

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.