

Memorandum

TO: **Richard Opper**, Director
Montana Department of Environmental Quality;
Joe Maurier, Director
Montana Fish, Wildlife, & Parks;
Mary Sexton, Director
Montana Department of Natural Resources & Conservation

FROM: Center for Natural Resources & Environmental Policy, University of Montana

SUBJECT: Montana Environmental Policy Act Report

DATE: February 28, 2012

The attached report provides an assessment of the Montana Environmental Policy Act (MEPA). Beginning in August 2011, two graduate students in the Natural Resources Conflict Resolution program, Dave Whisenand and Sandra Treadaway, worked with Richard Opper from the Department of Environmental Quality and under the direction of Matthew McKinney and Sarah Bates to interview twenty people who have worked with MEPA in a variety of capacities. This list included people familiar with MEPA's structure, implementation, and use, and comprised a representative cross-section of the interests affected by MEPA.

Throughout the fall semester, the students performed legal and policy research, conducted interviews, and organized the responses into a report. A meeting in Helena on February 9, 2012 provided an opportunity for feedback by those interviewed and a few additional interested parties. The following people participated in this meeting:

- Warren McCullough, Bureau Chief Environmental Management, DEQ
- Candace West, Chief Legal Counsel, DNRC
- Lynn Zanto, Administrator, DOT
- Tom Martin, Bureau Chief Environmental Services, DOT
- Todd Everts, Director of Legal Services, Legislative Services
- Kathleen Williams, Representative, House District 65
- Mark Simonich, Government Affairs Director, Helena Association of Realtors
- Janet Ellis, Program Director, Montana Audubon

- John Munding, Retired, FWP
- Jan Sensibaugh, Former Director, DEQ
- Sonya Germann, MEPA Planner, DNRC
- Kristi Ponzoso, Environmental Impact Specialist, DEQ
- Heidi Bruner, DOT
- Bonnie Lovelace, Special Projects, DEQ
- Joe Maurier, Director, FWP
- Joe Lamson, Deputy Director, DNRC
- Richard Opper, Director, DEQ
- Sandra Treadaway, Student, Sociology
- Dave Whisenand, Student, Law
- Sarah Bates, Senior Associate, Center for Natural Resource and Environmental Policy
- Matthew McKinney, Director, Center for Natural Resource and Environmental Policy

Department of Environmental Quality Director Richard Opper reiterated the sideboards of the report and discussion: that MEPA will neither be repealed nor made substantive. The report's findings were then presented, followed by discussion of whether the report accurately reflected participants' concerns.

The meeting produced an interesting discussion of ways to improve MEPA and its implementation. While this process was designed to generate a legislative suggestion for improving MEPA, much of the discussion focused on improving implementation. Changes to the structure were discussed, but the focus was on improving the use and implementation of the current MEPA. The following is a summary of the discussion:

Purpose

- Not intended as a consensus document
- Agencies will consider input, including report and discussion it prompts
- Specific suggestions may be appropriately shared with agency directors
- Not necessarily a public document

Effectiveness & Accuracy

- Easy-to-read
- Clear
- Understandable
- Lacking detail
- Significance of having federal agencies involved when the National Environmental Policy Act (NEPA) applies should be emphasized because it profoundly affects state agencies
- Distinctions between NEPA and MEPA should be more clear
- Mistakenly indicated state agencies produce FONSI

Options for Improvement

- Implementation
 - "Improving MEPA" includes both the statute and the process of implementing MEPA

- Do not try to fix bad policy by tinkering with statute; instead provide sufficient support for those implementing MEPA
- Four ways to improve MEPA's implementation:
 - (1) coordination,
 - (2) training,
 - (3) programmatic reviews, and
 - (4) best practices.
- EQC standards incorporated into the best practices
- Encourage meaningful public engagement during scoping process
- Capture methods used by most successful agencies
- MEPA practitioner's conference to identify issues with statutory structure
- Recognize work by practitioners, possibly through certifications or awards
- Public Education
 - Ground rules for comment process on how to effectively engage in the MEPA process
 - Public should know they can make a difference
 - On controversial projects, agencies could approach interested parties early, sit down and discuss public participation opportunities
 - Make EQC guide widely available and place links on all agency websites
- Legislation
 - Bill like MEPA could be rewritten to improve organization and readability without affecting substance
 - Re-writes of bills like MEPA have been successful in the past
 - Re-write could open "Pandora's box"

Richard then provided some wrap-up comments and addressed next steps in this process. He acknowledged that the direction given by the Governor was to look at MEPA and come up with a draft bill that could improve MEPA without compromising its intent. Richard suggested this report be used by the agencies to internally develop a proposal for legislation, which will then be distributed for feedback from the group that participated in this study.

It was a pleasure to work with you and the other participants in this study, and we look forward to staying in contact as you move forward with this information.

Sincerely,

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Improving The Montana Environmental Policy Act:

Perspectives and Options

March 1, 2012

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I. INTRODUCTION

Governor Brian Schweitzer initiated the process that led to this report in a memorandum attached to the delivery of his signature passing Senate Bill 233 (SB 233) into law. Governor Schweitzer directed Mary Sexton, Director of the Department of Natural Resources & Conservation, Joe Maurier, Director of the Department of Fish, Wildlife, and Parks, and Richard Opper, Director of the Department of Environmental Quality, to “work with a broad spectrum of Montana citizens in taking a comprehensive look at the Montana Environmental Policy Act” (MEPA). Specifically, Governor Schweitzer instructed the directors to develop new MEPA legislation that remains true to its original purposes, but is: (1) simplified; (2) understandable; and (3) applicable to today’s economic and social landscape.

To help with the process, the directors turned to the Center for Natural Resources and Environmental Policy (CNREP). CNREP, an applied research and education center based at The University of Montana, agreed to conduct a “situation assessment,” a well-defined method to clarify issues, interests, and options associated with complex, multiparty public issues. CNREP agreed to select two graduate students in the Natural Resources Conflict Resolution Program at the University of Montana to complete the assessment.

II. METHODS

The process of developing this report started when the students, CNREP staff, and Richard Opper developed a set of questions and identified a list of stakeholders.¹ The questions were broad and open-ended to encourage an unrestricted discussion. The students conducted interviews and policy research throughout October and November 2011. Most of the individual interviews were complete in 30-45 minutes. Notes were taken during the interviews and

¹ See Appendix D.

responses were then organized into this report. Responses are not attributed to the people we spoke with to encourage open and honest interviews. The two questions were:

1. What are your concerns regarding how MEPA is currently structured, implemented, and used?
2. What are three things (or more) that you would change about MEPA, particularly how do you think the MEPA process could be streamlined in its application without compromising its intent?

Stakeholders were identified based on their experience with and knowledge of MEPA. We spoke with representatives from: Department of Environmental Quality; Department of Natural Resources & Conservation; Department of Fish, Wildlife, & Parks; Department of Transportation; Montana Environmental Information Center; Northern Plains Resource Council; Montana Audubon; Montana Petroleum Association; Montana Mining Association; Legislative Environmental Policy Office; Environmental Quality Council; Helena Association of Realtors; University of Montana School of Law; as well as some legislators and retired agency personnel. Although this is a small sample of those ultimately affected by MEPA, it provides a representative cross-section of those working with MEPA.

The assessment team is grateful to all the people we spoke with for taking time to meet with us and provide such thoughtful and candid responses. Throughout this process, the Code of Professional Conduct for the Association for Conflict Resolution² guided the assessment team. This code of conduct essentially compels an assessment team to operate as nonpartisan, impartial servant of all stakeholders and decision makers.

