995; amd. Sec. 47, Ch. 19, L. 1999.

Appendix C

MEPA Issue Inventory

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1. General Comments:

MEPA should emphasize common sense, reasonableness, and equity.--MCA

MEPA is so overwhelming, complicated, and frustrating that it is extremely hard to address one particular aspect of the law.--MCA

MEPA is a subjective black hole because there are so few definitions to guide the process.--MWPA

Anyone wishing to stop a proposed action can use MEPA simply as an obstructionist tool, with no intention of a "look before you leap" analysis.--MWPA

What are we intending with MEPA? MEPA reviews should not become research projects. What guidelines can be developed to ensure the intent of MEPA is met?--DEQ

Is MEPA to be looked at as the silver bullet?--DEQ

The reason MEPA exists is to assure that state agencies ultimately serve the broader public interest by requiring them to look at all the ramifications of their decisions and to involve the public in their

decisionmaking process.--AG

MEPA is a good law for a variety of reasons. Chief among these reasons is that it stimulates public participation in government decisionmaking. Another benefit of MEPA is that it facilitates informed decisionmaking and thereby better governmental actions.--MWF

The Legislature may wish to consider whether MEPA results in better government or just more expensive government.--DNRC

No one would question the good intent of the MEPA law passed in 1971. However, MEPA, after 28 years, instead of being a look before you leap law has increasingly become a way to find a reason not to leap at all.--WETA

MEPA is a process that allows better decisions to be made by state agencies which can protect the environment for current and future generations. This is an important role for state government.--MA

MEPA promotes predictability for citizens and industry. Everyone is better off when they know what rules an agency will follow to make a decision.--MA

MEPA ultimately works as a tool to guarantee that citizens are able to participate in government decisionmaking processes that impact our natural resources. It helps provide predictability for citizens and industry. MEPA is effective because it forces state agencies to consider the environmental implications of proposals before they act. For these purposes the value of MEPA is undisputable.--MEIC

MEPA protects our constitutional rights.--GYC

The MEPA process is very helpful in making a logical decision based on objective and subjective input.--MDT

2. Comments on SJR 18:

- The EQC and state agencies do not have enough overall and specific data on the quality of the environment for use in comparing whether or not MEPA is working. Funding should be sought to expand this aspect of EQC's work.--NPRC
- The EQC should widely publicize and solicit public involvement in the public hearing process.--NPRC
- The EQC should remain an advocate for strong state environmental policy.--NPRC

- Get those who legislatively proposed MEPA (the bill sponsors) to look at where MEPA has gone and determine in their minds how it has worked.--DEQ
- The Attorney General's Office supports the underlying premise of SJR 18. MEPA like all other laws should be subject to continuing and exacting review to assure that it is being implemented in the most efficient and effective manner possible and the Legislature's goals in enacting it are being met.--AG
- In any study that EQC undertakes to assess MEPA the ultimate question that must be addressed is: does MEPA accomplish what was intended by the law?--DNRC
- The EQC may want to compare Montana's environmental situation with the environmental effects occurring in states that do not possess "little NEPAs" such as Idaho.--DNRC
- If the EQC is not structured to develop such a study (effectiveness of MEPA) an entity such as PERC in Bozeman may be able to design and carry out a study of the relative benefits of MEPA.--DNRC
- EQC should identify criteria that can be periodically applied to measure the effectiveness of MEPA. This may provide the tool needed to improve MEPA over time.--DNRC
- Since this process is dealing with an important Montana Law it should be opened up to all Montana citizens, not merely those that the EQC chose to contact. Since there has been no public notice of this process, the deadline for comments should be extended and a full, fair and open public dialog of MEPA instituted which fully complies with SJR 18 (4).--FWS
- The EQC study should not address defining terms in statute as SB 413 proposed. The terms most critical to MEPA are defined in rule. Secondly, the EQC study should not address the issue raised in SB 413 concerning eliminating review of unquantified amenities.--MA, GYC
- The EQC should be extremely cautious about proposing changes in MEPA to the 2001 Legislature. But like any good thing, MEPA could stand minor improvements.--MEIC

3. State Actions That Trigger or Do Not Trigger MEPA:

- What state actions require MEPA reviews and what actions do not? Review the requirements and see if additions or eliminations need to be made.--DEQ
- Air quality State Implementation Plans (SIPs) can have adverse social and environmental effects, but we don't do MEPA reviews on SIPs.--DEQ

