



**TREASURE STATE**  
**RESOURCES ASSOCIATION**  
OF MONTANA

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**TREASURE STATE RESOURCES ASSOCIATION NEWS**

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# The Montana Environmental Protection Act (MEPA) and the Upcoming 2025 Legislative Session

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## **What's Happening with MEPA Right Now (And Why You Should Care)**

If you need a permit from a Montana state agency, you have a project on state land, or you need the state to take any kind of action to complete your project, MEPA's should concern you!

Recent litigation has spotlighted how MEPA is causing delays or entirely halting industry projects ranging from energy generation to mining to timber sales (and much more). MEPA is costing industry and state permitting agencies money and time. And litigants have realized MEPA challenges have greater chance of success than other state actions are weaponizing litigation.

In the 2025 session, the legislature will focus on MEPA, and we can expect a number of bills ranging from proposals to entirely eliminate MEPA to recommendations to add substantive additional requirements, like a social cost of carbon and climate change analysis for Environmental Assessments (EAs) and Environmental Impact Statements (EISs). It will be important to navigate carefully through all these perspectives to create surgically precise MEPA reform that is meaningful and defensible, so that industry does not end up back in court on each individual project.

## **How Does MEPA Work?**

MEPA is similar to its federal counterpart NEPA, with some notable differences. For projects involving a mix of federal and state action, both analyses are required (though they can "tier" off one another). For non-federal projects, state agencies need to prepare an EA or EIS for all "state actions" that may affect the environment. This includes issuing almost any permit, action involving state land, or other Montana approvals—water, air, mining or extraction, construction, roads, state land and forest management, state land leases or easements, and more.

## **Key Concepts to Consider**

- MEPA review is separate from a substantive permit review and can be contested more easily in a standalone court challenge. If the state agency's MEPA analysis is found insufficient, it can cause the permit to be stayed or vacated, potentially halting or even terminating a project.
- MEPA review is time-consuming. Larger or more controversial projects require more in-depth review, which usually takes more than a year to complete.
- Often, the entity seeking the permit has to pay, even if it is not challenged in court. If the state conducts a comprehensive EIS, the permit applicant must cover the significantly high cost of the EIS, which is typically five or six figures.
- MEPA documents are published for public comment. This can increase public scrutiny and opposition to a project. Sometimes the only way the public learns of a project is through the MEPA process.

## **Court Decisions**

Recent court decisions have significantly expanded MEPA's scope and power, increasing the likelihood of successful MEPA challenges that vacate permits and pause projects. Pending court decisions may further expand its power include:

- *Held v. State* (appeal pending): The District Court found that "the State must either: 1) exercise discretion to deny permits for fossil fuel activities when the activities would result in [greenhouse gas] emissions that

cause unconstitutional degradation and depletion of Montana's environment and natural resources, or infringement of the constitutional rights of Montana's children and youth; or 2) the permitting statutes themselves must be unconstitutional.” If the District Court’s finding is upheld, all state agencies must include an analysis of greenhouse gasses and climate change in EAs/EISs.

- *MEIC v. DEQ (a.k.a. Laurel Generating Station)* (pending): Whether the air quality permit should be vacated or stayed (preventing construction) pending a MEPA appeal; if climate change and greenhouse gas emissions must be considered; and whether the agency adequately considered noise and light impacts in the air quality permit.
- *Trout Unlimited v. DEQ (a.k.a. Tintina)* (decided, 2024 MT 36): MEPA was utilized to challenge the highly technical substantive aspects of the Black Butte copper mine permit, including engineering, water, and tailings disposal. The challenge was successful in the district court but was defeated at the Montana Supreme Court. It took 12 years to permit and litigate the project, including a lengthy EIS process.
- *Cottonwood v. DEQ* (decided, 2024 MT 105N): A MEPA challenge seeking to prevent the Yellowstone Club from using wastewater to make artificial snow for skiing. Although the court decided that DEQ’s MEPA analysis was sufficient, it took three years to litigate, under the threat of an injunction.
- *Protect the Clearwater v. DEQ* (pending): Groups used MEPA to challenge a dry land opencut gravel mining project near Elbow Lake. Despite some preliminary rulings by the Montana Supreme Court and the District Court on procedural issues, the project remains enjoined until the case is completed (permit application was submitted three years ago).