² See <http://cnrep.org/documents/tools/conductstandards.pdf>

III. BACKGROUND

The Montana Environmental Policy Act (MEPA) passed in 1971 with nearly unanimous bipartisan support.³ Patterned after the National Environmental Policy Act of 1969, MEPA does not set standards or regulations. Instead, like its national counterpart, MEPA requires agencies to identify and consider the effects of a pending decision on the environment and on people and to ensure the public is informed of and participates in the decision-making process.⁴ The chief sponsor of MEPA, Representative George Darrow, described MEPA as “common sense” and a “think before you act” law.⁵ The purpose of the Montana Environmental Policy Act (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 to enrich the understanding of the ecological systems and natural resources important to the state.⁶

By all accounts, MEPA was designed to ensure permitting and other agency decisions were informed decisions in that the consequences of the decision were understood, reasonable alternatives were evaluated, and the public’s concerns were heard.⁷ To this end, MEPA requires a systematic and interdisciplinary analysis of effects that:

- Describes the need for the action or the problem the agency intends to solve,
- Explains the agency’s intended solution to the problem,
- Discusses other possible solutions,
- Analyzes the potential consequences of pursuing one alternative or another in response to the problem, and
- Discusses the specific procedures for alleviating or minimizing adverse consequences.⁸

³ John Munding, Todd Everts, Larry Mitchell, and Hope Stockwell, *A Guide to the Montana Environmental Policy Act 1* (Legislative Environmental Policy Office 2009).

⁴ *Id.* at 11.

⁵ *Id.*

⁶ Mont. Code Ann. § 75-1-102(2) (2011).

⁷ Munding, *supra* n. 1, at 11.

⁸ Munding, *supra* n. 1, at 12.

Depending on the complexity and seriousness of the issue, MEPA may require agencies involve the public in each step of the decision-making process.⁹ Except for actions that have no or very minor environmental impacts, agencies must:

- Tell the public that an agency action is pending,
- Seek preliminary comments on the purpose and need for the pending action,
- Prepare an environmental review (categorical exclusion, environmental assessment, or environmental impact statement) that describes and discloses the impacts of the proposed action including an evaluation of reasonable alternatives and possible mitigation measures,
- Request and evaluate public comments about the environmental review, and
- Inform the public of the agency's decision and its justification for that decision.¹⁰

A. Other State Environmental Policy Acts

State Environmental Policy Acts (SEPA) are generally modeled after the National Environmental Policy Act (NEPA) and require state or local agencies prepare an environmental review (EA, EIS, or CE) identifying the environmental impacts of a proposed project. Fifteen states and the District of Columbia have some form of a SEPA currently in place. The states are:

- California,
- Connecticut,
- Georgia
- Hawaii,
- Indiana,
- Maryland,
- Massachusetts,
- Minnesota,
- Montana,
- New York,
- North Carolina,
- South Dakota,
- Virginia,
- Washington, and
- Wisconsin.¹¹

⁹ *Id.* at 12.

¹⁰ *Id.*

¹¹ Kenneth A. Manaster & Daniel P. Selmi, *Generally*, 2 State Env. L. § 13:2 (2010).

SEPAs vary in their application and breadth, but SEPAs are an important part of state environmental law generating considerable controversy.¹²

1. Who is subject to SEPA?

States such as New York and California have SEPAs that apply to both state agencies and local governments. Other states such as Wisconsin, Maryland, and Minnesota limit the scope of their SEPAs to state agencies and legislative requests for appropriations altering the air, land, or water resources. Some states even allow agencies to determine which actions are subject to environmental review.¹³ In Montana, MEPA applies only to state agencies.

2. What are the significance threshold & alternatives analysis requirements?

A significance threshold is the point at which an EIS is required. Like NEPA, most SEPAs, including MEPA, require an EIS when the agency action or approval involves a *significant* effect on the environment.¹⁴ Determining what constitutes a significant effect is not always easy and often litigated.

It is helpful when comparing environmental policy acts to look to the federal approach because all SEPAs were modeled, to some degree, after NEPA. NEPA does not define “significant,” but the Council on Environmental Quality’s (CEQ) regulations say significance should be evaluated based on both the “context” and “intensity” of the environmental impact.¹⁵ The CEQ regulations do not provide a numerical threshold for evaluating significance, although

¹² *Id.* at § 13:1.

¹³ Adams, Matthew G., “A Survey of State Environmental Policy Acts,” *National Environmental Policy Act*, Paper No. 14, 2 (Rocky Mt. Min. L. Fdn. 2010) (citing Mass. Gen. Laws Ann. tit. 30 § 62E).

¹⁴ Adams, at 2.

¹⁵ *Id.*

some federal agencies employ numerical thresholds for impacts susceptible to such quantitative analysis.¹⁶

Most SEPA's, including MEPA, are similar to NEPA's mandate of a "range of reasonable alternatives to proposed federal actions."¹⁷ Some SEPA's contain more detail, but nearly all require agencies:

- Consider a range of alternatives, and
- Define that range according to some combination of the purpose for the proposed project and the rule of reason.¹⁸

States have taken a variety of approaches to providing agencies guidance in determining whether a proposed action would have a significant effect triggering an EIS. New York has a system of presumptions where proposed actions are categorized according to quantitative and qualitative criteria with a presumed level of analysis (EA, EIS, or CE) for each category.¹⁹ Other states provide materials such as checklists to facilitate a thorough but efficient project-by-project significance determination.²⁰ Finally, California has lowered the threshold for preparation of a full EIS to "wherever there is substantial evidence supporting a fair argument that the project *may* have a significant effect on the environment," instead of requiring a determination that the project *will* have a significant effect on the environment.²¹ The Montana courts have held that an

¹⁶ *Id.* at n. 29.

¹⁷ 42 U.S.C. §§ 4332(2)(C), (E); 40 C.F.R. §§ 1502.14, 1508.9; Adams, *supra* n.35, at 3.

¹⁸ *Id.* at 3 (*See e.g.* Cal. Pub. Res. Code §§ 21100, 21150, N.Y. Env. Conserv. Law § 8-0109(2)(d); Wash Rev. Code Ann. § 43.21C.030(c)(iii); Cal. Code Regs. tit. 14, § 15126.6; N.Y. Comp. Codes R. & Regs. tit. 6, § 617.9(b)(5)(iii)).

¹⁹ Adams, *supra* n. .32 (citing N.Y. Comp. Codes R. & Regs. tit. 6 § 617.20).

²⁰ *Id.* at 3.

²¹ *Id.* at 3, n. 35 (citing *Pocket Protectors v. City of Sacramento*, 124 Cal. App. 4th 903 (2004)).

EIS must be prepared if significant impacts may occur²² or there are substantial questions whether an action would have significant impacts.²³

3. What mitigation measures are available to the agencies?

NEPA requires a “reasonably thorough” discussion of mitigation. The courts have interpreted “reasonably thorough” to require a discussion of mitigation measures with sufficient detail to ensure environmental consequences have been fairly evaluated.²⁴ NEPA does not require mitigation measures, but federal agencies may use mitigation to reduce the impacts of a proposed action to a level that allows issuance of a finding of no significant impact (FONSI).²⁵ Federal agencies may also impose mitigation measures, when necessary, to comply with the permitting requirements of other environmental statutes.²⁶ CEQ guidance issued on January 14, 2011, reemphasized the importance of mitigation and monitoring in the NEPA process and directed agencies to utilize them more widely.²⁷

Many SEPA's require agencies to identify specific mitigation measures for the proposed action. Some states even allow those identified mitigation measures to become binding. California's SEPA requires that agencies develop and adopt plans for monitoring and reporting on mitigation.

²² National Wildlife Federation et al. v. Department of State Lands, Golden Sunlight Mines,, 1st Judicial District, Lewis and Clark County, CDV 92-486.Memorandum and Order, September 1, 1994,

²³ Ravalli County Fish & Game et al. v. Montana Department of State Lands et al. 273 Mont. 371, 903 P.2d 1362 (1995).

