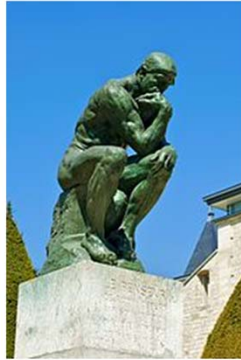


MEPA for Decisionmakers



The Legislative Environmental office first offered a MEPA course in the 1990s, at a time when state agencies were faced with a deluge of legal challenges. The training was targeted toward helping agencies improve their implementation of MEPA and therefore make their documents more legally defensible. We again started offering training to state employees in 2010. That training has been focused on MEPA practitioners, those writing the MEPA documents. This is our first training specific to decisionmakers.

This is a broad, basic overview of MEPA and the environmental review process, which is designed to develop objective information that you, the decisionmaker, can use to make effective and strategic decisions.

As the decisionmaker, it's your responsibility to approve the environmental review document and to decide whether to implement a proposed action. It's a critical role in the MEPA process. The decisionmaker must be someone different from the person or persons responsible for writing the environmental review and must be someone who has authority to make decisions on behalf of the agency. The individual who fills the role of decisionmaker may vary from agency to agency or even between programs within the same agency.

When is a MEPA review necessary?

What form will the MEPA review take?

How is a MEPA document completed?

How are decisions made with MEPA?

Our review of MEPA will answer these core questions.

The point being...

When MEPA is implemented correctly, it
results in
better, more legally defensible
decisions

MEPA, the Foundation



We'll start with a look at the foundation of MEPA

Way Back Machine

1971

MEPA passes with nearly unanimous support

Sponsored by Rep. George Darrow, a
Republican and petroleum engineer from
Billings



(MEPA Handbook 2013, pages 5-9)

This might surprise you, but MEPA was enacted by nearly unanimous support in 1971. It passed 99-0 in a Republican House and 51-1 in a Democratically controlled Senate with a Democratic Governor

MEPA was sponsored by Rep. George Darrow, a Republican and petroleum engineer from Billings.

MEPA was one of several bills considered that legislative session. The battle around the appropriation to implement the bill might be a better measure of the political climate than MEPA's almost unanimous approval.

There's more information about the legislative history in your MEPA handbook. We've included references to it at the bottom of some of the slides. We hope you'll find the handbook useful as a desk reference back at the office.

MEPA, the Foundation



The Montana Environmental Policy Act

Title 75, chapter 1, parts 1 through 3, MCA

(MEPA Handbook 2013, pages 69-114)

The Montana Environmental Policy Act is codified in Title 75 of the MCA. The entire text is in your handbook

The Montana Environmental Policy Act has three parts, the first is what we call the “spirit” of MEPA. It establishes the actual environmental policy and purpose.

The Purpose of MEPA

... is to declare a state policy that will encourage productive and enjoyable harmony between humans and their environment, to protect the right to use and enjoy private property free of undue government regulation, to promote efforts that will prevent, mitigate, 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 ...

75-1-102(2), MCA

One of the biggest things to remember about MEPA is that it is a procedural act. The Legislature has clarified this point more than once over the years. Most recently, the 2011 Legislature added language that states MEPA is procedural and does not provide for regulatory authority beyond authority already explicitly given to agencies in statute.

MEPA has three parts



The “letter of the law”

Title 75, chapter 1, part 2

Requires state agencies to carry out the policies in
part 1

The second part of MEPA is what we call the “letter of the law” – laying out how state agencies are to carry out the policy. In the second part of MEPA, state agencies are directed to use a systematic, interdisciplinary analysis of state actions that have an impact on the human environment in Montana.

This analysis is your EA (which stands for environmental analysis) or your EIS (the Environmental Impact Statement)

The third part of MEPA establishes the Environmental Quality Council.

Way Back Machine



1971

Spring: MEPA enacted by Legislature

November: Constitutional Convention

1972

June: Voters ratify new state constitution

(MEPA Handbook 2013, pages 2-4)

To jump back into the way back machine...The Legislature enacted MEPA just prior to the Constitutional Convention. Therefore, the new Constitution to some extent reflects the language of MEPA.

MEPA, the Foundation



The Montana Constitution

Article II, section 3. The right to a clean and healthful environment.

Article II, section 8. The right of participation.

Article II, section 9. The right to know.

Article IX, section 1. Requiring the state and each person to maintain and improve a clean and healthful environment in MT for future generations.

(MEPA Handbook 2013, page 3)

The noteworthy constitutional provisions are listed on the slide.

The state Supreme Court has subsequently ruled that these rights are fundamental rights, that they are interrelated and interdependent, and that any state action that implicates the right to a clean and healthful environment will only be upheld if it furthers a compelling state interest and only minimally interferes with the environmental right while achieving the state's objective.

