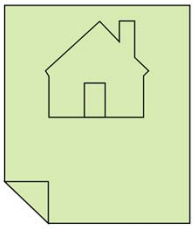
The House that MEPA Built



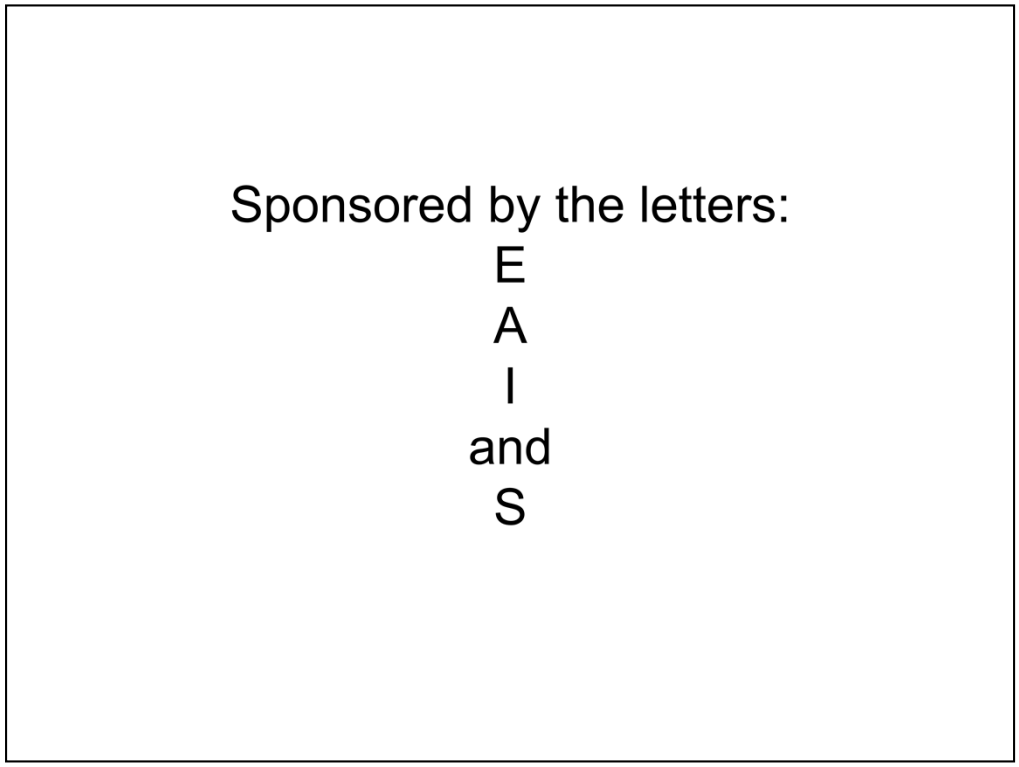
Basics of MEPA

December 10, 2015

Good morning everyone and welcome to our MEPA Training for State Employees, which we have dubbed “The House that MEPA Built” – over the course of the day, we’ll be looking at the foundation of MEPA, its bricks and mortar, and the roof that is decisionmaking.

My name is Hope Stockwell, I am a research analyst with the Legislative Services Division in Helena. I work in the Environmental Policy Office and help staff the Environmental Quality Council in the interims between legislative sessions. The EQC is the legislative body with statutory oversight of MEPA.

Introductions – who you are, MEPA experience, what you want out of today’s class



For Sesame Street fans, today's training is sponsored by the letters E A I and S. If you're not already familiar with those letters, you will be by days' end.

A little history on how this training came about: Our office first offered a MEPA course in the 1990s, at a time when state agencies were faced with a deluge of legal challenges to their MEPA documents. Since then and until 2010, we didn't have the staff resources. We picked back up in 2010 and have provided training for about 230 state employees since then.

My experience with MEPA has been totally academic and I recognize that you may have a better working understanding of MEPA because you use it on a daily basis. The intent of this training is to review the legal framework of MEPA and the core concepts of the process, while incorporating your on-the-ground experience. Especially if there are questions raised that need that real world perspective.

Our purpose…

Our purpose is to help you sort through the tangle that you may consider MEPA.

What are your concerns/questions that you're hoping to address today?

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?

By answering these core questions.