### **Legislative Revisions Through Agency Bills**

State agencies—primarily those affected by MEPA, including the Department of Transportation, Environmental Quality, Fish Wildlife and Parks, and Natural Resources—are currently writing agency bills, many of which have already been approved by the Governor’s Office and interim committees for “pre introduction.” Some of these agency bill packages contemplate MEPA modifications. Conversations within and between agencies and industry on MEPA reform have already begun and we can anticipate independently sponsored bills. If industry wants to work with or garner the support of state agencies, now is the time to initiate those conversations. Once January starts, agency bills will progress rapidly, making it harder to secure agency time and focus on details.

With the legislature’s other big-ticket items on its plate this session (like property taxes and Medicaid expansion), it is important to act early and surgically to avoid distractions or potential disputes. Bills introduced in early January will be positioned more favorably in the session. Again, conversations and drafting should start now, not after session starts.

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## **Governor Gianforte Celebrates Nearly \$1 Billion Energy Investment in Montana**

*Cuts ribbon on Clearwater Wind Energy Center*

MILES CITY, Mont. – Governor Greg Gianforte yesterday cut the ribbon on NextEra Energy Resources' Clearwater Wind Energy Center in Miles City and celebrated the company's nearly \$1 billion investment in Montana.

"We're ramping up energy production in Montana with our all-of-the-above approach, including wind, oil and gas, solar, and hydropower," Gov. Gianforte said. "We'll continue to welcome investment in Montana to make energy more affordable and reliable across the region."

The Clearwater Wind Energy Center, which started in 2013, was developed the in four phases across Custer, Garfield, and Rosebud counties and created approximately 350 jobs during each phase of construction.

Joining representatives from NextEra Energy Resources, Avista, Portland General Electric, and Puget Sound Energy, the governor celebrated the completion of the fourth phase of the project. Clearwater Wind Energy Center will produce over 750 megawatts (MW) to power over 500,000 homes per year. Recently, the Montana Department of Environmental Quality (DEQ) approved Class 14 eligibility for the Clearwater transmission tie line, which connects the Clearwater wind project to the existing Colstrip transmission lines that will export wind energy to utility customers across the region and into Washington state.

Highlighting the benefit of Montana's wind resources to improve grid reliability and lower costs, Avista Chief Executive Officer Dennis Vermillion added, "Wind is part of the diverse supply portfolio that we have, and it only complements our affordability and priority to deliver our customers energy as cost effectively as possible."

According to DEQ, Montana added an average of 53 MW of wind per year to its generated energy portfolio from 2005 to 2017, and an average of 180 MW from 2018 to 2023. Just over 14% of the electricity generated in Montana comes from wind, and 43% comes from hydropower.

Speaking to Montana's all-of-the-above approach to energy, the governor added, "With our abundant coal and hydro resources, Montana has long served as a powerhouse for the west. This project solidifies our legacy as an energy powerhouse as demand grows for renewable energy, and as utilities look to diversify their portfolios."

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# Legislature aims to require waiver for public access to behind-the-scene bill drafting discussions

Changes made after July court decision that sought records of PSC redistricting bill

BY: [BLAIR MILLER](#) - OCTOBER 2, 2024 5:25 PM [HTTPS://DAILYMONTANAN.COM/2024/10/02/LEGISLATURE-AIMS-TO-REQUIRE-WAIVER-FOR-PUBLIC-ACCESS-TO-BEHIND-THE-SCENE-BILL-DRAFTING-DISCUSSIONS/](https://DAILYMONTANAN.COM/2024/10/02/LEGISLATURE-AIMS-TO-REQUIRE-WAIVER-FOR-PUBLIC-ACCESS-TO-BEHIND-THE-SCENE-BILL-DRAFTING-DISCUSSIONS/)

Montana lawmakers might have to sign a waiver to allow the public to see written communications between them, legislative staff, lobbyists and others that detail how bills are crafted and written, and who is involved in behind-the-scenes discussions that influence the laws legislators create every two years.

Last week, the Legislative Services Division, which [writes bills for lawmakers](#), sent emails to senators who are not up for re-election this year and who have requested bill drafts for next year. They said that legal staff interpreted a Lewis and Clark County District Court judge's decision from July to mean that those communications, compiled in what is called a "junque file," are privileged and off limits to the public.