- Should MEPA apply to state permitting programs that are exempt from NEPA under the functional equivalence doctrine (e.g. some EPA-administered programs)?--DEQ
- Should passing laws require a MEPA analysis? Why should the legislative process be exempt?--DEQ
- Policy decisions affecting school trust lands by DNRC or the State Land Board are exempt from the requirements of MEPA. If policy decisions impact the human environment, they need to be included in MEPA or the state agency should conduct a rulemaking process that is subject to MEPA.--MWF
- Planning and Zoning:
 1. What are the expectations?
 2. Should local governments be under MEPA?
 3. Should local governments do MEPA or MEPA-like reviews?
 4. How does local zoning impact MEPA analysis.--DEQ
- C Should some or all rulemaking be exempt from MEPA?--DEQ
- C The Legislature recently exempted legislation from MEPA review, it should do the same for rulemaking.--FWP
- C An inherently difficult part of the MEPA process is determining the level of significance for a given impact. The significance criteria help in that determination, but don't fit all circumstances. Additionally, more time should be provided to determine whether an agency needs to prepare an EIS.--FWP
- C Consider eliminating MEPA analysis on classes of actions which involve minimal or relatively minor environmental consequences. Use MEPA for those truly major state actions.--MSA
- C Identify programs and policies that could avoid the requirements of MEPA analysis. Build in incentives or policies that limit the application of MEPA analysis.--MSA
- C Policy decisions that are tiered to information in MEPA documents or are implemented through site-specific MEPA projects should have to go through a MEPA process. Example: old growth policy on state lands.--FWS
- C Major projects need to be clearly defined.--WETA
- C For infrequent projects, we need to clarify when an EIS will be required, rather than an EA.--WETA

- C The EQC should annually track the statutory exemptions to MEPA that are specific in nature.--MA, MEIC, TU, GYC
- C What activities on school trust lands should be exempt from MEPA? Should policy decisions or guidelines be exempt?--MA, MEIC
- C Does DNRC do MEPA review for water rights, new water use permits, dam safety, and grant programs?--MA, MEIC, TU
- C Categorical exclusions and checklist EAs should be periodically monitored by EQC perhaps through some random auditing process.--TU, GYC
- C A definition of what constitutes material change in entitlement, thus triggering MEPA, is not provided in statute. This needs to be clarified.--GYC
- C Major policy decisions and guidelines constitute actions with potentially significant impacts on the human environment and therefore should be subject to MEPA, just as rules are subject to MEPA.--GYC
- C How are categorical exclusions to be adopted? Can they be adopted through rulemaking or only through an environmental review process?--FWP

4. Scope of the Analysis:

- C Should a state action on a small portion of a large project require analysis of the large project, e.g. should a relatively routine permit or authorization at a single point be the determining factor in a long pipeline project?--DEQ
- C If the department prepares a MEPA document on an MPDES permit application, should the scope of the analysis be limited to the impacts of the discharge or should it include the impacts of the facility being constructed?--DEQ
- C What are the limits to the scope of a study?--DEQ

5. Public Participation Issues/Comments:

- Public notice requirements of permitting create unfair and unnecessary delays.--MCA
- Lengthen the public comment period for environmental impact statements to a minimum of 60 calendar days.--NPRC

- Make public comment and involvement for environmental assessments mandatory, not discretionary.--NPRC
- Require agencies to allow participants access to the notes from scoping meetings and to correct inaccuracies.--NPRC
- Require agencies to make data on MEPA documents, processes, categorical exclusions, and decisions widely available.--NPRC
- While there may be ways to improve the process required by MEPA, I believe allowing participation by Montanans in government decisionmaking not only is an obligation we have as public servants, but also serves to help design state programs that are more responsible and more efficiently run.--Sec. of State
- I strongly believe that MEPA plays an important and crucial role in ensuring that the actions of state government are done in a public fashion, allowing the public to be informed of proposed government actions and ensuring the people of Montana an opportunity to participate in agency decisions.--Sec. of State
- Should substantive comments be more clearly defined to provide the agencies the guidance and the scope of response necessary to public comments?--DEQ
- Should the expectations of the EIS be redefined and explained to the public?--DEQ
- Are there any limits to what will and won't be available to the interested parties throughout the process?--DEQ
- Should additional guidance be established for public participation?--DEQ
- The primary emphasis in the SJR 18 study should be on how best to improve the ability of the public to be aware of and participate in agency decisionmaking.--AG
- There are no incentives in MEPA for an interested party to seek solutions through the public involvement process, because they can simply litigate if they are not satisfied with the decision.--DNRC
- Some projects receive little or no public comment. For other controversial projects the public is often frustrated with the agency because the agency lacks the statutory authority to deny a proposed action.--FWP
- The current minimum comment period of 30 days for a draft EIS and 15 days for a final EIS is too short and should be doubled.--MWF