²⁴ 40 C.F.R. §§ 1502.14, 1502.16; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

²⁵ *Robertson*, 490 U.S. at 352; Adams, *supra* n. 35, at 3 (citing 40 C.F.R. § 1508.13; *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982)).

²⁶ *Id.* at 3 (See 32 C.F.R. § 651.15(g)).

²⁷ Memo. from Nancy H. Shutley, Chair of the Council on Environmental Quality, to Heads of Federal Departments & Agencies, *Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact*, 4-5 (Jan. 14, 2011)

(http://ceq.hss.doe.gov/current_developments/docs/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf).

B. Recent Changes to MEPA

Some of the most significant changes to MEPA occurred during the 2001 legislative session.

Eight of the nine proposed bills affecting MEPA passed and included:

- New time limits and procedures,
- Definitions for specific terms,
- Requirement that legal actions be brought within 60 days of final agency action,
- Clarification that MEPA is procedural, and
- Requirement that any alternative be reasonable, achievable under current technology, and economically feasible.

The most notable change of 2001 prevented an agency from denying or conditioning a permit, license, or lease because of MEPA.²⁸ Subsequent amendments during the 2003 legislative session referenced Montana's constitutional right to a clean and healthful environment, declared MEPA was procedural, and reemphasized that MEPA was intended to provide an adequate review of state action to ensure environmental considerations were taken into account.

In 2007, one MEPA bill passed that required a customer fiscal impact analysis during the permitting process for new facilities or facility upgrades under the Montana Major Facility Siting Act.²⁹ Two MEPA bills passed during the 2009 legislative session; limiting the scope of review for energy development on state land to boundaries of state land and exempting authorization of historical use of a navigable riverbed from MEPA.³⁰

During the 2011 legislative session, additional changes to MEPA were proposed and one bill, SB 233 passed. SB 233 drew a distinction between state-sponsored and private actions with more emphasis on analyzing the impacts of state-sponsored actions.³¹ Possibly the most significant and controversial change was the restriction placed on remedies for inadequate

²⁸ *Id.*

²⁹ S.B. No. 448 (Chapter 469, Laws of 2007).

³⁰ H.B. No. 529 (Chapter 239, Laws of 2009); S.B. No. 507 (Chapter 475, Laws of 2009).

³¹ *Id.* at § 75-1-201.

compliance with MEPA. The Legislature amended MEPA to prohibit a court from enjoining or overturning the issuance of a permit, license, lease, or other authorization for failure to comply with MEPA.³² This limit is currently being challenged in *Northern Plains Resource Council v. State Board of Land Commissioners*.³³ Finally, MEPA's purpose was amended in 2011 to state that in enacting MEPA, the legislature is fulfilling its constitutional obligations by providing for review of state actions.³⁴

IV. INTERESTS & CONCERNS

A. There was agreement that MEPA is a well-intended law that can have a positive effect on decision-making.

Almost everyone we spoke with expressed support for the ideal and intent of MEPA. There was disagreement over whether MEPA worked better in its current or original form.

"By and large, MEPA works the way it was intended to work; it results in better decision-making, and contrary to the rhetoric, rarely stops projects."

While almost everyone we spoke with supported the ideal and intent of MEPA, many thought it was not working as effectively as it could and should work. In general, there was support for attempting to improve MEPA.

"We can create a MEPA for the 21st century building on the lessons of the past 40 years making MEPA better than it as ever been."

The people we spoke with identified a range of benefits including that MEPA:

- Can be a good decision-making tool
- Fosters meaningful public engagement
- Is a way for agencies and permit applicants to look before they leap
- Results in decisions with least impact and most benefit
- Provides a better understanding of environmental impacts

³² *Id.* at § 75-1-201(6)(c).

³³ Montana Legislature: Environmental Quality Council, *MEPA Court Cases*, <http://leg.mt.gov/css/Services%20Division/lepo/mepa/Court-Cases/court-cases.asp> (accessed November 20, 2011).

³⁴ Mont. Code Ann. § 75-1-102(1)(a).

There was nearly unanimous support for public participation as a fundamental purpose of MEPA. Many people suggested that the way MEPA encourages public participation by informing the public and allowing comments is an important part of MEPA that is currently utilized effectively. We heard repeatedly that to the extent MEPA requires agencies make their decisions openly and allow the public to participate, MEPA should not be altered.

Several people we spoke with thought MEPA works fine on smaller projects, and that only the unique challenges and publicity of larger projects create problems for implementation. Some of the unique challenges identified were:

- Time for staff to work on the project
- Influx of national interest
- Meeting deadlines with such a large project
- Money needed to complete an effective analysis, and
- Technical expertise for the level of review necessary

Several people we spoke with said that in response to the increased demands, many agencies utilize private contractors to complete analysis. While the people we spoke with said these private contractors are helpful, several people questioned their competence, standards, and motivation to complete the analysis in a timely manner.

There was agreement among some that MEPA is currently very difficult to implement.

“With all of the controversy, unending timelines, and public outrage, it is hard not to feel that the MEPA process is permanently impaired.”

Those that had the hardest time with MEPA again pointed to the larger and higher-profile projects as creating the most problems for MEPA. A related concern was expressed regarding the effect federal involvement in MEPA has, such as when a project is subject to NEPA and MEPA because of federal funding. Specifically, it was suggested that the timelines for complying with mandatory NEPA procedures do not match MEPA deadlines added by the legislature.

B. There was some agreement that MEPA is unclear and to a lesser extent, agreement the lack of clarity is a result of repeated amendments.

Many people we spoke with expressed concern that MEPA's language does not provide clear enough direction. Some people further suggested this lack of clarity was a result of the number of times MEPA has been amended over the years.

"Repeated amendments and gerrymandering have created a MEPA that is hopelessly complicated, confusing, and frustrating to implement"

A few people suggested the confusion and disorganization of MEPA is a result of small amendments that never involved a full-scale rethinking of MEPA. There was nearly unanimous agreement that the MEPA process is uncertain and difficult to follow. Some specific questions people thought MEPA should provide more guidance on were:

- When is an environmental effect significant enough to trigger an EIS?
- Should an EIS be triggered more easily when it is a high-profile decision?
- Are there quantitative ways to provide a more definite idea of when particular analyses are required?
- How many alternatives are sufficient for an EIS as opposed to an EA?
- Is there a preferred process that will identify all the necessary information while also producing a legally defensible decision?

Quite a few people thought MEPA's lack of clarity results in longer than necessary documents and that specific guidelines on the extent and depth of analysis would be helpful. Several people thought lengthy documents were a result of agency attempts to "bullet-proof" their documents from judicial review. A few people we spoke with said that instead of relying on the statute they utilize their agency's interpretation of MEPA in the Administrative Rules of Montana (ARMs). Those that said they relied on the ARMs thought it worked well for them but were concerned it might produce inconsistency.

Related to the concern that MEPA is lacking clarity, some people suggested that MEPA should include more clear and enforceable time limits that possibly do not allow the agency

discretion to extend the time limit. Some people even said that whatever the agency has come up with in that allotted time should be the MEPA analysis that is released.

C. With a few exceptions, there was broad agreement that lack of coordination between agencies causes inconsistent implementation.

A number of people we spoke with thought there was not enough coordination and sharing of ideas between agencies. Several people thought fostering more coordination between agencies could result in more consistent implementation and allow sharing of ideas on how to conduct an effective and efficient MEPA analysis. Some people we spoke with thought some agencies conduct a more efficient or effective analysis and that those agencies could assist other agencies in improving their approach.

“There is little consistency between agencies that implement MEPA; some produce a concise and effective document while others produce expansive documents that do not focus on the most important issues.”