Ultimate goal --

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: its statutes, enacted in 1971, and its constitutional underpinnings, ratified in 1972

To give you some historical context…

MEPA was enacted on the heels of the National Environmental Policy Act, which went into effect on January 1, 1970. NEPA came into existence following increased appreciation for the environment. The 1969 Santa Barbara oil spill was a catalyst. It was the largest spill at the time, though now is third after the Deepwater Horizon spill in 2010 and the Exxon Valdez in 1989. The late 60s were a watershed time for environmental legislation, with the passage of the Wilderness Act and the Clean Air Act. The Clean Water Act came in 1972. Protests over how the Interstate Highway System was constructed in the 60s were also a factor.

Montana has its own environmental legacies…

Way Back Machine

1971

MEPA passes with nearly unanimous support

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

(MEPA Handbook 2015, pages 5-9)

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

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

There's more information about the legislative history in your MEPA Handbook. Pull it out now, as well be referring to it throughout the day. You'll periodically see references to it on the bottom of the slide presentation. We do this so you get used to looking through it and can mark some stuff today with the idea that you'll take it back to your office and use it as a desk reference.

MEPA sets a very high standard for state agencies to follow, which may be at times difficult to achieve. The difficulty was already apparent in 1971. While there seems to have been unanimous agreement about the need for balance, accountability, and public involvement in agency decisions, there were strongly divergent opinions about how to accomplish that.

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.

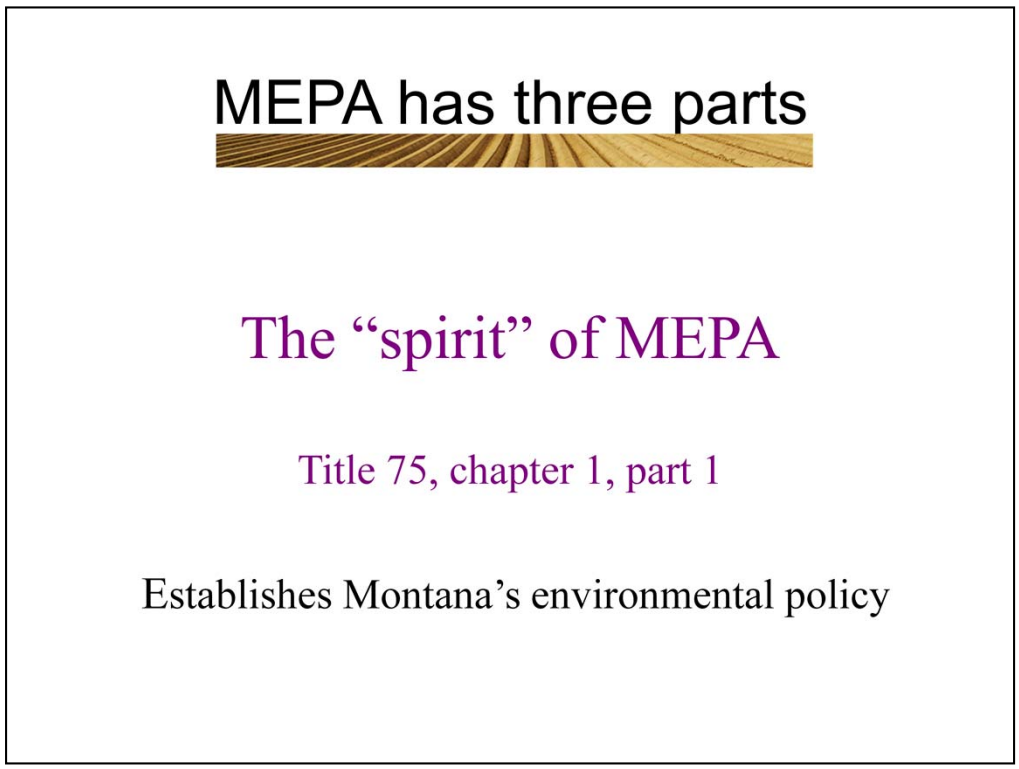
MEPA, the Foundation

The Montana Environmental Policy Act

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

(MEPA Handbook 2015, pages 68-113)

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. The policy:

•Acknowledges that human activity can have a profound impact on the environment; and