- Newsletters which keep the public informed of the progress of MEPA alternative development and issues are very useful.--FWS
- Overall, the MEPA's public participation and evaluation of environmental effects purpose is good.--FWS
- When the Legislature sets out to limit the public's involvement in issues affecting public resources because the agencies can't follow the law properly is a problem. The problem is not with the public but with the agencies. This does not foster greater governmental accountability and it erodes citizens' confidence in the process and the agencies.--FWS
- MEPA fulfills the Montana constitution's public participation clause (Art. II, sec. 8). Additionally MEPA can help lead agencies to make decisions that guarantee our constitutional right to a clean and healthful environment (Art. IX, sec. 1).--MA, GYC
- Public comment on all EISs and EAs should be longer: 60 days for draft EIS, 30 days for FEIS, and 30 days on draft mitigated EA and 30 days on the final mitigated EA.--MA, GYC
- Short timeframes can be a problem for citizens interested in a large scale proposal. Technical information on large projects takes years for the agency and the applicant to generate, yet the public is supposed to read, understand, synthesize, and critique these enormous documents in 4 weeks. This is hardly realistic.--MEIC
- Even though agencies hold public meetings on large-scale projects, it is often the applicant who controls the meeting. This intimidates the public and stifles public comments. The agency should be the presenting entity.--MEIC, GYC
- EQC should determine how many MEPA documents in the last 10-15 years have attracted public comment. This would document the actual level of public involvement taking place.--TU
- Some citizens have expressed dissatisfaction over the open house format for public hearings on proposals. They have complained about having to go from one table to another, of having personnel associated with the applicant's company at the tables, and of feeling like the agency or company representatives are arguing with them. The problem may be in how such meetings are administered and whether other opportunities exist for issue or language clarification.--GYC

6. Timeliness of the MEPA Process Issues:

- Public notice requirements of permitting create unfair and unnecessary delays.--MCA

- Delays in MEPA implementation are often attributable to slow response time on the part of the applicant.--NPRC
- Repeal the 365-day statutory limit on completing MEPA review for Metal Mine Reclamation Act permits.--NPRC
- Some exemptions from conducting an EIS exist due to statutory time limitations. Should the use of such exemptions be reevaluated?--DEQ
- Is there an appropriate total time for complementing EAs and EISs?--DEQ
- How can timeframes be controlled?--DEQ
- Is it possible to use contract language (deadlines and penalty clauses) to help keep timeframes from slipping?--DEQ
- Government actions by their nature take time to complete. The passage of time allows opponents of an action to claim that circumstances have changed and that a supplemental document needs to be produced which is likely to be challenged as insufficient. The MEPA process becomes a continual loop without closure.--DNRC
- Legislatively establish strict timeframes for MEPA compliance including a strict statute of limitations for judicial challenges.--MSA
- Time limits that are binding should be inserted in the statute. Clear standards need to be established for an agency to take additional time that exceeds the statutory time limits.--WETA
- The current rules impose certain time limits but they do not address the primary causes of delay; absence of agency oversight over contractors, delays caused by interagency duplication, lack of coordination, and the lack of internal decisionmaking procedures.--WETA
- It would be helpful for the EQC to categorize when and where agencies are having a problem meeting timeframes.--MA
- One of the problems on bigger projects appears to be that MEPA is coupled with NEPA; whereas MEPA has a specific timeframe, NEPA does not - this makes it impossible to comply with MEPA timeframes on projects involving federal agencies. Because of this difference in obligation, ultimately no timeframes are followed on large projects carried out by state and federal agencies. Is there a solution to this?--MA, MEIC, GYC

- Are timeframes really a problem or is it the completeness of the permit application? When does completeness review end and MEPA begin? Is the timeframe to review the completeness of the permit application sufficient?--MA, MEIC, TU

7. Alternatives Issues:

- State agency personnel should not feel compelled to select an action alternative as the preferred alternative or decision rendered.--NPRC,
- State agencies should better explain their rationale when alternatives and mitigation measures are summarily dismissed on the basis of cost.--NPRC
- Should there be limits to the scope of information necessary for alternatives analysis; should it be available information or something requiring data collection; if so, are there limits to the amount/level of detail necessary?--DEQ
- In order to do a consideration of the no action alternative, do the costs and benefits work out and how far do we take nonmonetary costs? --DEQ
- Alternatives should be evaluated in light of reasonably feasible economic and technical considerations.--DEQ
- Should we have to do an alternatives analysis to resolve a conflict?--DEQ
- Should alternatives be defined by the project proponent, public, or agency or by a combination of the three? Is it appropriate for the proponent of the project to choose the alternatives versus the agency?--DEQ
- If the agency changes the rationale for the preferred alternative or changes the preferred alternative itself after draft EIS comments have been considered, do we open the EIS to allow public comment?--DEQ
- The comparison of alternatives is skewed by a timber target on state lands. The mandated 42 million board feet timber target on state lands skews alternatives that are developed in individual EAs and EISs and hedges the decisionmaker to select an alternative on meeting the target rather than what is best for the land.