A few people we spoke with explained that some MEPA coordinators have been meeting informally from time-to-time. While those that identified this informal coordination thought it was helpful, they thought agency personnel should be directed to use a portion of their time to coordinate with other agencies.

D. There was limited agreement that this study is flawed because the sideboards that MEPA would neither be abolished nor made substantive favor one set of interests.

Some people expressed strong disagreement with the premise of this study. Specifically, there was concern that the sideboards of not abolishing MEPA or making MEPA substantive were unfairly presented as opposites. As a result, the people we spoke with that expressed this concern suggested the premise of this situation assessment was flawed. Some concerns included:

- MEPA is not broken
- The choice of making MEPA substantive or repealing are not opposites
- Any more legislation will result in effective abolishment
- This study undermines the ability to be an advocate, and

- A study was already conducted recently and there is no need for a new one

Some people did not think that this study was flawed, but they did think that MEPA was actually substantive either: because the information it brings to light results in substantive outcomes, or because the constitutional right to a clean and healthful environment allows MEPA to be enforced substantively. In addition, some people thought MEPA should be made even more clearly procedural by further limiting the effect it can have on outcomes.

E. There was some agreement that agency and public knowledge and attitude toward MEPA can be an obstacle to effective implementation.

Many people we spoke with see public participation as an integral part of MEPA, but thought most of the public participation that occurs is "often overwhelming in number and underwhelming in content." One reason identified for unhelpful comments was the public's misunderstanding of MEPA.

"The public seems to think they get a vote and that the agency is required to select the alternative with the most votes, this is evident in the thousands of stock postcards agencies receive when a high-profile MEPA is being conducted."

As a result, many of the people we spoke with said submitted comments do not effectively inform the analysis or decision. Several people thought the public should understand comments are supposed to assist agencies in identifying issues, and are not a vote. There was some suggestion by people we spoke with that educating the public will always be a problem, but that it can be helped by more aggressive education.

In addition to misunderstanding the comment process, many people we spoke with thought the public did not have a great understanding of MEPA as a whole.

"Many people think that MEPA is the Montana Environmental Protection Act, not the Montana Environmental Policy Act, and as a result many people think the agencies are required to pick the most environmentally protective alternative."

Many people we spoke with also observed that the public does not understand MEPA is procedural, not substantive. Some people we spoke with were concerned that the public tends to think a MEPA document must cover every environmental effect imaginable.

“The expectation of the public is that MEPA is substantive, thus most of the public believes their comments will force a change, when in fact MEPA only requires the agency consider the comments, not necessarily adopt them.”

Some people we spoke with suggested that the public does not understand that MEPA applies both to state-initiated as well as private-initiated projects requiring a state permit.

Several people thought the contentious atmosphere surrounding MEPA does not allow it to be embraced as a positive tool that can result in better decision-making.

“MEPA is often used as a scapegoat for slow economic times when it does not actually stop many projects, either way, the way it has become a lightning rod for controversy has hurt MEPA’s ability to be an effective tool.”

Several people thought that MEPA identifies too many issues that cannot be prevented or controlled. As a result, the idea of using what you learn from your analysis of the alternatives is often lost in the contentious process.

F. There was limited agreement that the MEPA process is erroneously used after a decision has been made.

A few people thought that rather than using MEPA as a decision-making tool, many agencies have already decided when they turn to MEPA. The people that identified this as a problem suggested that because agencies have usually made their decision before they begin the MEPA process the public, agency personnel, and private applicants have grown to see MEPA as an unnecessary procedural nuisance. Even if the agency has not made its decision before the MEPA process, some people suggested the public perception is that they have.

G. There was limited agreement that there should be a distinction between the MEPA requirements for private-initiated as opposed to state-initiated projects.

Some of the people we spoke with thought without a clear distinction between state and private initiated projects, public expectations lead to alternatives that would never work for the private applicant. While stopping short of saying MEPA is unnecessary, some people thought the permitting and other substantive laws should be the focus for addressing environmental effects and MEPA should strictly be a procedural requirement. Again highlighting their support for public participation as a fundamental purpose of MEPA, a few people thought MEPA should be limited to providing information to the public and addressing concerns raised by the public, while the permitting laws address any identified environmental effects.

“MEPA should explicitly include a balancing of three fundamental constitutional rights: (1) the right to pursue life’s basic necessities; (2) the right to life, liberty, and property; and (3) the right to a clean and healthful environment.”

Some people we spoke with thought the goal of MEPA with respect to private applicants should be to minimize effects, while allowing the project to go forward. Among people supporting a more clear distinction between private-initiated and state-initiated MEPAs, we heard MEPA should be used more as a disclosure tool and not as an attempt to predict the future and guarantee an outcome because it is impossible to predict the future.

“You almost need two MEPAs, one for private applicants that are already subject to extensive substantive permitting laws, and one for state projects that do not involve as many substantive permitting laws.”

While some expressed an interest in drawing a cleared distinction between state-initiated and private-initiated projects, this was not broadly supported. Some people we spoke with thought that would just create more confusion and frustration.

V. OPTIONS FOR IMPROVEMENT

Most people we spoke with had more to say about the issues they encounter regarding MEPA and less to say about options for improvement.

“Those are my concerns with MEPA, but as far as doing anything about it, I am just not sure what can be done.”

A few people said they were so busy implementing MEPA; they did not have time to think of options for improvement. Still, some of the people we spoke with did have suggestions for improving MEPA. While few of these suggestions were very specific, some common themes arose among the suggestions. No option was supported overwhelmingly, but as mentioned earlier there was nearly unanimous support for MEPA’s intent and public participation as its fundamental purpose. Most people that suggested an option for improving MEPA said it would improve MEPA for all stakeholders.

“MEPA could work as a one-stop shop for environmental and natural resource decisions, improving government efficiency while still ensuring environmental effects are analyzed.”

The suggestions we heard fall into the following categories: (A) MEPA’s Structure and Direction; (B) Agency Training and Support; (C) Public Perception and Participation; (D) State vs. Private Initiated; and (E) Judicial Review.

A. MEPA’s Structure and Direction

- 1. There was broad agreement that MEPA has become structurally confusing and difficult to implement, and with a few exceptions, that it could be reorganized or rewritten without losing its meaning.**

There was nearly unanimous agreement that MEPA has become confusing and difficult to implement. Many people suggested MEPA could be reorganized or rewritten to improve its readability.

"From a legislative drafting standpoint, MEPA is disorganized and confusing, it could be completely rewritten or reorganized without changing its meaning."

There was some disagreement over whether MEPA could be rewritten or reorganized without changing its meaning. At least a portion of the people we spoke with thought that MEPA should not be changed any more than it already has been. Some suggested it would be an improvement to revert to the original MEPA language.

2. There was strong support for providing more specific direction, especially with regard to the number of alternatives required, the depth of analysis for each alternative, and the significance thresholds for an EA or EIS.

Many people suggested more specific direction would improve MEPA. Most people thought it would improve MEPA's clarity for agency personnel, private applicants, and the public. Specifically, we heard that people would like more direction on the number of alternatives required, the depth of analysis required for those alternatives, and the significance thresholds for determining when an EIS or an EA is appropriate.

"A more specific definition of what constitutes a 'major state action' triggering MEPA. This definition could include reasonable sideboards that would be valuable both for the conservation community and developers."

A few people thought quantitative guidance would be helpful. For example, a project under a particular number of acres would be exempt from an EIS; conversely, a project over a particular number of acres would require an EIS.

There was some support for providing agencies with more guidance on prioritizing issues so the most in-depth analysis could be reserved for the most important issues. Several people thought without more direction regarding the depth of analysis, the tendency for agency personnel is to consider every issue imaginable, when a more effective and beneficial analysis would focus on the few big issues. Related to this tendency to overanalyze, there was at least

some support for creating firmer time limits and even possibly taking discretion away from the agency to extend the time limits.