If Implemented Correctly

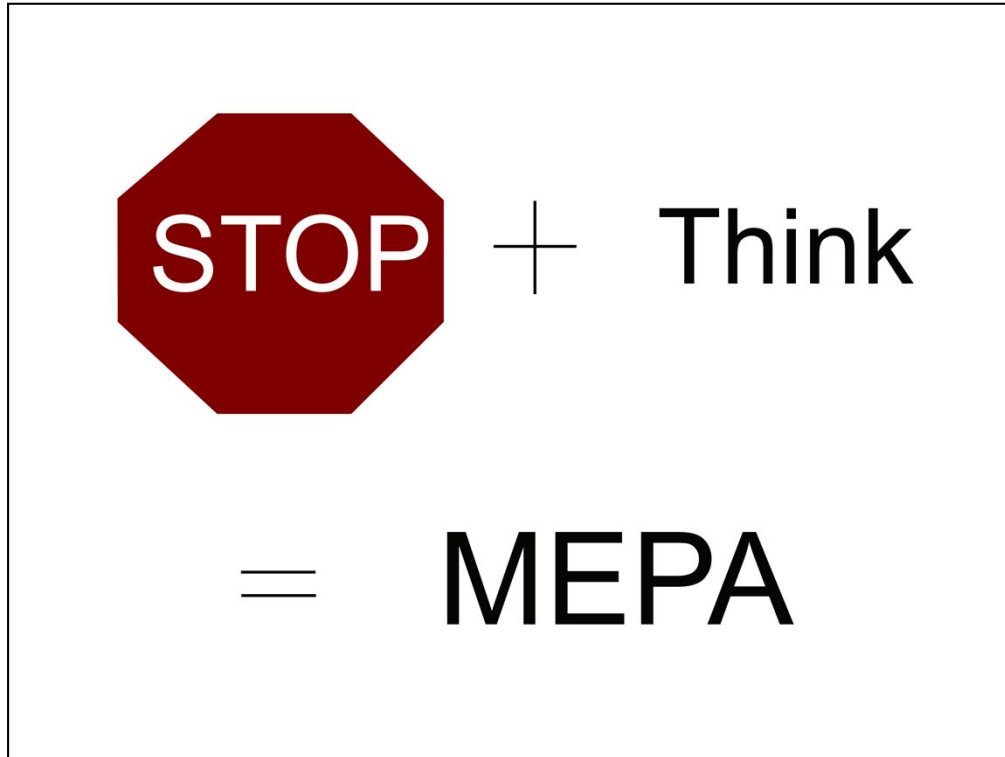
...MEPA should facilitate the ability of state agencies to make BETTER decisions

MEPA ultimately is the legislative tool to ensure the balance between these rights and state action. Though the state Supreme Court ruled in 1979 that there is no indication that MEPA was enacted to implement the clean and healthful provision of the constitution (*Kadillak v The Anaconda Co.*), since MEPA preceded the Constitution.

If implemented correctly, MEPA should facilitate the ability of state agencies to make better decisions.

Not only should better decisions be balanced decisions -- maintaining a clean/healthful environment without compromising people's livelihoods -- they should also be accountable -- clearly explaining the agency's reason for selecting a particular action and made with public participation.

The takeaway here is that better decisions are also more legally defensible.



In essence, MEPA is a “think before you act” Act.

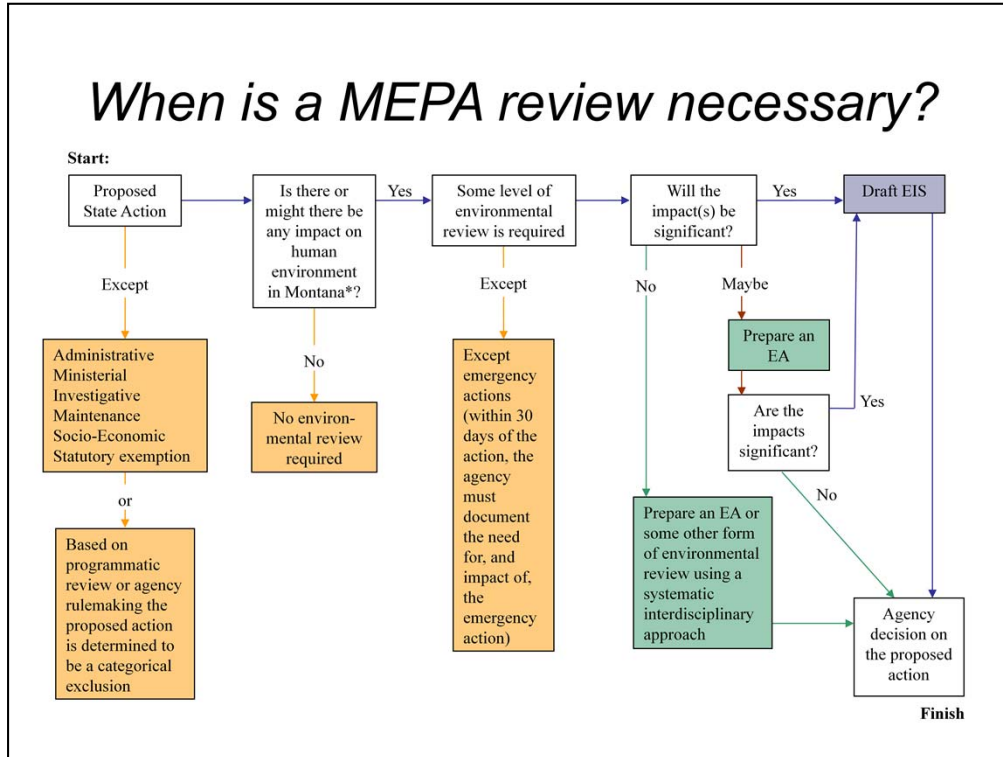
Both state and federal courts have called it “the hard look” and have described MEPA as a series of procedural steps to review actions of state government in order to make informed decisions.

MEPA, the Bricks



So now that we've established the foundation of MEPA, let's get to the bricks that make the structure.

When is a MEPA review necessary?



We'll walk through the MEPA flowchart.

Our first core question today: when is a MEPA review necessary? To answer that question, we have to start in the upper left corner of the MEPA flowchart.

When is a MEPA review necessary?