8. Mitigation Issues:

- Agencies should be required to make information on compliance with mitigation measures widely available to the public, including but not limited to distribution via the Internet.--NPRC
- Agencies should be required to implement all mitigation measures adopted in a record of decision.--NPRC
- Should there be a limit on the level of detail necessary in proposed mitigations (conceptual, preliminary, or final design)?--DEQ
- MEPA should not be a paper exercise. Proposals that are committed to in MEPA documents should really happen on the ground (mitigation, monitoring, etc.) EQC should examine ways agencies can monitor for all mitigation commitments made under MEPA. HB 346 embodies aspects of this concept.--MA, MEIC, TU, GYC

9. Impact Analysis Issues:

- FWP has not wholly considered the ramifications of (impacts on) private property rights as required by MEPA legislation during the 1995 Legislative Session.--AL
- The environmental analysis should be limited to new impacts versus existing impacts that are not subject to any state action.
- Should the scope of cumulative impacts be expanded to include reasonably foreseeable future projects?--DEQ
- The MEPA rules need to clarify the intent of the language “pre-impact study” that is currently found in the definition of “cumulative impact.”--DNRC
- At what level of detail does the public want to see the social and economic effects on property values?--DEQ
- Regulatory Restriction Analysis: Some groups say not only do you have to do an analysis on the economic impacts of proposed restrictions on the applicant, but also an analysis on the economic impacts of granting the permit on the people outside the project area.--DEQ
- Define what compensation will be for those areas affected by an action.--DEQ

- Economic and private property considerations. MEPA provides for these considerations, but most of the time they are avoided or minimally considered. EQC should consider ways to require agencies to implement previous statutory directives.--MSA
- Cumulative impacts is a key component of MEPA documents. DNRC's cumulative impact analysis is rarely complete and usually only deals with issues that beef up the timber volume.--FWS
- Cumulative impacts needs to be better defined. We believe that MEPA's cumulative impacts provision requires a review of all actions under consideration, not just those in a formal review process, and an assessment of the impacts of all such actions, not just the proposed action on the human environment.--GYC

10. Substantive vs. Procedural Issues:

- Most, if not all, of the issues identified by the alternative livestock industry concern the FWP's use of MEPA as a substantive regulatory tool.--AL
- Should the scope of the MEPA document under the sanitation and subdivisions act be limited to water quality and solid waste?--DEQ
- If it is substantive, can investigations be made only for significant impacts? If it is substantive, is mitigation of all significant impacts required?--DEQ
- It would simplify statute implementation by agencies and interpretation by the courts to have MEPA be clearly procedural.--DNRC
- The Legislature may wish to consider clarifying that MEPA does not enlarge any agency's power beyond its specific mandate.--DNRC
- A careful rewrite of MEPA should add definitions to narrow the focus of the law to consideration and disclosure of potential environmental impacts of agency actions. If an agency action might result in a violation of a substantive environmental law, it is wise to anticipate and mitigate those issues. However, MEPA should not be used to establish substantive restrictions that would otherwise be dealt with by the Legislature.--MWPA
- MEPA is a procedural statute. The statute was not intended to preclude adverse environmental impacts of a proposed action. The whole array of substantive environmental laws in Montana to provide for environmental protection.--MSA
- In Montana, agencies utilize MEPA substantively to impose stipulations, conditions, or requirements on permits, licenses, authorizations, or other approvals. Agencies utilize the

significance threshold between an EA and EIS to justify imposition of conditions or stipulations.--MSA

- Legislatively confirm that MEPA is a procedural requirement and is not a substantive environmental measure. This would eliminate certain abuses of the mitigated EA concept and clarify that what is required is the compliance with substantive environmental laws.--MSA
- Put limits on the ability of an agency to use mitigation as a way to require an applicant to take certain actions beyond what would be required by other environmental laws.--WETA

11. Environmental Review Fee and Cost Issues/Comments:

- MEPA should be changed to ensure project proponents, not taxpayers bear the full cost of MEPA.--NPRC
- It would be interesting if, as a part of the interim study, the EQC could total the amount of money spent on MEPA in a calendar year.--AL
- MEPA costs are too high for licensees.--AL
- What should define project costs for purposes of assessing EIS fees to an applicant?--AL
- While there is no doubt that MEPA compliance increases costs and at times even results in agencies having to make decisions that they would prefer not to make, those consequences are an intended and necessary part of open and accountable government.--AG
- For EISs:
 1. Presently there is not enough money to cover all EIS costs.
 2. Does the formula used for the last 20 years need to be redone?
 3. How should the fees imposed under MEPA relate to MEPA fees established in other regulatory statutes?--DEQ
- EAs are unfunded in many cases. Should applicants pay for the EA?-- DEQ
- Categories that should be explored for greater applicant funding:
 1. Should they pay for analysis?
 2. Should they pay for staff time?
 3. Should they pay for public notice?
 4. Should the fee structure be charged from start to finish?
 5. Should there be a bond required to cover the cost of the EIS? If so, what kind of bond? --DEQ