“The timeframes for MEPA drag on forever, the agency should have the time allotted and the analysis they complete within that time should be the analysis, as it is now, the agency just asks the private applicant if the time period can be extended and the private applicant is not going to say ‘no’ to the person deciding whether they get a permit.”

There was limited support for making time limits mandatory, but there was a broadly supported concern with the timeframe for MEPA analyses. Numerous people suggested it takes too long, but there were few specific suggestions for reducing the amount of time a MEPA analysis requires. A few people thought expressly stating it was the agencies’ duty to complete MEPA in a timely and efficient manner could help. Another idea was to require agencies utilize functionally equivalent analyses already completed by other agency personnel. Several people also suggested that projects with similar impacts in similar geographical areas should be nested to avoid duplicative analyses and allow data to be shared.

We also heard it would be beneficial for MEPA to include guidance that is more specific on what types of alternatives must be analyzed. There was at least some support for identifying a list of issues the agencies must consider and requiring the agency consider any relevant and novel issues brought up during scoping.

“MEPA could identify ten things an agency must consider, and then if novel and relevant issues were raised during scoping the agency would consider those, and if the agency considered all of those issues in its analysis it would have complied with its duties under MEPA.”

Another idea for improving MEPA’s clarity suggested was to provide definitions that are more specific either by statute or through the EQC. The people supporting this idea pointed to the Council on Environmental Quality (CEQ) as an example of providing federal agencies with clear definitions as well as support and training regarding NEPA. The proponents of more

specific definitions within MEPA suggested such definitions would assist agencies, private applicants, and the public.

Some people did not support inserting more specific guidance because it would restrict the agency's ability to adapt and be flexible.

"MEPA does not necessarily need new laws or regulations but tools, one idea would be to create best practices that provide agency personnel with an idea of the preferred process for a particular action."

While the suggestion of best practices was not very specific, it did evidence at least some resistance to creating more specific direction within MEPA.

3. There was some support for adding a preliminary environmental review before the analysis begins that allows agency personnel to identify perceived issues followed by public input.

Several people suggested an initial environmental review period could allow agency personnel to identify perceived issues, the public to provide their input, and then the agency to move forward with analysis. Some suggested the preliminary environmental review should have a deadline for public comment after which the record would be complete and any further issues would be precluded from judicial challenge. Further, some suggested that anyone making a MEPA challenge should be required to have made comments at the early environmental review. There was relatively little support for this idea, but it does address the timeliness concerns of many people.

4. There was some support for expanding the use of programmatic assessments to determine whether a proposed action could be categorically excluded.

A relatively small number of people suggested agencies should utilize programmatic assessments more often. A programmatic assessment would allow the agency to analyze and decide whether a routine action could be categorically excluded from analysis.

“These programmatic assessments and categorical exclusions would have to be written in a way that it is not a clean pass, a caveat might be included that if impacts affect a particular topic then an EA is required.”

While the expanded use of categorical exclusions was not widely suggested as an option for improvement, a number of people we spoke with identified unnecessary and duplicative analysis as an issue they had with MEPA. It is possible these people support broader use of categorical exclusions.

B. Agency Training and Support

1. MEPA training for agency personnel should be expanded and more broadly required.

There was nearly unanimous support for expanding MEPA training opportunities for agency personnel. Many people mentioned the training provided by the Legislative Environment Policy Office (LEPO) as a good example that should be expanded. In addition, several people identified the MEPA handbook as a helpful tool that should be used by agency personnel often.

Several people mentioned that LEPO conducted more training in the past and that it would be helpful if they conducted more. It was also suggested that the EQC could coordinate these trainings. One topic people thought could be covered that is not usually covered is effectively dealing with the public during MEPA’s public participation process. Some people also expressed concern that for these trainings to be helpful a structure must be put in place that dedicates the necessary time and resources.

There was also limited support for attempting to restore an understanding in legislators and agency personnel that they are public servants.

“Among agency personnel and legislators, there should be an understanding that you are a servant for all Montanans and at a minimum, you owe a duty of honesty, objectivity, thoroughness, and empathy in performing your job.”

With a renewed understanding of public service, the MEPA process could be conducted in a more effective and publicly beneficial manner.

- 2. There was strong support for requiring and expanding opportunities for agency personnel implementing MEPA to share ideas and approaches to completing an effective and efficient MEPA analysis.**

Many people suggested agencies should coordinate more frequently with other agencies.

Several people mentioned that there is a disparity between the different agencies' approaches to MEPA and that coordination between agencies could standardize and improve the agencies that are less effective and efficient.

"Some agencies are more effective and efficient than others; the more effective agencies should be sharing their approaches with the less effective agencies."

Several people mentioned that a handful of MEPA coordinators are already meeting informally, but they thought it would helpful to formalize these meetings. This could take the form of a quarterly meeting for all MEPA coordinators to share ideas and approaches. Some people also thought that in order to improve agency implementation, the agency personnel should be directed to dedicate a particular amount of their time toward training and coordinating with other agencies.

C. Public Perception and Participation

- 1. The public should be informed and allowed to provide feedback at the earliest point in the MEPA process.**

There was a great deal of concern for the need to reach out to the public early in the MEPA process and begin taking in public feedback as early as possible.

"Front-loading the MEPA process with feedback early in the process will help avoid major issues arising during the eleventh hour that could have been addressed earlier on."

Some people suggested the agency should begin speaking with the public informally at a point in the process where the public perception is that the project could still be changed. Some we spoke with suggested the challenge is making the public feel more engaged in the project. A few people we spoke with thought taking in information earlier could help remedy the perception that public input cannot change the end-result thereby engaging the public.

“An open dialogue early on in the MEPA process will benefit every decision-maker by informing them of the public’s main concerns and objections.”

Some also supported engaging the public as early as possible because it could potentially allow agencies to create a deadline for raising concerns. While this idea was not broadly supported, it reflects a concern that the current MEPA process does not encourage the public to raise their concerns early because they can litigate at the end of the process anyways. To remedy this, some proposed allowing agencies create a deadline; say 30 days after scoping, for raising concerns that must be addressed by the agency in its analysis. Thus, the decision-maker could proceed to address all the concerns raised prior to the deadline and not have to worry about a challenge at the end. While the proponents of this idea did not explain how this would affect access to judicial review; presumably, this would require an additional restriction on whom or what can make a MEPA challenge.

2. There was some support for more aggressive and expanded public education.

Many people identified the public’s misunderstanding or lack of knowledge of MEPA as an obstacle to its effective implementation. Several people suggested most people do not understand MEPA is procedural, which leads to unrealistic expectations that in turn create infeasible alternatives or unhelpful comments.

Several people suggested that the best way to remedy this misunderstanding is to implement aggressive educational campaigns to help people understand MEPA.

"The public's misunderstanding of MEPA will always be a problem, all that can be done is to continue and attempt to educate the public."

More aggressive public education was not a widely supported idea, but in general, there was agreement that a better-informed public would allow the MEPA process to be more effective.

D. State vs. Private Initiated Projects

1. There was limited agreement that the distinction between state-initiated and private-initiated projects requiring MEPA should be emphasized.

There was some support for emphasizing the distinction between state-initiated and private initiated projects. This distinction would let the permitting statutes and other substantive laws serve as the primary check on private-initiated actions. Another reason suggested for emphasizing the distinction between state-initiated and private-initiated projects was it would help avoid unrealistic alternatives.

"If an alternative would make the proposed private development infeasible then it should not be included as an alternative."

Some even suggested MEPA should be split into two laws with separate requirements for state and private initiated projects.