"The takeaway from our analysis of the opinion is that you are entitled to claim legislative privilege for certain correspondence and information that is gathered while drafting legislation," the letter said.

[The Montana Free Press first reported](#) the changes by Legislative Services last week.

Legislative Services Division officials and attorneys are set to discuss the changes with the Legislative Council at [a hearing on Thursday](#). The changes stem from a [July court decision](#), but in that decision, the judge did not address [a 1995 decision](#) from

the same court that found junque files must be open to the public under the Montana Constitution in most instances.

### **Changes to junque file transparency**

[Emails](#) were sent to lawmakers who had already filed bill draft requests on Sept. 25 telling them they could waive the “legislative privilege” by signing [a waiver](#) or responding to the email. The email said lawmakers could also choose not to waive their privilege, but said there was no guarantee that information would stay privileged in the future, and that the court ruling was still subject to a possible appeal.

The email and the waiver both cite a July 12 opinion from Lewis and Clark County District Court Judge Christopher Abbott in a discovery fight between lawyers for the state and for a group of voters who have sued over the Public Service Commission redistricting map [redrawn during last year’s session](#) by Sen. Keith Regier, R-Kalispell, through his Senate Bill 109.

Abbott in February [found the map is likely unconstitutional](#) and appears to be gerrymandered to favor Republicans. But he declined to toss the map out and set an expedited schedule for the suit, which is currently set to go to trial in December.

But attorneys with Upper Seven Law who are representing the plaintiffs had tried to subpoena Regier in May for a deposition and to get ahold of the full junque file for the bill. The firm had previously requested the junque file, but the file the attorneys received contained only different versions of the bill draft and no communications about the bill.

Reporters, lobbyists, and members of the public [commonly request and receive](#) junque files during legislative sessions to learn more about the stakeholders behind a bill, to determine whether it is “copycat” legislation also being proposed in other states, and to glean information about how and why changes were made to a bill’s language. The Daily Montanan and other Montana news outlets reported several times during the 2023 session on [the contents of junque files](#).

“Plaintiffs have requested the ‘junque file’ from the Legislature, but the file contains no correspondence or other background materials that would shed light on legislative intent for the districts adopted,” Abbott noted in his July opinion.

#### **Subpoena fight in PSC redistricting lawsuit**

The subpoena from Upper Seven had asked for anything Regier possessed relating to documents and communications involving the bill and maps, and communications with other lawmakers, officials and outside people or groups about how the maps came together.

Regier objected to the subpoena and [filed a motion to quash it](#), arguing that the Montana Constitution provides him legislative privilege from compulsory testimony and the production of documents akin to that provided to members of Congress by the Speech and Debate Clause of the U.S. Constitution.

Upper Seven [argued](#) that the Montana Constitution did not contain the same privilege, that any privilege would have to be qualified, and that any privilege would have to be considered alongside the Montana Constitution’s right to know.

[Article V, Section 8](#) of the Montana Constitution provides some privilege for lawmakers: “A member of the legislature is privileged from arrest during attendance at sessions of the legislature and in going to and returning therefrom, unless apprehended in the commission of a felony or a breach of the peace. He shall not be questioned in any other place for any speech or debate in the legislature.”

Regier cited common law, the U.S. Constitution’s [Speech and Debate Clause](#), and that section of the Constitution to argue both that he should not be required to testify at a deposition and should not have to produce communications about the crafting of SB 109 because it involved things said during the legislative session.

[Upper Seven had argued](#) it was entitled to the public documents under [Article II, Section 9](#) of the state Constitution – the right to know – which says: “No person shall

be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.”

Upper Seven attorneys argued the court needed to consider the legislative privilege in conjunction with the right to know. But [Abbott's opinion](#) said they were incorrect.

“They emphasize that nothing in the limited (Constitutional) Convention record on this provision suggested an intention for legislative immunity to create an exception to the right to know,” Abbott wrote. “In this Court’s view, Plaintiffs have the analysis exactly backwards.”