Proposed
State
Action

“action” – an activity that is undertaken, supported, granted, or approved by a state agency

(MEPA Handbook 2013, page 115, MEPA Model Rule II: Definitions)

Whether a MEPA review is required depends on the kind of state action being proposed.

A state action is an activity that is undertaken, supported, granted, or approved by a state agency.

i.e. land acquisition, highway/road construction, rulemaking, contracts, funding, a lease, permit, license, certificate, or other entitlement for use or permission to act by the agency

‘Action’ is pretty all encompassing. However, there are some state actions that are by their nature excluded from MEPA review.

When is a MEPA review necessary?

Start:

Proposed State Action

“exempt actions” – do not require review under MEPA because of their special nature

Except

Administrative
Ministerial
Investigative
Maintenance
Socio-Economic
Statutory exemption

Administrative
Ministerial
Investigative
Maintenance
Socio-economic

or

Based on programmatic review or agency rulemaking the proposed action is determined to be a categorical exclusion

“categorical exclusion (CE)” – applies to actions that don’t individually, collectively, or cumulatively cause significant impacts to the human environment in Montana, as determined by rulemaking or programmatic review, and for which it’s been determined an EA or EIS is not required

(MEPA Handbook 2013, pages 25, 144)

These are called ‘Exempt actions’ and they don’t require MEPA review because of their special nature. These includes administrative, ministerial, investigative, maintenance, and primarily socio-economic actions. These are laid out in detail on page 25 of your handbook.

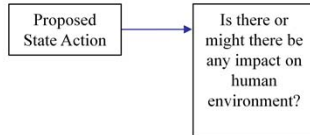
The Legislature has also exempted certain actions from MEPA Review

And, agencies have exempted certain actions – known as categorical exclusions – from MEPA through rulemaking or programmatic review because the actions don’t individually, collectively, or cumulatively cause significant environmental impacts.

A full list of the types of exempted activities is in the back of the Handbook, Appendix C, page 144.

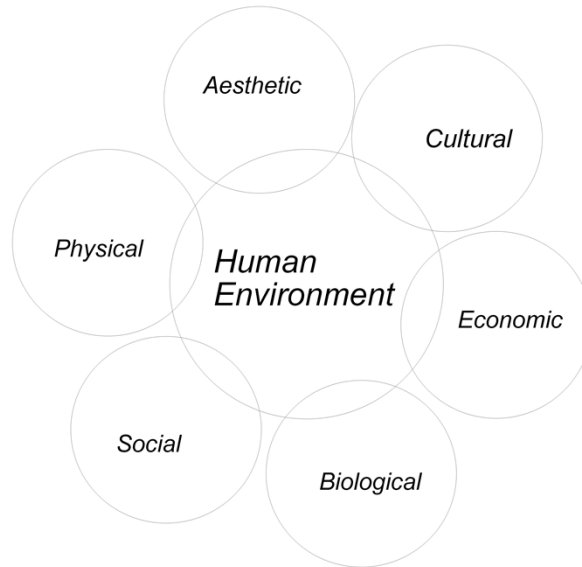
When is a MEPA review necessary?

Start:



Once you've considered whether your proposed action is exempt from MEPA, and for the sake of continuing, we'll say that it's not...you must ask yourself whether the proposed action would impact the human environment.

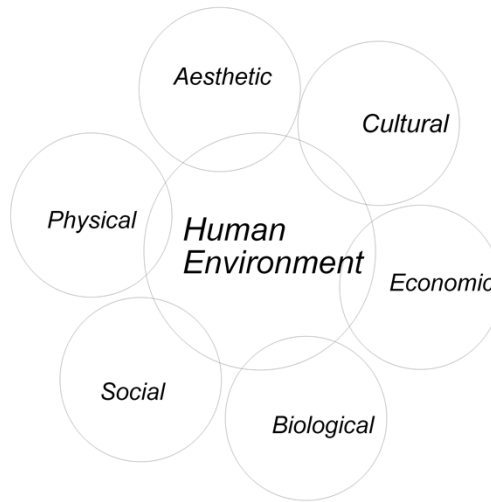
Human Environment



The 'human environment' includes biological, physical, social, economic, cultural, and aesthetic factors.

Sounds pretty big right?

Human Environment within Montana



The 2011 Legislature put some geographic arms around the term human environment by limiting it to the human environment within Montana's borders, though lawmakers did provide some exceptions.

Human Environment within Montana

Except:

- If the environmental review is conducted by FWP for the management of wildlife and fish
- or
- a review beyond Montana's borders is required by law, rule, regulation, or a federal agency

75-1-201(2)(b), MCA, 2011

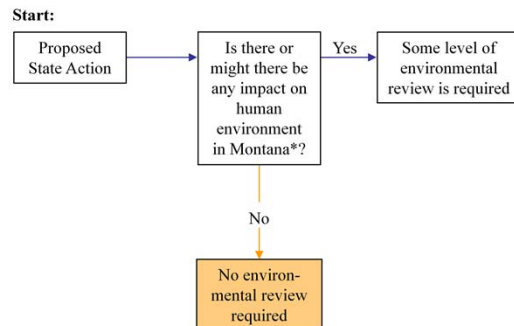
The 2011 Legislature said that an environmental review may include a review of actual or

potential impacts beyond Montana's borders if it is conducted by:

- (i) the department of fish, wildlife, and parks for the management of wildlife and fish;
- (ii) Or the review is required by law, rule, or regulation or a federal agency.

(paraphrasing)

When is a MEPA review necessary?



Now, going back to the MEPA flowchart. If your proposed action will not have an impact on the human environment in Montana, you don't have to conduct an environmental review.

If it will, or it might, or you're not sure, some level of environmental review is required. And to determine what level, we have to talk about impacts.