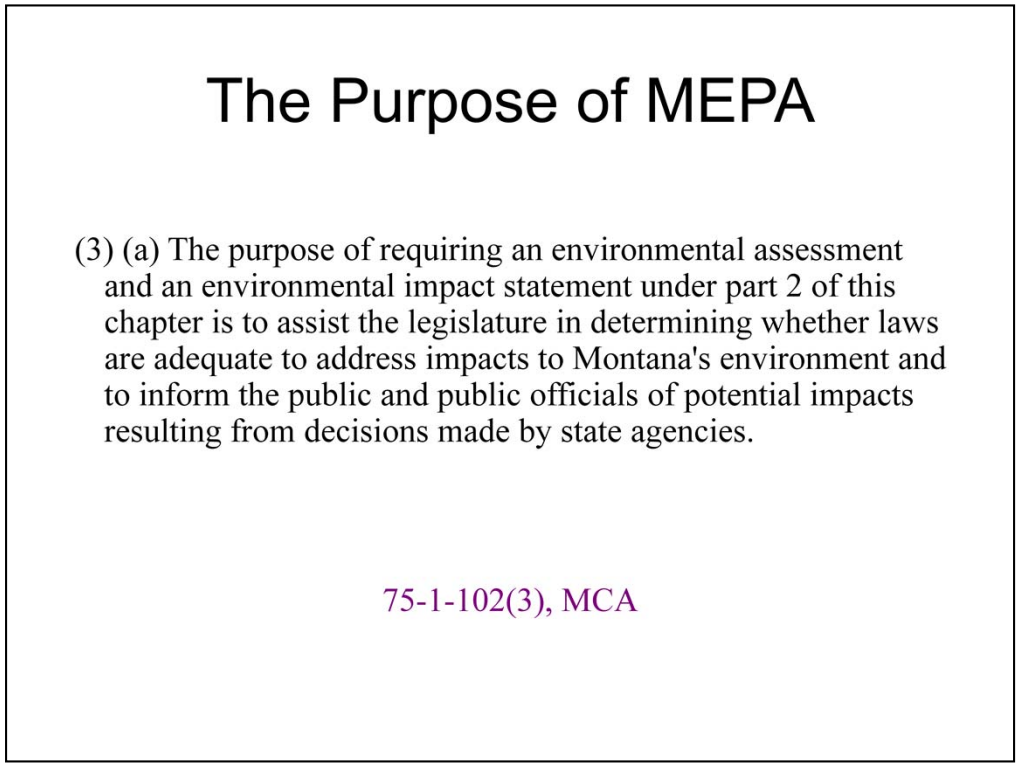
•requires the state to coordinate plans, functions, and resources to achieve various environmental, economic, and social goals.

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

The purpose of MEPA is laid out in this part of statute. Read out loud



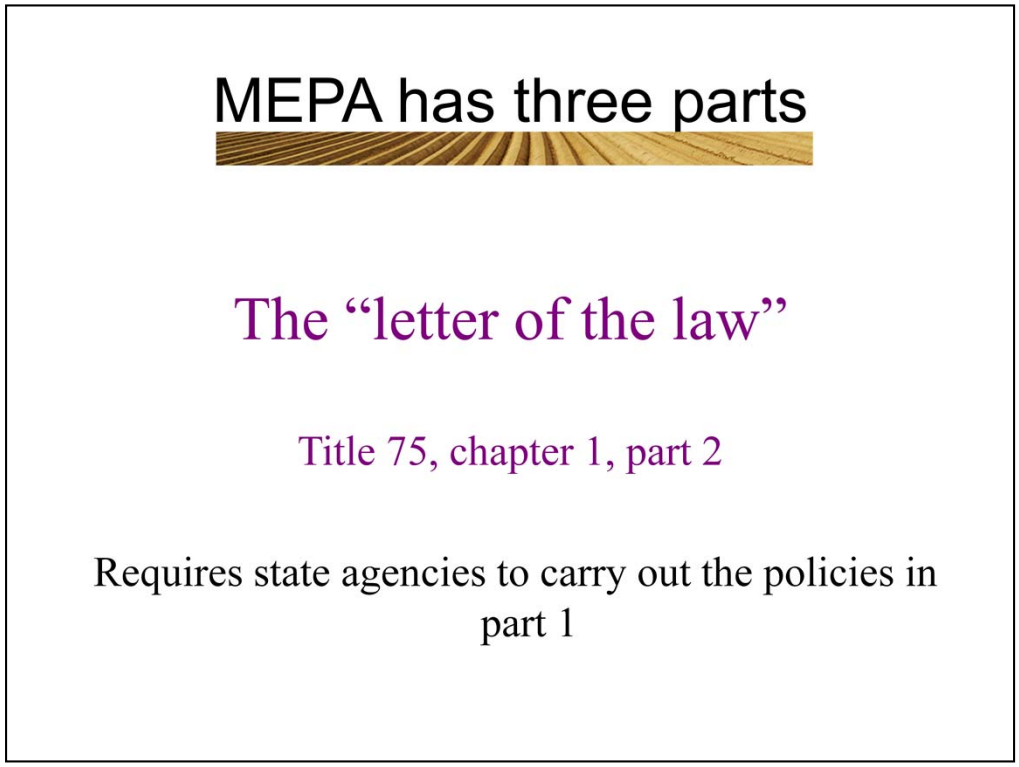
The 2011 Legislature also added a new subsection to the purpose section:

(3) (a) The purpose of requiring an environmental assessment and an environmental impact statement under part 2 of this chapter is to assist the legislature in determining whether laws are adequate to address impacts to Montana's environment and to inform the public and public officials of potential impacts resulting from decisions made by state agencies.