Abbott found that the state constitution does confer “an absolute testimonial privilege” for state legislators to not be forced to testify when it comes to their legislative acts, and agreed that Regier should not be subject to a deposition, quashing the subpoena.

But he wrote that the question over the junque file documents was a “somewhat more complicated” matter, saying there has not been a Montana Supreme Court decision about such a question since the state Constitution was re-written in 1972.

He said that requiring a lawmaker to understand that “every scrap of paper” involving the construction of a bill could be open to the public might potentially chill legislative activity, and noted the Constitution says members “shall not be questioned” over their legislative acts.

But he also wrote that the legislature has long considered itself subject to the right to know, that full junque files, fiscal notes and legal review notes have long been public, and that the legislature chose not to exempt itself from judicial enforcement of public records laws.



“Thus, recognition of a legislative nontestimonial privilege does not imply that the legislature is exempt from the right to know or the public records statutes of the state,” Abbott wrote. “At the same time, the right to know does not abrogate a legislator’s protection from being ‘questioned’ outside the legislature about the legislator’s deliberations, thoughts, or motives underlying the drafting, sponsorship, amendment, support, or opposition to legislation.”

He wrote that the right to know cannot compel the production of documents from a junque file because that would be “tantamount to questioning a legislator about their motivations and deliberations as to core legislative acts” and said he disagreed with Upper Seven that qualified legislative privilege could be overcome by the right to know.

“The constitutional prohibition on subjecting a legislator to questioning about their motivations in connection with legislative acts is an absolute protection,” Abbott found.

He said he understood that the motivations behind the maps are especially important in a gerrymandering case, as it would provide evidence for the plaintiffs, but said allowing that to happen would “create an exception” to the legislative privilege.

“In sum, the Court will find requests for production to be barred by legislative privilege where the request seeks nonpublic information that necessitates disclosure of a legislator’s motivations or deliberations or is tantamount to questioning the legislator about their motivations and deliberations,” Abbott wrote.

He quashed most parts of the subpoena; but he did find that a lawmaker’s communications with the Public Service Commission and state and local executive branch officials would be public because it would constitute that lawmaker waiving legislative privilege.

**1995 court decision found junque files should be public in most cases**

But Abbott's opinion did not include discussion of a [1995 order](#) from a Lewis and Clark County District Court judge that did find the public's right to know outweighed legislative privilege in most instances involving junque files. None of the parties had included the order in their briefs either; two attorneys told the Daily Montanan the case was not entered into the online system attorneys and paralegals use to conduct legal research.

The Montana Environmental Information Center had sued the Environmental Quality Council and Montana Legislative Council in 1995 after it tried to get ahold of the junque file, or bill draft file, for a bill a Deer Lodge senator had been working on to revise the Metal Mine Reclamation Act. The EQC and Legislative Council, as arms of the legislature, denied the request until the bill-drafting process was complete, and told the court that legislative employees are immune from suit under the state Constitution, common law and [statute](#).

Judge Thomas Honzel found the issues in the case involved not just an argument over that lone bill draft, but whether the right to know extends to junque files "in the hands of the Legislative Council, EQC, or any other government agency or subdivision."

The judge wrote the question would "undoubtedly surface again during future legislative sessions." He wrote in the order that resolution of the question depends on the "interplay" of the right to know and the legislative immunity provisions of the Constitution – the same two issues at play in the case Abbott presided over.

But Honzel found those provisions were not in conflict, saying the suit did not involve questioning legislators about "speech or debate" in the legislature or otherwise get in the way of their duties.

"The issue presented relates only to whether the MEIC or any other member of the public is entitled to examine documents in the files of two statutorily created councils during the bill-drafting process," Honzel wrote.

He cited a U.S. Supreme Court decision that found legislative employees – not members of Congress – were not immune from suit under the federal Speech and Debate Clause to say that legislative employees were not either.

The order said the bill-draft files of the Legislative Council and EQC should be public except in specific cases where a person’s individual privacy is implicated. But some have interpreted his order as going beyond those legislative employees.

“Respondents seem to suggest that early public knowledge of what may come before the legislature would somehow be detrimental. The Court does not share that view. Neither did the framers of our constitution,” Honzel wrote.

“They declared that the public has the right to examine documents held by public agencies which do not touch upon matters of individual privacy. The framers did not except bill drafts or bill-draft requests from that right, and the Court is not authorized to find such an exception where one does not exist,” he concluded.