"A mine is already required to comply with a multitude of permitting laws as well as other substantive environmental laws, so for private actions MEPA should focus on the process of informing the public and allowing public input not addressing substantive environmental concerns."

While there was some support for allowing permitting statutes and other substantive environmental laws to serve as the the primary check on private-initiated actions, some also opposed this idea because of potential environmental effects that could be considered under MEPA but are not considered by the permitting statutes.

"There is no consequence for failing to consider fish and wildlife, historical, or cultural resources under the permitting statutes."

Those opposed to allowing permitting statutes play a primary role in private-initiated projects suggested that not only should agencies continue to have to complete MEPA analyses, they should be allowed to impose mitigation measures on private applicants. The people supporting mitigation explained that without mitigation, MEPA really has no teeth and as a result is ineffective.

E. Judicial Review

There was little support for restricting the opportunity to sue over MEPA. Although frustration was expressed over MEPA challenges that appear focused only on delaying a project, there was broad support for leaving the opportunity to go to court for failure to comply with MEPA.

“Everyone should have the opportunity to go to court and challenge a project; it is the public’s way of keeping the agency in check.”

While there was essentially no support for restricting the opportunity to sue over MEPA, there was some support for imposing limits especially time limits. As mentioned earlier, some people supported creating a deadline for concerns to be raised that would preclude new concerns from being raised later. A few even suggested that people who did not raise their concerns before the deadline should be precluded from taking their MEPA challenge to court. Restricting the concerns that were raised at a particular point in the process could be accomplished by requiring the court make its determination based on the record provided by the agency.

There was also some support for requiring that any person or group making a MEPA challenge meet a burden of demonstrating their claim is in the public’s interest, including the socio-economic interest. Another alternative to judicial review suggested was the creation of a formal mechanism for independent oversight, probably through the EQC.

VI. CONCLUSION

This situation assessment was intended to assist the directors of state agencies implementing MEPA in taking a comprehensive look at MEPA and “developing new legislation that remains true to its original purposes, but is simplified, understandable, and applicable to today’s economic and social landscape.”³⁵ Identifying areas of agreement and disagreement over the issues facing MEPA is the first step in creating improvements that satisfy all sides. While the political divisiveness of MEPA presents challenges to designing agreeable improvements, this report should assist in identifying areas of possible improvement.

While there was not unanimous agreement on particular ways to improve MEPA, there was at least some agreement that the multitude of changes over the years have made MEPA difficult to understand and apply. Many people echoed Governor Schweitzer’s suggestion that “cumulative legislative changes to MEPA over the years have left a MEPA that is confusing and difficult to implement.”³⁶ Many suggested MEPA could be completely rewritten improving its readability while preserving its intent. However, some we spoke with strongly believed that aside from removing some amendments, MEPA should not be touched because any changes will only further restrict the ability of citizens to use MEPA as a tool to protect their right to a clean and healthful environment.

There were a variety of ways to improve MEPA suggested. There was strong support for MEPA providing more definite guidance on when EISs are required, how many alternatives must be identified, and generally, the best process for completing a MEPA analysis. To this end, many thought the agencies should be allowed or required to meet and coordinate more frequently. Many also suggested the most recent 2011 changes were ill advised and should be

³⁵ See Appendix F.

³⁶ See Appendix F.

discarded. Finally, there was considerable support for expanding the EQC's involvement in reviewing MEPA documents and providing training.

While there was no cohesive proposal that arose through the interviews, there was broad support for making changes that deal with the problems so many amendments have created while preserving MEPA's intent. Possibly the strongest finding of this report was that there was essentially unanimous support for the purpose of MEPA. Further, nearly everyone we spoke with suggested that to the extent that MEPA provides more information to the public and allows the public to contribute, it is a great decision-making tool.

VII. APPENDICES

APPENDIX A: Legislative History

Although MEPA passed with near unanimous support, it was not actually funded until a special summer session in 1971 where funding was established at Forty Percent of the initially proposed budget. Since its passage, there have been numerous attempts to amend or study MEPA. At least Forty-Three legislative amendments have passed. Cumulatively, the various amendments have resulted in what many describe as a "confusing" or "unworkable" statute.

MEPA is divided into 3 sections:

- (1) General Provisions,
- (2) Environmental Impact Statements, and
- (3) Environmental Quality Council.³⁷

The General Provisions establish and declares Montana's environmental policy, providing guidance to courts, regulators, and private citizens for interpreting and applying MEPA.³⁸ The Environmental Impact Statements section requires state agencies carry out the policies in the General Provisions section by mandating written environmental review consisting of an interdisciplinary analysis of state actions that have an impact on the human environment.³⁹ The Environmental Quality Council section established the Council (EQC) and outlined its authority and responsibilities.⁴⁰

In 1995, Senate Bill 231 (SB 231) clarified it was the state's policy under MEPA to protect the right to use and enjoy private property free of undue government regulation.⁴¹ While MEPA already required a social and economic impact analysis, SB 231 now required agencies to consider regulatory impacts on private property rights and alternatives to the proposed action.

³⁷ Mont. Code Ann. § 75-1-102.

³⁸ Mont. Code Ann. §§ 75-1-101 to 110.

³⁹ Mont. Code Ann. §§ 75-1-201 to 220.

⁴⁰ Mont. Code Ann. §§ 75-1-301 to 324.

⁴¹ S.B. No. 231 (Chapter 352, Laws of 1995).

Amendments to MEPA

According to the EQC's MEPA database, over 54,000 MEPA documents (EIS, EA, and CE) have been completed since 1971.⁴² As of 2009, 55 MEPA actions had been litigated including pending, settled, and dropped cases.⁴³ The courts have found in favor of the state about 71% of the time.⁴⁴ MEPA litigation is typically focused on: (1) whether a state agency should have conducted a MEPA analysis, or (2) whether the MEPA analysis adequate.⁴⁵ An interim study completed by the EQC in 2000 made the following findings concerning MEPA litigation:

- (1) the MEPA process has resulted in state agencies making legally defensible decisions,
- (2) the more complete environmental document, the more likely the state is to prevail in litigation,
- (3) the state tends to lose more MEPA cases when the agency has failed to conduct an EIS,
- (4) there is no evidence that filed cases were frivolous, and
- (5) there is no information to suggest appeals of agency decisions have been untimely.⁴⁶

⁴² Montana Legislature: Environmental Quality Council, *MEPA Reports*, <http://leg.mt.gov/css/Publications/MEPA/mepa.asp#results> (accessed November 20, 2011).

⁴³ Munding, *supra* n. 1, at 9.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

APPENDIX B: Judicial History

MEPA reflects many of the thoughts and ideas discussed at the 1972 constitutional convention and adopted in the Montana Constitution. Some notable provisions include a right to a clean and healthful environment, a right of participation, a right-to-know, and a duty to protect and improve the environment.⁴⁷ As the courts have been called to interpret MEPA, they have often been simultaneously asked to interpret the right to a clean and healthful environment. The Montana Supreme Court has stopped short of finding a constitutional tort, but repeatedly held the right to a clean and healthful environment is a fundamental right.

In *Montana Environmental Information Center v. Department of Environmental Quality (MEIC)*, the Montana Supreme Court first held that the right to a clean and healthful environment is a fundamental right. A state action that implicates a fundamental right—such as the right to a clean and healthful environment in Montana—is subject to strict scrutiny by the courts. Strict scrutiny requires the state action further a compelling state interest and minimally interfere with the right while achieving the state's objective otherwise that state action is unconstitutional.⁴⁸ The court has reaffirmed this holding in several decisions since *MEIC* including *Sunburst School Dist. No. 2 v. Texaco, Inc.* where the court declined to create a constitutional tort based on the right to a clean and healthful environment but did reaffirm the finding that it was a fundamental right.⁴⁹

The connection between Montana's constitutional right to a clean and healthful environment and MEPA make it possible future MEPA challenges will be supported by constitutional claims. Future changes to MEPA could also be subject to a constitutional challenge. It is possible a court could find a change to MEPA unconstitutional if the change so

⁴⁷ Mont. Const. Art. II §§ 3, 8, 9.