***n.* im-pakt**

Any change from the present condition of the environmental resource or issue as a result of the agency action.

An impact may be adverse, beneficial, or both.



(MEPA Handbook 2013, page 39)

Impacts and the consideration of those impacts are the real bricks of the MEPA structure. An impact is any change from the present condition of the environmental resource or issue as a result of the agency action. An impact may be adverse, beneficial, or both. Another way to think of an impact is the effect half of a cause/effect scenario.

Types

Direct – occur at the same time and place as the action that triggers the effect

Secondary – occur at a different location or later time than the action that triggers the effect

Cumulative – collective impacts when considered in conjunction with past, present, and future actions of the state and non-state entities

Residual – impacts not eliminated by mitigation



(MEPA Handbook 2013, page 40-41)

There are four types of impacts.

Direct occur at the same time and place as the action that triggers the effect.

Secondary or indirect impacts that occur at a different location or later time than the action that triggers the effect.

Cumulative impacts are collective impacts when considered in conjunction with past, present, and future actions

Residual impacts are not eliminated by mitigation measures.

Regardless

...of the degree or intensity of an impact, or whether its adverse or beneficial or both, if there is an impact an environmental review must be conducted

Except:

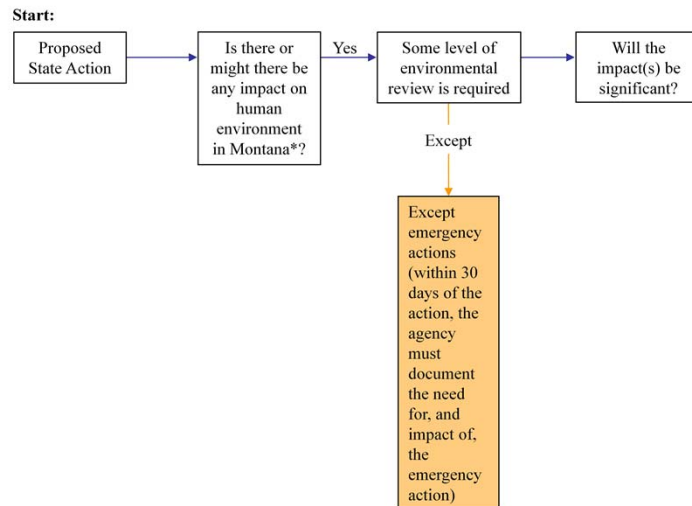
- for actions that are exempt
- in an emergency



The takeaway here is that, regardless of the degree or intensity of an impact, which we'll get to later, or whether its adverse or beneficial, if your proposed action would impact the human environment, some kind of environmental analysis has to be conducted

That's of course, except when an exclusion applies, or in the case of an emergency, in which the agency has 30 days following the action to document the need for, and the impact of, the action

When is a MEPA review necessary?



To determine what level of analysis has to be conducted and therefore what form your MEPA review must take, you now have to consider whether the possible impacts of the proposed action will be significant.

Significance is the key to determining whether your environmental review will be an EA (an environmental assessment) or an EIS (an Environmental Impact Statement).

However, there is no exact definition of significance. MEPA and the MEPA Model Rules provide guidelines, but no actual threshold. That will be up to your agency to figure out.

So, how does an agency go about doing that??

Significance

To determine **significance**, and whether you need to prepare an EA or an EIS, start by considering:

- 1) the **scope** and magnitude of the proposed action
- 2) the **characteristics of the location** where the activity would occur



(MEPA Handbook 2013, page 27-28)

To determine significance, you start by considering the scope and magnitude of the proposed action and the characteristics of the location where the activity will occur. i.e. is this location critical habitat for a threatened or endangered species?

Significance

...must be determined for an impact/action on a **case-by-case basis**, considering:

- Severity
- Duration
- Geographic extent
- Frequency
- Probability of occurrence
- Growth-inducing/inhibiting?
- Quality/quantity of affected resource and importance of that resource
- Contribution to cumulative impacts
- Precedent setting
- Conflict with local, state, federal law



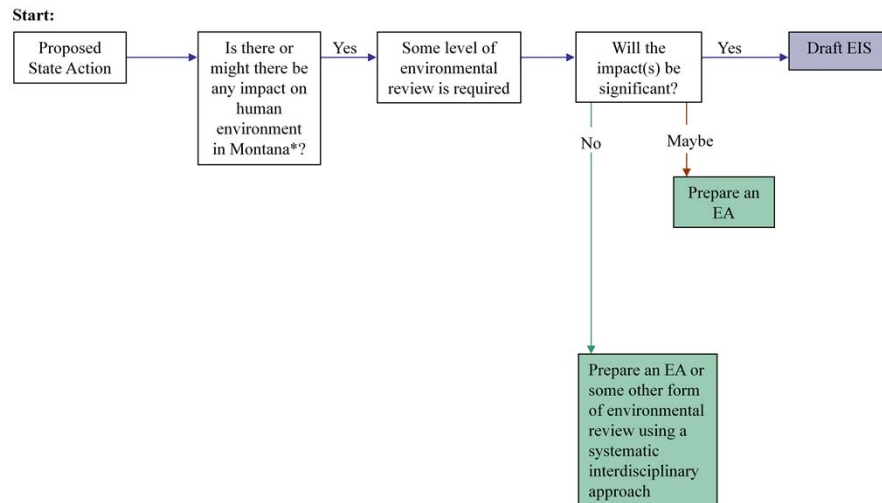
(MEPA Handbook 2013, page 120
MEPA Model Rule IV: Determining the Significance of Impacts)

Each agency has developed its own criteria; be sure to review your agency's rules; if there's a call to be made, it will be the agency's decisionmaker who settles the question; it will be up to your MEPA practitioners to provide the necessary data and analysis for you to make an informed decision.