- C MEPA saves money by helping ensure that impacts are disclosed up front and ample mitigation is prescribed.--TU
- C Statutory cost recovery limitations in 75-1-202 and 75-1-203 are not high enough for large-scale mineral projects. Waivers are often needed. EQC may wish to review the premise of whether to apply a statutory maximum.--DNRC
- C MEPA is too expensive. Enormous amounts of time and money are spent on MEPA compliance.--DNRC
- C If the Legislature finds that it is appropriate for the applicant to fund the preparation of the environmental review, then the agency and applicant should determine and agree on whatever the proper cost is; an arbitrary statutory maximum serves no purpose. If, on the other hand, the Legislature finds that the state should pick up the expense, then say so in statute and provide a funding mechanism to cover it.--DNRC
- C Under 75-1-202, in order to charge an applicant fees to cover a portion of the costs of an EIS, as provided for in 75-1-203, an agency must determine within 30 days of receiving a completed application that an EIS is necessary. Yet under the MEPA rules one of the purposes of an EA is to determine the need for an EIS. These two provisions are in conflict and MEPA should be changed to allow for an EA to determine if an EIS is necessary.--FWP
- C Consider studying the cost of MEPA compliance on government and economic opportunities in Montana. How much does MEPA cost to implement? How much opportunity has MEPA cost Montana?--MSA
- C There should be constraints on the agency's ability to require an applicant to pay a disproportionate share of the cost of a project just to assure approval.--WETA
- C MEPA saves the state money because it reduces the number of lawsuits against the state because the decisions made using MEPA usually fulfill the constitutional requirement for a clean and healthful environment. MEPA also reduces private tort actions by helping prevent pollution to neighboring property. If MEPA wasn't in place, what would it cost agencies if they were to meet their constitutional obligation to a clean and healthful environment and for public participation requirements?--MA, MEIC, TU, GYC
- C There are many examples of specific ways Montana saves money because of MEPA. Environmental problems, such as abandoned mines, old landfills, and hazardous waste sites, that didn't go through MEPA are examples.--MA, MEIC, TU, GYC

- DNRC currently manages approximately 4,629,260 surface acres of school trust land. This translates into just 27 cents per acre per year for environmental protection. This seems like a reasonable cost to protect state land.--MA
- What is the cost per agency of the following: EAs, EISs, and mitigated EAs?--MA
- The cost of cleaning up degraded systems is something that needs to be assessed in evaluating the benefits of making thoughtful well-informed decisions.--GYC
- Without a comprehensive analysis of costs and timelines for MEPA review, there is absolutely no basis for declaring that MEPA requirements are the cause of time delays or cost overruns.--GYC
- Any comprehensive costs and timeline analysis should be broken down into different areas such as completeness review, collection of baseline or trend information, monitoring, document development, and public involvement. Data should include reimbursements to agencies for EIS preparation, state lands revenues from MEPA reviewed permits, costs of EAs, mitigated EAs, and categorical exclusions.--GYC
- The EQC should, over the long term, conduct periodic reviews of the timelines and costs required to complete MEPA process activities and factors affecting those timelines and costs.--GYC

12. Environmental Review Document Issues Generally:

- MEPA should be changed to establish standards for the quality of EAs and EISs.--NPRC
- Mining companies should not have the ability to black list MEPA document contractors.--NPRC
- EISs should be required to meet the most rigorous standards for academic documents.--NPRC
- EISs should contain the scientific and technical information necessary to provide the reader with an adequate working background of the material at hand. The document should also be written in plain English.--NPRC
- Information contained in other documents, such as permits already issued should be summarized in the EIS.--NPRC
- A process should be in place to correct poor quality work before a decision is rendered in order to decrease the chance that a decision will be challenged.--NPRC

- State agency personnel should disclose when scientific data, conclusions, or analysis have been changed.--NPRC
- Concurrent projects are a moving target when a project is subject to long-term analysis, resulting in an ongoing change of scope. Should the definition of concurrent actions be reevaluated?--DEQ
- EAs and EISs generally:
 1. Should there be length limits on documents?
 2. Should there be limits on the level of detail?
 3. Should there be limits on the amount of data needed for analysis?
 4. Is it appropriate for project proponents to develop an EIS or EA themselves with the agency then reviewing the document?--DEQ
- Can tiering of environmental documents be made more useful?--DEQ
- Can there be more guidelines for when to do or not to do programmatic EISs?--DEQ
- What level of engineering design standards should be used in the EIS analysis: conceptual, preliminary, or final?--DEQ
- How to deal with unavailable data? How far is an agency obligated to go?--DEQ
- Should there be more legal categorical exclusions?--DEQ
- Is there some way to define the depth of analyses needed for various aspects of the environmental reviews?--DEQ
- Should analysis requirements be different for agency-initiated projects as opposed to privately initiated projects?--DEQ
- What is the agency's responsibility to respond to new issues, new concurrent actions?--DEQ
- How can process implementation be evaluated to identify solutions for MEPA issues?--DEQ
- If the state is not going to conduct the analysis itself, the state should choose who does the analysis without any involvement of the party needing government permission.--MWF
- There are so many procedural pitfalls that we have come to the conclusion that we can't write a flawless MEPA document--that in itself indicates that MEPA is flawed.--DNRC