⁴⁸ *Montana Envtl. Info. Ctr. v. Dept. of Envtl. Quality*, 988 P.2d 1236, 1246 (Mont. 1999).

⁴⁹ *Sunburst School Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 61, 338 Mont. 259, 165 P.3d 1079.

significantly undermined MEPA that it was no longer fulfilling the legislature's constitutional obligation to ensure every Montanan's right to a clean and healthful environment.

In addition to drawing a connection between the constitutional right to a clean and healthful environment, at least one Montana district court has determined that MEPA is substantive when applied to metal mines subject to the Metal Mine Reclamation Act.⁵⁰ In a 1982 decision, Judge Bennett of the First Judicial District held that MEPA is substantive in the context of metal mines.⁵¹ While the Montana Supreme Court never weighed in on this opinion, it did cause the Montana Department of Environmental Quality to treat MEPA as substantive within the context of metal mines.⁵² Given the 2001 amendment expressing a clear legislative intent to make MEPA solely procedural, it is difficult to believe a Montana court would today find that MEPA is substantive when applied to metal mines.

⁵⁰ *Cabinet Resource Group v. Dept. of State Lands*, Cause No. 43194, (1st Dist. 1982).

⁵¹ *Id.*

⁵² *Improving the Montana Environmental Policy Act (MEPA) Process*, Senate Joint Resolution No. 18: Report to the 57th Legislature of the State of Montana, Legislative Environmental Policy Office (2000).

APPENDIX C: NEPA, MEPA, & SEPA

NEPA is a procedural statute without substantive mandates, as the Supreme Court observed in *Robertson v. Methow Valley Citizens Council* “[o]ther statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed – rather than unwise – agency action.”⁵³ Unlike NEPA, some states appear to include some substantive mandates. California’s SEPA prohibits public agencies from authorizing projects with significant environmental impacts if feasible alternatives or mitigation exists.⁵⁴ Similarly, New York’s SEPA requires that agencies “choose alternatives which, consistent with social, economic, and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects.”⁵⁵ Despite the earlier *Cabinet Resources* decision, MEPA was explicitly made a procedural statute through a 2001 amendment that provides that an agency may not withhold, deny, or impose conditions on a permit or other authorization based on MEPA.⁵⁶

A Montana state agency that receives federal money, such as the Department of Transportation, must comply with NEPA.⁵⁷ NEPA analysis often satisfies MEPA requirements without requiring significant changes because MEPA’s scope and requirements were patterned after NEPA. A significant change or amendment to MEPA could create problems for those agencies also subject to NEPA if because of new requirements NEPA analysis no longer satisfied MEPA.

⁵³ *Robertson*, 490 U.S. at 349.

⁵⁴ Cal. Pub. Res. Code § 21002; Cal. Code Regs. tit. 14, § 15043.

⁵⁵ N.Y. Env. Conserv. Law § 8-0109.

⁵⁶ H.B. No. 459 (Chapter 267, Laws of 2001).

⁵⁷ 42 U.S.C.A. § 4332(D).

One fundamental purpose of NEPA is to guarantee “relevant environmental information . . . be made available . . . [to] play a role in both the decisionmaking process and implementation.”⁵⁸

Most, if not all SEPA's explicitly include public participation as a fundamental purpose and include specific requirements governing public participation in and on the environmental review process.⁵⁹

CEQ's NEPA regulations provide three primary ways of streamlining the NEPA process:

- (1) “tiering” allows agencies to address broad issues in programmatic environmental analyses;
- (2) “incorporation by reference” allows agencies to rely on previously produced NEPA analyses without repeating them word-for-word;
- (3) “adoption” allows an agency to rely on a draft or final EIS prepared by another agency;
- (4) “reduce duplication” encourages cooperating with state agencies to the fullest extent possible when a SEPA is triggered.⁶⁰

Almost all SEPA's include provisions authorizing and encouraging the use of programmatic EISs, tiering, and incorporation by reference.⁶¹ California, in particular, has an extensive set of statutory provisions addressing programmatic environmental review that includes specific requirements for particular types of environmental review.⁶² Almost every state, including states with broad SEPA's such as New York and California, exempt compliance for particular actions such as emergencies, disaster cleanup, renewable energy development, commuter rail, and other activities a state legislature chooses to exempt.⁶³

NEPA is subject to judicial review of agency decisions through the Administrative Procedure Act (APA) and almost all NEPA claims are reviewed under the APA's deferential “arbitrary and

⁵⁸ Adams, *supra* n. 35, at 4 (citing *Robertson*, 490 U.S. at 351).

⁵⁹ *Id.* at 4 (See, e.g., Cal. Pub. Res. Code § 21092).

⁶⁰ 40 C.F.R. §§ 1500.4(j), (n), 1502.21, 1506.2, 1506.3.

⁶¹ Adams, *supra* n. 35, at 5.

⁶² Cal. Pub. Res. Code §§ 21157 – 21159.27.

⁶³ Manaster, *supra* n. 32, at § 13:3.

capricious” standard.⁶⁴ Most SEPAs include a statute authorizing judicial review within that state’s courts. Some SEPAs include time limits for challenging a decision. The standard of review applied by the court differs from state-to-state. In California, for example, an agency’s decision not to prepare an EIS is subject to the strict “fair evidence” test, while review of the adequacy of such an analysis is subject to the deferential “substantial evidence” standard.⁶⁵

California’s SEPA, the California Environmental Quality Act (CEQA), is widely regarded as the most environmentally protective or development restrictive of all the SEPAs. The CEQA also experienced its most significant reform of its over 40-year existence.⁶⁶ The amendments were broken into three bills: SB-292, SB-900, and SB-226.⁶⁷ SB-292 was a specific exemption for the construction of a football stadium, SB-900 created expedited judicial review for preferred “environmental leadership projects, and SB- 226 exempted solar development from CEQA, amended review provisions, and significantly expanded the definition of in-fill projects.⁶⁸

⁶⁴ 5 U.S.C. §§ 701-706.

⁶⁵ Adams, *supra* n. 35, at 5 (Citing *Laurel Heights Improvement Assoc. v. Regents of the Univ. of Calif.*, 6 Cal. 4th 1112 (1992)).

⁶⁶ Richard Frank, *California Governor Brown Signs CEQA Reform Bills*, Legal Planet the Environmental Law & Policy Blog (posted September 27, 2011).

⁶⁷ *Id.*

⁶⁸ *Id.*

APPENDIX D: List of People Interviewed

Warren McCullough, Bureau Chief Environmental Management, Department of Environmental Quality
Candace West, Chief Legal Counsel, Department of Natural Resources & Conservation
Rebecca Cooper, MEPA Coordinator, Fish, Wildlife, and Parks
Lynn Zanto, Administrator Rail, Transit, & Planning Division, Department of Transportation
Tom Martin, Bureau Chief Environmental Services, Department of Transportation
Todd Everts, Director of Legal Services, Montana Legislative Services Division
Kathleen Williams, Representative, House District 65
Chas Vincent, Senator, Senate District 1
Mark Simonich, Government Affairs Director, Helena Association of Realtors
Anne Hedges, Program Director, Montana Environmental Information Center
Janet Ellis, Program Director, Montana Audubon
Clayton Elliott, Community Organizer, Northern Plains Resource Council
Dave Galt, Executive Director, Montana Petroleum Association
Terry Grotbo, Geologist, AMEC Earth and Environmental
John Munding, Retired, Fish, Wildlife, and Parks
Jan Sensibaugh, Former Director, Department of Environmental Quality
Jack Tuholske, Professor of Law and Attorney, University of Montana
George Darrow, Original Author of MEPA
Sonya Germann, MEPA Planner, Department of Natural Resources and Conservation

APPENDIX E: Letter of Introduction

Center for Natural Resources &
Environmental Policy
32 Campus Drive
University Hall
Missoula, MT 59812

Dear _____

We would like to invite your participation in a study to assess implementation of the Montana Environmental Policy Act (MEPA) and to identify priority areas for improvement. You are one of approximately 25 stakeholders or leaders whose views and insights will inform this study.