Remember, the project sponsor can appeal a determination of significance to the appropriate board under statute.

****Keep in mind that controversy is not a significance criteria in MEPA, though it is in NEPA.****

What form will the MEPA review take?



If you determine the impact or impacts of a proposed action will NOT be significant, then an EA is prepared

If you're not sure, you prepare an EA to analyze the situation further

If you determine the impacts will be significant, then you have to prepare the more complex EIS.

One other caveat to this process of deciding what form your MEPA review will take is that (next slide)

What form will the MEPA review take?

Exception:

When other statutory requirements do not allow sufficient time for an EIS, a generic EA may be prepared.

(MEPA Handbook 2013, page 119
MEPA Model Rule III(3)(c): General requirements for Environmental Review)

When other statutory requirements do not allow sufficient time for an EIS, a generic EA may be prepared.

This substitution has been upheld by the courts; an example is the open cut mining permits issued by the DEQ

EA vs. EIS



A quick review on the differences and similarities of an EA and and EIS

MEPA, Terminology



“interdisciplinary approach” – a process for environmental review that incorporates all of the appropriate perspectives and disciplines from the various sciences and the environmental design arts

(MEPA Handbook 2013, page 65)

Both require a systematic, interdisciplinary approach that incorporates all of the perspectives and disciplines from the various sciences and the environmental design arts.

This ensures consideration of all impacts and a public decisionmaking process, which again should lead to better decisions which are also more legally defensible.

Environmental Assessment (EA)

Statutes and Rules:

General directions, impact evaluation, content	75-1-201, MCA MEPA Model Rules III, IV, V
Timelines	75-1-208, MCA MEPA Model Rule XXIII
Public review & hearing	MEPA Model Rules VI, XXIII
Appeals	75-1-201 and 208, MCA
Definitions	75-1-220, MCA MEPA Model Rule II

For use as an office reference, we've provided lists and statutes and rules that apply to an EA and an EIS.

Environmental Impact Statement (EIS)

Statutes and Rules:

General directions, impact evaluation, content	75-1-201, MCA MEPA Model Rules III, IV, VII, VIII, IX, XI, XII
Fees	75-1-202, 203, 205 through 207, MCA MEPA Model Rules XXIV, XXV, XXVI
Timelines	75-1-205 and 208, MCA MEPA Model Rules X, XII, XXIII, XXIV, XXV,
Public Review	MEPA Model Rule XXIII
Appeals	75-1-201 and 208, MCA
Definitions	75-1-220, MCA MEPA Model Rule II

Here's the list for an EIS

EA vs. EIS

Procedural and substantive differences



Substantively, an EA and EIS are very similar – though the substantive analysis will vary by depth and scope based on the complexity of the proposed project, its location, and significance of impacts. Procedurally, an EA and EIS can be very similar, but you have a lot more discretion with an EA about whether to take public comment and whether to respond to those comments. Draft revisions of an EA are also discretionary, while a draft EIS is required.

Keep in mind that your agency may have established policies or procedures for taking public comment and public involvement that are more stringent than MEPA. If your agency has, be consistent in your use of them because the public you typically interact with has probably developed expectations based on those policies. If you're not going to follow a certain protocol, be upfront about it. Tell people why you're not following that protocol, that you're doing something different.

MEPA, the Mortar



Analysis

For our third core question, “How is a MEPA document completed?” – We’re going to get to the mortar of MEPA, the analysis.

A MEPA document is driven by its analysis, and the steps that go into producing that analysis.

How to complete a MEPA document?

Regardless of what kind of environmental review you're preparing, it should include:

- a description of the proposed action – its purpose & need
- a description of the affected environment
- a description and analysis of reasonable alternatives
- an evaluation of the impacts
- a listing and evaluation of appropriate mitigation measures



(MEPA Handbook, pages 33, 120, & 124, MEPA Model Rules V and IX)

Regardless of whether you're preparing an EA or EIS, MEPA Model Rules V and IX require that your document include:

A description of the proposed action -- its purpose and need

A description of the affected environment --- what is the current condition?

A description and analysis of reasonable alternatives – though the scope & depth of analysis can vary greatly between an EA and EIS

An evaluation of the impacts

And a listing and evaluation of appropriate mitigation measures

MEPA, Terminology

“scope” – the full range of issues that may be affected if an agency makes a decision to implement a proposed action

“scoping” – the process used to identify all issues relevant to the proposed action. This includes public participation.

“issue” – clear statement of a resource that may be adversely affected – a problem or unresolved conflict that may arise

(MEPA Handbook 2013, page 35-36)

We've used that phrase the “scope of the analysis” a couple times now...

The scope of the analysis is the full range of issues that may be affected if an agency makes a decision to implement a proposed action.

Scoping is the process used to identify all issues relevant to the proposed action.

An issue is a clear statement of a resource that might be adversely affected by some specific activities that are part of a proposed action. Stated another way, an issue is a problem or unresolved conflict that may arise should the agency's objectives be met as proposed.

Issues and project objectives systematically drive the environmental review process. The issues establish the framework for the development of alternatives, the description of the affected environment, the determination of which resources must be evaluated in the analysis, and the complexity of the analysis.

MEPA, Terminology

“public participation” – a process by which interested and affected individuals, groups, and agencies are consulted and included in the decisionmaking of an agency

(MEPA Handbook 2009, page 29)

Public participation is the process by which interested and affected individuals, organizations, and agencies are consulted and included in the decisionmaking of an agency.