- MEPA procedural requirements need to be simplified and more explicit. This would provide a state agency greater assurance that their MEPA documents have met legal requirements thereby reducing costs.--DNRC
- The rules regarding programmatic impact statements are vague and don't set out what MEPA envisions. These rules need to be fleshed out.--FWP
- Establish definitions. Without statutory guidance, MEPA will continue to subject economic development actions and everyday projects to continual regulatory and/or judicial interpretations.--MSA
- Once a MEPA analysis is complete and the project or action commences, further MEPA compliance should not be required absent substantial expansions of the activity.--MSA
- Failure to conduct a proper MEPA process forecloses options. Many times the MEPA documents and processes are being used as a post hoc rationalization for a decision already made.--FWS
- Add a definition section. This would eliminate the existing range of interpretations and make sure everyone is on the same page and all know what all the words mean. This should result in less litigation.--WETA
- Often, information and data requirements for EAs can rival that for full EISs.--WETA
- The use of programmatic EAs should be utilized for more programs. This approach is in place for drilling permits issued by the Board of Oil and Gas Conservation and it is efficient and works well.--WETA
- EAs and Mitigated EAs:
 1. Who uses them?
 2. When are they used?
 3. What type of projects are they being used for?
 4. How were the checklist EAs put together? Should there be a model checklist EA?--MA, MEIC, TU
- How many MEPA documents have resulted in denial of a project?--MA, MEIC, TU, GYC
- Should there be guidance regarding the coordination and timing of multiple permits?--DEQ
- The EQC should, over the long term, monitor the use, by topic and agency, of checklist EAs, mitigated EAs, and categorical exclusions.--GYC

13. MEPA Litigation Issues:

- The important element of MEPA lawsuits is that precedent is established. There have been virtually no DNRC timber sales in the Swan State Forest since the original lawsuits of the 1980s.--MWPA
- If the public is fully involved in an agency decision from the outset, the likelihood of litigation and conflict is reduced.--AG
- Approximately one-fifth of one percent of all MEPA actions have been litigated. Based on these numbers, we are baffled how anyone can conclude MEPA produces too much litigation and therefore it must be amended.--TU
- It is reasonable to argue that a MEPA-type law could have kept the state out of court in many instances.--TU
- House Bill 142 lowers the judicial standard for state agencies in law. Agency decisions must only be supported by substantial credible evidence while the public must prove that the agency's decision was arbitrary and capricious, a much more difficult burden of proof which is patently unfair.--MWF
- HB 142 creates another stumbling block to citizens by prohibiting citizens from bringing forward evidence that was not brought up during the comment period provided by MEPA.--MWF
- The courts should recognize the potential impacts when they evaluate whether procedural error is meaningful. MEPA should provide some guidance relative to the magnitude of impacts.--DNRC
- MEPA needs a process to resolve dispute by means other than litigation. That process could result in some type of forced arbitration or a technical review panel. Another option could be a collaborative public involvement process that would eliminate any option for appeal if a party chose not to engage in the collaborative effort.--DNRC
- Statutorily provide for presumptions that an agency's analysis is complete. Without some statutory presumption that an EA or EIS is complete, litigation over what information should be considered or what data must be evaluated can be endless.--MSA
- Current law sets a clear and convincing evidence standard for parties filing for judicial review over an agency finding of no significant impact. Perhaps a similar standard should be adopted for cases filed over the adequacy of environmental impact statements.
--WETA

- A useful role for the EQC study would be to document what is going on with court cases and to seek answers to the testimony by DNRC and industries about whether or not citizens are really blindsiding agencies with new evidence.--MA
 - DNRC specifically indicated during the legislative session that they lost all of the suits where citizens were allowed to bring up new evidence and that they won all the suits where new evidence was prohibited from being introduced. The EQC should analyze the following questions:
 - In each case, what new evidence was brought in, was it available to the agency before their final decision was made and why was evidence allowed in some cases but not others? Have other agencies seen this pattern?
 - How many MEPA lawsuits were thrown out because they were deemed frivolous?
 - There was much discussion on the DNRC lawsuit surrounding Middle Soup Timber Sale. On this lawsuit what was the basis for the court's finding three times on the side of citizens (and against DNRC)?
 - Are certain agencies more subject to lawsuit challenges than others? Is there a pattern on why this happens? Could training of agency personnel reduce the number of lawsuit challenges?--MA, MEIC, GYC
- C The EQC should track all MEPA lawsuits on an annual basis.--MA
- C Before HB 142, did courts remand information back to agencies? If this did occur, what was the result?--MEIC, GYC
- C How did the court interpret the phrase "material change" that is now included in law because of HB 142? Does this simply codify the Ravalli County decision?--MEIC
- C New information should not be restricted in lawsuits. Agencies should not act on incomplete information and analysis, thus potentially putting public health and resources at risk.--GYC
- C We believe that anyone who comments during the MEPA process, including anyone who has expressed recreational, resource, public health, or noneconomic interests, must have standing to challenge the final decision in court.--GYC
- C EQC should monitor over the long term the characterization of MEPA lawsuits and lawsuit outcomes.--GYC
- C There should be a statute of limitations of 1 year or so after the ROD.--MDT