This letter describes the purpose of the study, the information-gathering process, and uses of the collected information. Our contact information is listed below and we are available to answer any questions you have about the study.

Purpose of the Study

In 1971, the Montana Legislature enacted MEPA with the goal of fostering wise actions and better decisions by state agencies. MEPA has two primary requirements: (1) agencies must consider the effects of pending decisions on the environment and on people prior to making each decision, and (2) agencies must ensure that the public is informed of and participates in the decision-making process. Since its passage, subsequent Legislatures have amended MEPA extensively. The most recent amendment, Senate Bill 233, passed during the 2011 legislative session. As Governor Schweitzer stated in his transmittal letter to Secretary of State Linda McCulloch, many view the current version of MEPA as convoluted and practically unworkable. With a belief that there is room for improvement under both the current law and as amended by SB 233, Governor Schweitzer has called for a comprehensive look at MEPA.

The goal of this study is to identify options for improving MEPA by determining more clearly the concerns and interests of key people involved with MEPA's creation, evolution, or implementation. Where general agreement is reached, the results of this study may lead to suggested changes to MEPA for consideration by the next Montana Legislature. Two areas upon which we do not expect agreement are: 1) for MEPA to be abolished, and 2) for MEPA to go beyond its "procedural only" status already established by the legislature. Therefore, we do not intend for this study to explore either of those two options.

At the request of the Montana Department of Environmental Quality (DEQ), graduate students and senior staff at the Center for Natural Resources and Environmental Policy at The University of Montana (<http://cnrep.org>) are conducting the research for this project. The DEQ will use information presented in this study to help identify and assess options for revising MEPA.

Interview Procedures and Confidentiality

We hope you choose to participate in this important study, but your decision to do so is voluntary and may be rescinded at any time. If you agree to participate, we will schedule a 30-minute conversation as soon as possible. We may record the conversation, and we will take notes to keep a record of what you say to be synthesized into a final report. Pursuant to University guidelines for research subject confidentiality, your individual responses to the questions will be confidential, and you will not be quoted in the study write-up. Only the person(s) interviewing you will have access to the original notes and recordings.

Sandra Treadaway and David Whisenand, graduate students at the University of Montana, will conduct interviews by telephone and in person. Sarah Bates and/or Matt McKinney, senior staff at the Center, are overseeing all study activities. We will complete the interview this fall and circulate the draft report early in 2012.

The interview questions are simple and open-ended as our intention is to have a conversation with you and elicit thoughtful responses:

1. What are your concerns regarding how MEPA is currently structured, implemented, and used?
2. What are three things (or more) that you would change about MEPA, particularly how do you think the MEPA process could be streamlined in its application without compromising its intent?

Thank you for considering our request to share your thoughts with us. If you are interested in participating, please feel free to contact David or Sandra to arrange an interview time. If we do not hear from you, we will follow up with a phone call.

Sarah Bates

Center for Natural Resources & Environmental Policy
The University of Montana
sarah@cnrep.org

Dave Whisenand

Univ. of Montana School of Law
Class of 2012
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Sandra Treadaway

Univ. of Montana Sociology Dept.
Masters Candidate 2012
sandra.treadaway@umontana.edu

APPENDIX F: Letter from Governor
Schweitzer

OFFICE OF THE GOVERNOR
STATE OF MONTANA

BRIAN SCHWEITZER
GOVERNOR



JOHN BOELINGER
LT. GOVERNOR

May 12, 2011

The Honorable Linda McCulloch
Secretary of State
State Capitol
Helena, MT 59620

Dear Secretary McCulloch:

I hereby deliver without signature Senate Bill No. 233 (SB 233), "AN ACT REVISING ENVIRONMENTAL IMPACT LAWS; REVISING STATUTES RELATED TO AN ENVIRONMENTAL IMPACT ANALYSIS AND AN ENVIRONMENTAL ASSESSMENT; PROVIDING DEFINITIONS; CLARIFYING THAT ALTERNATIVES INCLUDED IN AN ALTERNATIVES ANALYSIS ARE DISCRETIONARY; PROVIDING THAT THE SCOPE OF AN ENVIRONMENTAL REVIEW IS ONLY WITHIN MONTANA'S BORDERS; PROVIDING THE REMEDY FOR FAILURE BY AN AGENCY TO COMPLY WITH THE REQUIREMENTS OF THE MONTANA ENVIRONMENTAL POLICY ACT; REVISING THE ENVIRONMENTAL REVIEW FEE ASSESSMENT; AMENDING SECTIONS 75-1-102, 75-1-201, 75-1-203, 75-1-208, AND 75-1-220, MCA; AND PROVIDING EFFECTIVE DATES, AN APPLICABILITY DATE, AND A CONTINGENT TERMINATION DATE." In accordance with Article V, § 10(1) of the Montana Constitution, at the expiration of 10 days after its delivery to me by the Legislature, it shall become law.

MEPA has been a popular scapegoat for those whose development projects have failed in Montana. For many years it has been under assault by one industry or legislature after another, culminating in a 2001 amendment under Republican leadership fundamentally changing MEPA by making it "non-substantive," meaning that problems discovered through the MEPA process could no longer inform conditions or restrictions to be placed on a permit.

I believe that there is room for the improvement of MEPA under both current law and as amended by SB 233. The cumulative legislative changes to MEPA over the years have left a statute that is confusing and difficult to implement. I have signed SB 233 because I believe it may offer some minor clarity to MEPA, and I do not believe that it will fundamentally weaken environmental protections or citizens' involvement in state decisions. However, critics are correct in claiming that MEPA is convoluted and practically unworkable.

Moving forward, I believe MEPA can be rewritten in a way that will protect both public and private interests, and even enhance the public's role in major permitting decisions made by state agencies. Montana can again become a model for the nation in demonstrating how to clearly identify and disclose issues to the public in a way that will

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lead to the best possible outcomes. Neither SB 233 nor any other recent revision has accomplished this for Montanans.

For these reasons, I am directing Mary Sexton, Director of the Department of Natural Resources and Conservation, Joe Maurier, Director of the Department of Fish, Wildlife, and Parks, and Richard Opper, Director of the Montana Department of Environmental Quality, to work together and with a broad spectrum of Montana citizens over the next eighteen months to take a comprehensive look at MEPA. I have charged the Directors with developing new MEPA legislation that remains true to its original purposes, but is simplified, understandable, and applicable to today's economic and social landscape.

The proposal will be presented to the 2013 Legislature for its consideration. I am optimistic that we can develop a new, more effective MEPA process that leads to good decision-making and involves the Montanan citizenry to the highest degree. I have stated before, and I continue to believe, that project development and protection of the environment in our great state are not mutually exclusive and that both are in the best interests of all Montanans.

Sincerely,


BRIAN SCHWEITZER
GOVERNOR

cc: Mary Sexton, Director, Department of Natural Resources and Conservation
Joe Maurier, Director, Department of Fish, Wildlife, and Parks
Richard Opper, Director, Department of Environmental Quality