Article II, section 9 of the Montana Constitution guarantees any person the right to examine documents or observe deliberations of all aspects of state government, except in cases where the demand for individual privacy exceeds the merits of public disclosure, i.e., personnel matters

MEPA and the MEPA model rules require that members of the public have the opportunity to be involved in the environmental review process, though to what degree depends on the complexity of the project, the seriousness of the potential impacts, and the level of public interest in the proposed action.

At the very least, the public has to be able to have access to MEPA documents and inspect them upon request. Beyond that, for an EA, the agency's responsibility to provide public involvement in the process is largely discretionary.

The public's process in the EIS process is mandatory. MEPA Model Rules require a scoping process for an EIS. MEPA Model Rule XII (12), sets a minimum 30-day public comment period for the draft EIS and a 15-day public comment period for the final EIS. Your agency specific rules may differ.

MEPA, Terminology

“public participation” is NOT

- Public relations
- A popularity vote
- Public information

(MEPA Handbook 2013, page 44)

A word about what public participation is not. Public participation should not be mistaken for public relations, which seeks to present information in the best possible light.

Public participation is also not a measure of how many people favor or oppose a proposal.

It's not even public information, which is one-way communication that only seeks to inform the public. The purpose of public participation is two-way participation—to inform and solicit responses from the public.

One of the central premises of MEPA is informed decisionmaking. Without public participation, a truly informed decision is unobtainable.

Scoping is often the first opportunity for public involvement in the MEPA process, and as said earlier will help you develop the rest of the key components of your environmental review

How to complete a MEPA document?

Scoping: Relevance

Comments are relevant if they identify:

- An issue
- Ways to measure effects of impacts and the potential significance of those effects
- Ways to mitigate impacts

Comments are NOT relevant if they are:

- Beyond the scope of the proposed action
- Unrelated to decision being made
- Already decided by law, rule, policy
- Conjectural or not supported by scientific evidence
- A general comment or position statement



Source: U.S. Forest Service "Introduction to NEPA 2016"

A couple thoughts on scoping, it can generate all kinds of comments for your agency to wade through. As a decisionmaker, your interdisciplinary team may involve you if they're having difficulty deciding whether a comment is relevant.

The decision about what the environmental review should contain is the agency's decision. Even if you don't agree with a comment, at least you will know what the interested parties consider the principal areas for analysis.

How to complete a MEPA document?

Developing Alternatives

Alternatives provide different ways to accomplish the same objective as the proposed action

No Action Alternative

What happens if the proposed action does not take place, or there's no change from the status quo (i.e. existing management)



The issues identified during scoping will help your agency develop and analyze alternatives for the environmental review. Alternatives provide different ways to accomplish the same objective as the proposed action.

Depending on the proposal, you may or may not have to conduct an alternatives analysis. When in doubt, consult your attorney.

When considering alternatives, MEPA requires you to consider reasonable alternatives that are achievable under current technology and that are economically feasible. This standard was added to MEPA by the Legislature in 2001, but I believe first stated in an opinion by the Montana Supreme Court in 1982 (MT Wilderness Assc. v Board of Natural Resources and Conservation). That opinion leaned on a 1973 NEPA ruling by the Ninth Circuit (Life of the Land v. Brinegar), which stated NEPA should not be “employed as a crutch for chronic faultfinding. Accordingly, there is no need for an EIS to consider an alternative whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative. Rather, the EIS need only set forth those alternatives ‘sufficient to permit a reasoned choice’.”

Statute also calls for a “no action” alternative.

An agency proposing alternatives is required to consult with the project sponsor regarding any proposed alternative and give due weight and consideration to the project sponsor’s comments.

Here’s another change made by the 2011 Legislature:

If the alternatives analysis is conducted for a project that is not a state-sponsored project – so a

private actor for instance wanting a permit to undertake a project -- and alternatives are recommended, the project sponsor may volunteer to implement the alternative but is not bound to do so.

75-1-201, MCA

The 2011 Legislature also specifically defined "alternatives analysis" such that for a non state-sponsored project, the analysis cannot include an alternative facility or an alternative to the project itself. 75-1-208, MCA

How to complete a MEPA document?

Impacts Analysis

- How to apply direct, indirect, cumulative impacts concepts
- Determine site-specific impacts
- Consider beneficial and adverse impacts
- Use meaningful measures of change
- Provide evidence to support findings



Source: U.S. Forest Service "Introduction to NEPA 2010"

Once the alternatives are developed, it's time to analyze their impacts.

When analyzing impacts, the agency must consider direct, indirect, and cumulative impacts, site-specific impacts, beneficial and adverse impacts, how the impacts will be measured, and how the analysis will be documented, including evidence to support the agency's conclusions.

When measuring impacts, measurements must be quantifiable, understandable, and sensitive enough to record the change that would occur. As a decisionmaker you have to be able to understand what the measurement is and how it characterizes the attribute.