14. Miscellaneous Issues:

- Clean up the codes. The regulated community and the public should be able to look to one location for all statutory language related to MEPA.--NPRC
- Repeal House Bill 142.--NPRC, GYC
- Senate Bill 413 should be used as a framework to discuss what is wrong with MEPA.--MWPA
- MEPA has not hurt or made it more difficult for the Land Board to serve the trusts.--Sec. of State
- Are quarterly reports to the EQC really necessary since all EAs and EISs are sent to the Council?--DEQ
- Department of Livestock follows less stringent MEPA rules than other agencies that results in much less thorough analysis. DOL needs to adopt the model MEPA rules.--MWF
- MEPA allows multiple state agencies to inject themselves into another program's decision area through inclusion of indirect impacts.--DNRC
- One of the barriers to effective MEPA implementation is knowledge and experience with the requirements and process. With new employees and people who are changing jobs there is always a need for MEPA training. The EQC should consider conducting MEPA training, possibly through the Professional Development Center.--FWP, GYC
- Why hasn't DOL adopted the 1988 MEPA rules? What are the major differences between DOL rules and the 1988 rules?--MA, GYC
- State regulators should not be project proponents, this should be the role of the project consultants. If the project is inadequate, incomplete, or inappropriate, the agency should deny it, not suggest ways for improvements. The state does not have the resources to act as a company's private consultant on large scale projects.--MEIC
- Consultants:
 - If the state disagrees with a private consultants research it should state clearly what information it disagrees with and why.
 - Agencies should publically list consultants they use for MEPA compliance including where the consultants are located and the number of MEPA contracts received on an annual basis.

- Agencies should provide a list of those MEPA documents done externally and those internally.--MEIC, TU, GYC
- C It became clear in the EQC's enforcement and compliance study that agencies cannot tell the public whether the condition of the natural resources they are responsible for protecting are improving or declining in health and productivity. MEPA's impact analysis is impaired without this basic analysis. Better trend analysis is need. Because EQC has the statutory responsibility to monitor environmental trends across the state, it is up to the appropriate entity to ensure that such indicators are developed.--GYC
- C There has been an absence of any direct authority to adopt rules, yet, all agencies have done so. This is a concern.--MDT

Appendix D

LC 0158 - New, material, and significant MEPA issues presented to a court must be remanded by the court back to the implementing agency for consideration.

**** Bill No. ****

Introduced By *****

By Request of the Environmental Quality Council

A Bill for an Act entitled: "An Act clarifying existing law to require that new issues not first presented to a state agency in an action challenging a decision under the Montana Environmental Policy Act must be remanded by the district court to the agency for its consideration; and amending section 75-1-201, MCA."

Be it enacted by the Legislature of the State of Montana:

Section 2. Section 75-1-201, MCA, is amended to read:

"75-1-201. General directions -- environmental impact statements. (1) The legislature authorizes and directs that, to the fullest extent possible:

- (a) the policies, regulations, and laws of the state must be interpreted and administered in accordance with the policies set forth in parts 1 through 3;
- (b) all agencies of the state, except the legislature and except as provided in subsection (2), shall:
 - (i) use a systematic, interdisciplinary approach that will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking that may have an impact on the human environment;
 - (ii) identify and develop methods and procedures that will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking, along with economic and technical considerations;
 - (iii) identify and develop methods and procedures that will ensure that state government actions that may impact the human environment are evaluated for regulatory restrictions on private property, as provided in subsection (1)(b)(iv)(D);
 - (iv) include in each recommendation or report on proposals for projects, programs, and other major actions of state government significantly affecting the quality of the human environment a detailed statement on:
 - (A) the environmental impact of the proposed action;
 - (B) any adverse environmental effects that cannot be avoided if the proposal is implemented;
 - (C) alternatives to the proposed action;
 - (D) any regulatory impacts on private property rights, including whether alternatives

that reduce, minimize, or eliminate the regulation of private property rights have been analyzed. The analysis in this subsection (1)(b)(iv)(D) need not be prepared if the proposed action does not involve the regulation of private property.