#### **Response to junque file changes**

Anne Hedges, the director of policy and legislative affairs for the MEIC, was early in her career with the organization at the time. She, along with the MEIC’s attorney and another attorney, confirmed this week the state never appealed Honzel’s order.

“They lived with the decision because it didn’t cause any conflict; it didn’t cause any problems,” Hedges said. “I spent a decade saying ‘you’re welcome’ to people in the Capitol who are like, ‘God, this is really helpful to have,’ and now we’re moving in the opposite direction.”

Hedges noted that Todd Everts was counsel for the EQC on that case. He is now the Director of Legal Services and Code Commissioner for the Legislative Services Division and was copied on the emails to lawmakers notifying them of the changes.

Hedges said she was “incensed” about the changes after 30 years of the junque files being public and said that Everts should have known about the decision when Legislative Services was crafting the changes.

“This just takes us back to smoke-filled rooms where the public doesn’t have access to information it needs to know whether its elected officials are acting in the public interest, in their constituents’ best interest,” Hedges said.

Legislative Services Division Executive Director Jerry Howe said the division was reacting to Abbott’s decision with the changes and said people would “get everything you want to know” at Thursday’s meeting.

“Our legal team has been reading the opinion, and of course we want to be able to comply with a court order,” he said. “The legal team read that opinion and have been contemplating how to proceed.”

George Wolcott, the spokesperson for the Senate Democrats, said Democratic senators were upset at the move by Legislative Services and felt that it got in the way of the public’s right to know. He said the caucus would be having conversations about how to address the issue.

“We believe that transparency shouldn’t be a partisan issue, and I hope that the whole legislature should take the time now to recommit to the values of public participation,” Wolcott said.

A spokesperson for Senate Republicans said Wednesday he had been out of the office for some time, would be back on Thursday, and was unaware of the changes surrounding junque files. Members of the House did not receive the emails last week because they are all up for re-election, but the waiver, email draft, and Abbott’s decision have now been [posted](#) on the Legislative Council’s website ahead of the Thursday meeting.

Hedges said there have been discussions ongoing about whether to take the changes to court.

“We don’t have time to wait, and the legislative session is knocking at the door, and this is a critical issue for the public interest – for every public interest group, everyone who is not a powerful moneyed interest that works in the Capitol,” she said.

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## Treasure State Resources Association puts out a call for additional funds for work on Water Nutrient Discharge Standards

**\*\*\*\*\*UPDATE\*\*\*\*\***A number of TSRA members have agreed to cost-share on the work that Vicki Marquis is doing with the water nutrient discharge standards.

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### **TSRA Contact Information:**

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## **Upcoming Legislative Meetings:**

### **Local Government Interim Committee**

**Final meeting was on September 10th**

**Where: State Capitol & Zoom**

For more information go to: [committee website](#)

### **Revenue Interim Committee**

**Next Meeting is Scheduled for November 18, 2024**

**Where: State Capitol Room & Zoom**

For more information go to: [committee's website](#).

Contact committee staff, [Megan Moore](#), with any questions.

### **Water Policy Interim Committee**

**The Committees final meeting was September 12-13, 2024**

**Where: State Capitol & Zoom**

An agenda and materials will be available at <http://leg.mt.gov/water> For more information, contact Jason Mohr, committee staff, at 406-4444-1640 or <http://jason.mohr@legmt.gov>.

### **Environmental Quality Council**

**Final meeting was September 24, 2024**

## **Where: Libby, MT**

Please use this link to check in for more information:

<https://leg.mt.gov/committees/interim/eqc/>

## **Energy and Telecommunications Interim Committee**

**Final meeting was September 10, 2024**

## **Where: State Capitol & Zoom**

For more information go to:

<https://leg.mt.gov/committees/interim/etic/meeting-info/>

### **Upcoming Events/Dates:**

December 4-6, 2024

Montana Stockgrowers Annual Convention and Trade Show  
Billings, MT

January 7, 2025

TSRA Legislative Showcase and Reception  
Delta Colonial Hotel

May 28-30, 2025

Montana Stockgrowers Midyear Meeting  
Butte, MT

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