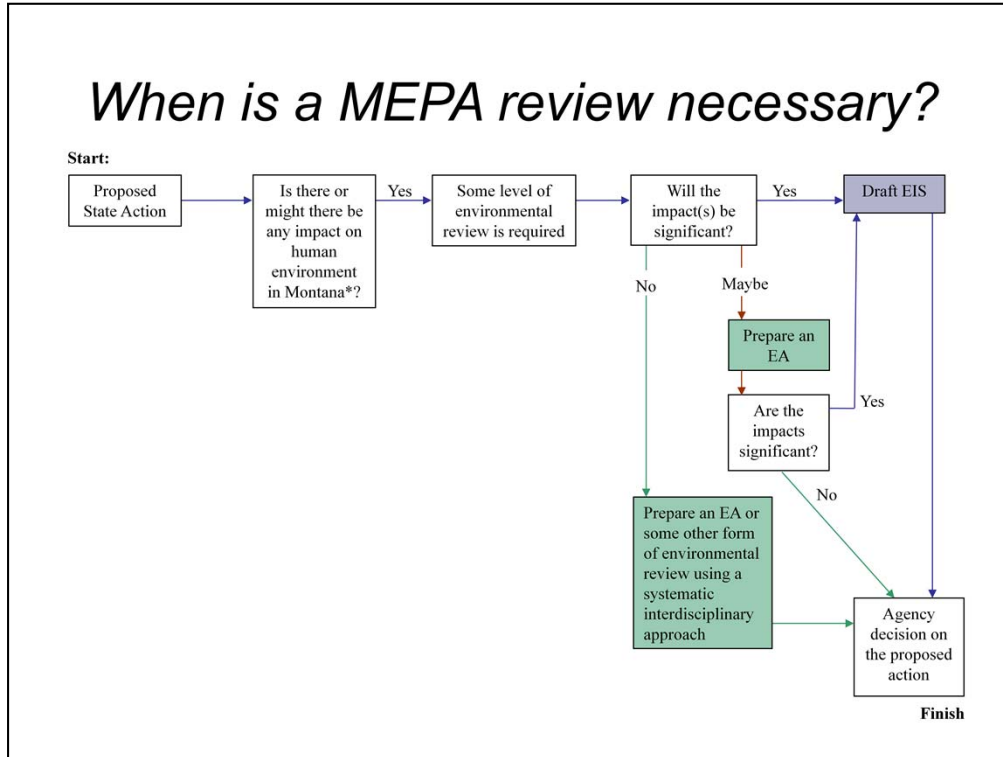
The person writing the analysis should provide you with some context by describing the existing condition of the effected environment and then the extent of the change that would occur. That will help you determine whether an impact is significant or not.

The writing throughout the MEPA document, and in your decision document, needs to be specific. Courts have held that "general statements about 'possible' effects and the existence of 'some risk' do not constitute a 'hard look' absent a justification

regarding why more definitive information could not be provided. (MT Wildlife Federation v. MT Board of Oil and Gas Conservation, 2012)

Remember, there's no defined threshold for significance. Significance is based on the context of the situation. The analysis needs to lay out the evidence clearly so that you as the decisionmaker and the public can understand how those conclusions were reached.

When is a MEPA review necessary?



Round out the MEPA flowchart here.

If we knew the impacts would be significant we went straight to an EIS. If we knew they were not, or we weren't sure, we conducted an EA.

Coming out of the EA, if the impacts are found to be significant then you head to an EIS. If the impacts are found to be not significant, you can proceed to agency decisionmaking! And when you're done with your EIS, you can proceed to decisionmaking.

MEPA & Decisionmaking



Now to answer our fourth and final question: How are decisions made with MEPA?

Ever feel like this?



Ever feel like this?

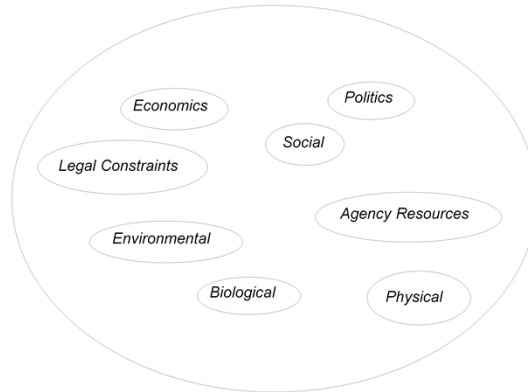
Neither MEPA nor the MEPA Model Rules specifically tell agencies how they should use the products of the environmental review process in their planning and decisionmaking. However, one of the purposes of MEPA is to foster better, more informed, and wise decisions. State agencies are required to think through their actions before acting. This process necessitates an objective environmental review.

If done objectively and thoroughly, the alternatives analysis should provide a clear basis for choice by comparing impacts and sharply defining the issues. That doesn't mean you won't still have hard choices.

But comparing alternatives may help to either identify hidden assumptions or validate the rationale behind a proposed action.

How are decisions made with MEPA?