(E) the relationship between local short-term uses of the human environment and the maintenance and enhancement of long-term productivity; and

(F) any irreversible and irretrievable commitments of resources that would be involved in the proposed action if it is implemented;

(v) study, develop, and describe appropriate alternatives to recommend courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources;

(vi) recognize the national and long-range character of environmental problems and, when consistent with the policies of the state, lend appropriate support to initiatives, resolutions, and programs designed to maximize national cooperation in anticipating and preventing a decline in the quality of the world environment;

(vii) make available to counties, municipalities, institutions, and individuals advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(viii) initiate and use ecological information in the planning and development of resource-oriented projects; and

(ix) assist the environmental quality council established by 5-16-101;

(c) prior to making any detailed statement as provided in subsection (1)(b)(iv), the responsible state official shall consult with and obtain the comments of any state agency that has jurisdiction by law or special expertise with respect to any environmental impact involved. The responsible state official shall also consult with and obtain comments from any state agency with respect to any regulation of private property involved. Copies of the statement and the comments and views of the appropriate state, federal, and local agencies that are authorized to develop and enforce environmental standards must be made available to the governor, the environmental quality council, and the public and must accompany the proposal through the existing agency review processes.

(d) a transfer of an ownership interest in a lease, permit, license, certificate, or other entitlement for use or permission to act by an agency, either singly or in combination with other state agencies, does not trigger review under subsection (1)(b)(iv) if there is not a material change in terms or conditions of the entitlement or unless otherwise provided by law.

(2) The department of public service regulation, in the exercise of its regulatory authority over rates and charges of railroads, motor carriers, and public utilities, is exempt from the provisions of parts 1 through 3.

(3) (a) In any action challenging or seeking review of an agency's decision that a statement pursuant to subsection (1)(b)(iv) is not required or that the statement is inadequate, the burden of proof is on the person challenging the decision. Except as provided in subsection (3)(b), in a challenge to the adequacy of a statement, a court may not consider any issue or evidence that was not first presented to the agency for the agency's consideration prior to the agency's decision. A court may not set aside the

agency's decision unless it finds that there is clear and convincing evidence that the decision was arbitrary or capricious or not in compliance with law.

(b) When new, material, and significant evidence is or issues are presented to the district court that had not previously been presented to the agency for its consideration, the district court shall remand the new evidence or issue back to the agency for the agency's consideration and an opportunity to modify its findings of fact and administrative decision before the district court considers the evidence or issue within the administrative record under review. Immaterial or insignificant evidence or issues may not be remanded to the agency. The district court shall review the agency's findings and decision to determine whether they are supported by substantial, credible evidence within the administrative record under review."

{Internal References to 75-1-201:

2-4-405x	2-4-405x	75-1-104x	75-1-106x
75-1-106x	75-1-106x	75-1-202x	75-2-211x
75-20-231x	77-5-201x	82-4-337x	90-6-307x }

- END -

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Appendix E

LC 0159 - A joint resolution by the Legislature requesting the EQC to conduct an interim study of specific MEPA issues identified in the SJR 18 MEPA study.

**** Bill No. ****

Introduced By *****

By Request of the Environmental Quality Council

A Bill for an Act entitled: "An Act requesting that the Legislative Environmental Quality Council conduct an interim study on the Montana Environmental Policy Act (MEPA) statutory fee schedule, MEPA alternatives analysis, state agency use of Programmatic environmental reviews, and the adequacy of state agency MEPA administrative rule definitions."

WHEREAS, the 1999 Legislature directed and the Environmental Quality Council (EQC) completed a very extensive and detailed study and review of the Montana Environmental Policy Act (MEPA) process and its implementation; and

WHEREAS, during the course of that study, the EQC convened nine meetings, including five formal public hearings in Libby, Great Falls, Helena, Missoula, and Billings, that resulted in 242 issues being raised regarding MEPA implementation; and

WHEREAS, at the conclusion of the EQC's study, the EQC and the general public concluded that although the EQC had addressed many of the issues raised, because of time constraints there were additional issues that deserved careful and deliberative study; and

WHEREAS, the EQC has longstanding and statutorily required involvement in MEPA issues and has demonstrated strong bipartisan expertise in analyzing and reviewing MEPA policy and implementation.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

(1) That the EQC be requested to give priority to the study of the following MEPA issues:

(a) evaluate and update MEPA's statutory fee schedule provisions to ensure fairness and certainty in the cost of implementing MEPA;

(b) evaluate the implementation of agency alternatives analysis to provide an adequate review of reasonable alternatives;

(c) evaluate state agency use of programmatic environmental reviews to determine if greater efficiency can be gained in the implementation of MEPA; and

(d) evaluate the adequacy of state agency MEPA administrative rule definitions in the efficient implementation of MEPA.

(2) That the EQC convene a working group of various stakeholders to assist the EQC in evaluating the issues set out in subsection (1).

(3) That the EQC actively solicit the participation of groups and individuals whose state-regulated activities are subject to MEPA review, of Montana citizens, of state and local officials, and of any other persons or groups with interest in the outcome of the study.

(4) That state agencies responsible for implementing MEPA fully cooperate and assist the EQC in this study.

(5) That the EQC, prior to September 30, 2002, be requested to:

(a) prepare a report of its findings and conclusions; and

(b) identify options and make recommendations, including legislation if appropriate, to the Governor and to the 58th Legislature.

- END -

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