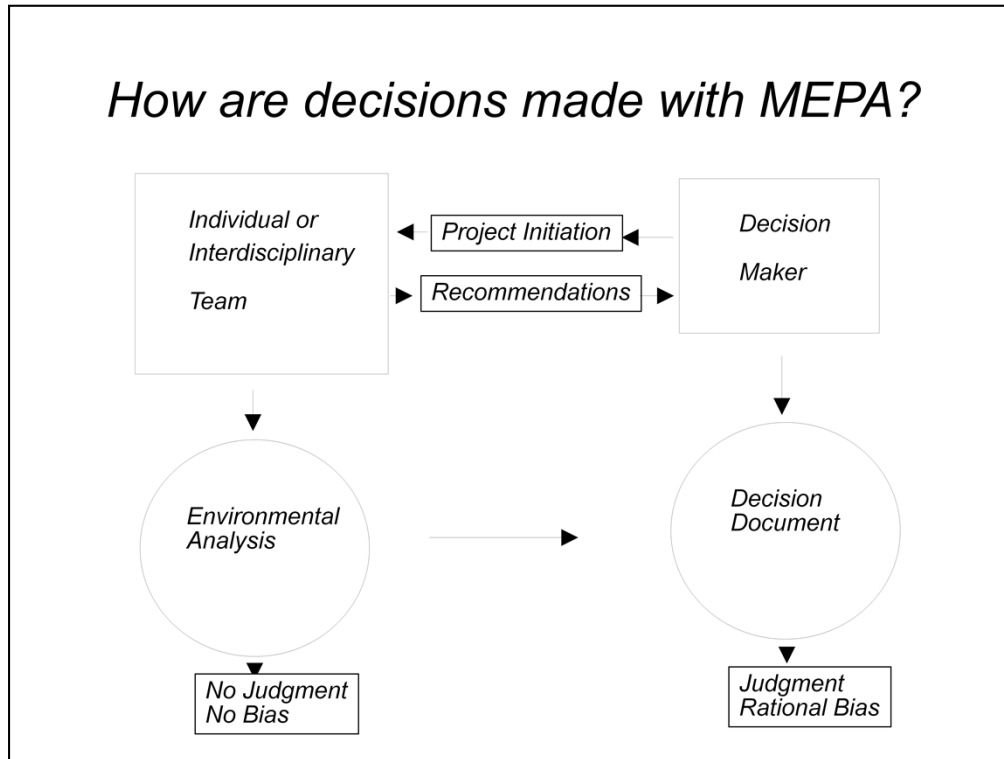
Decision Bubble



Part of the reason the job of the decisionmaker can be difficult is that you have many considerations, in addition to environmental factors.

While the MEPA document must be objective, the decisionmaking process may involve discretion, judgment, and even bias. (That's why document preparers have to be different than decisionmakers.) That can sometimes make things uncomfortable between decisionmakers and MEPA practitioners writing the documents.

How are decisions made with MEPA?



Here's a graphical look at how the two sides interact...MEPA practitioners on the left, Decisionmaker on the right

The basis for your decision/judgment must be founded, at least in part, on the unbiased MEPA analysis they've prepared, and the rationale must be included in the final document.

How are decisions made with MEPA?

Procedural Requirements

MEPA Model Rules require a Record of Decision (ROD) for an EIS.

The specific procedural requirements for a ROD are found in MEPA Model Rule XVII on page 87 and 88 of your handbook.

What that final document looks like can vary.

MEPA rules require a record of decision (ROD) for an EIS.

The ROD is a concise public notice that announces the decision, explains the reasons for the decision, and explains any special conditions surrounding the decision or its implementation.

A ROD is not required for an EA. However, some form of documentation for the decision is advisable. The Model Rules do require, at least, that the agency make a finding on the need for an EIS (MEPA Model Rule V(3)(j) and Rule VI(6)).

Each agency has its own protocols for how decisions are documented.

But documentation and thorough documentation at that is very important.

Some relevant case law

Adequacy of the Record:

Ravalli County Fish and Game Assn. v DSL, 1995

MT Wildlife Federation v. MT Board of Oil and Gas Conservation, 2012

Consideration of federal rulings on NEPA is appropriate:

Kadillak v. The Anaconda Company, 1979

Other statutory timeframes take precedence over MEPA:

Kadillak v. The Anaconda Company, 1979

Standard of Review is Arbitrary, Capricious, or Unlawful:

North Fork Preservation Assn. v DSL, 1988

Reiterated in MEPA

Alternatives must be reasonable:

MT Wilderness Association v. Board of Natural Resources and Conservation, 1982

In a court case called Ravalli County Fish and Game v Department of State Lands (1995), the Montana Supreme Court summed it up by saying “implicit in the requirement that an agency take a hard look at the environmental consequences of its actions is the obligation to make an adequate compilation of relevant information, to analyze it reasonably and, perhaps most importantly, not to ignore “pertinent data”.

In Ravalli, the court referenced a United States Supreme Court ruling on an agency’s failure to create an adequate record, which said “If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.”

In a National Environmental Policy Act case (NEPA) involving the US Department of Interior, the Tenth Circuit said that “Without an administrative record, courts are left to rationalize the agency's decision--a form of review which abandons standards in favor of predilections.” Many state and federal courts have said that kind of speculation is exactly what NEPA (and MEPA) were intended to prevent.

One more note on documentation,

When tiering to another environmental document – and we haven't discussed tiering today, but this point speaks to the adequacy of the record, tiering allows you to incorporate by reference issues addressed in a previous environmental review – the Montana Supreme Court has said in 2012 that an environmental document should make specific reference to MEPA documents to which it is tiered so that members of the public are made aware of the information utilized. (MT Wildlife Federation v MT Board of Oil and Gas Conservation)

In that same case, the Montana Supreme Court said that environmental documents should contain sufficient explanation to provide the public and a reviewing court with a clear statement of reasons to explain why a project's impacts are not significant.

Some other pertinent case law:

Because MEPA is modeled after NEPA, the Montana Supreme Court has long held that it is appropriate to look to federal interpretation of NEPA when MEPA or MEPA case law is lacking. (Kadillak v Anaconda)

Other statutory timeframes take precedence over MEPA. (Kadillak v Anaconda)

The standard of legal review in MEPA cases is whether the agency acted arbitrarily, capriciously, or unlawfully. (N. Fork Preservation Assn. v DSL)

Consider us a resource:

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Montana Environmental Policy Act information
www.leg.mt.gov/mepa

Please consider our office a resource:

Our office has developed a MEPA web page that includes:

- a searchable database of MEPA documents, we are the state repository for these
- an online version of the MEPA handbook
- a legislative history of MEPA
- copies of MEPA training courses for state employees
- documents pertaining to all of the MEPA court cases, since it was enacted