In subsection 3(b), the legislature also clarified further that MEPA is procedural and does not provide for regulatory authority beyond authority already explicitly given to agencies in statute.

***

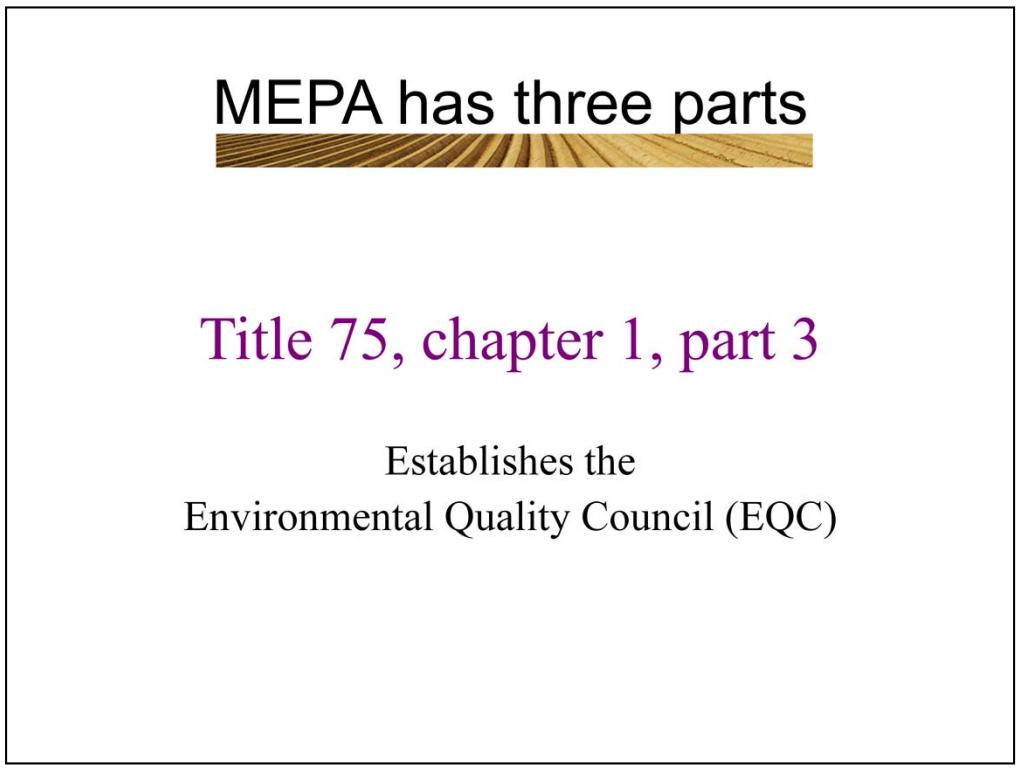
(b) Except to the extent that an applicant agrees to the incorporation of measures in a permit pursuant to 75-1-201(6)(b), it is not the purpose of parts 1 through 3 of this chapter to provide for regulatory authority, beyond authority explicitly provided for in existing statute, to a state agency.



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 set forth in part 1. 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, for which I work. The EQC has legislative oversight of MEPA

Way Back Machine

1971

Spring: MEPA enacted by Legislature

November: Constitutional Convention

1972

June: Voters ratify new state constitution

(MEPA Handbook 2015, 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. All persons have the **right to a clean and healthful environment** and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways.

Article IX, section 1. The **state shall maintain and improve a clean and healthful environment for all generations**. The Legislature shall provide for the administration and enforcement.

(MEPA Handbook 2015, page 3)

The noteworthy constitutional provisions include:

•the right to a clean and healthful environment, and the requirement that the state maintain and improve that environment (next slide)

MEPA, the Foundation

The Montana Constitution

Article II, section 8. Right of public participation.

Article II, section 9. Right to know.

(MEPA Handbook 2015, page 3)

•the right to public participation; and

•the right to know.

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.

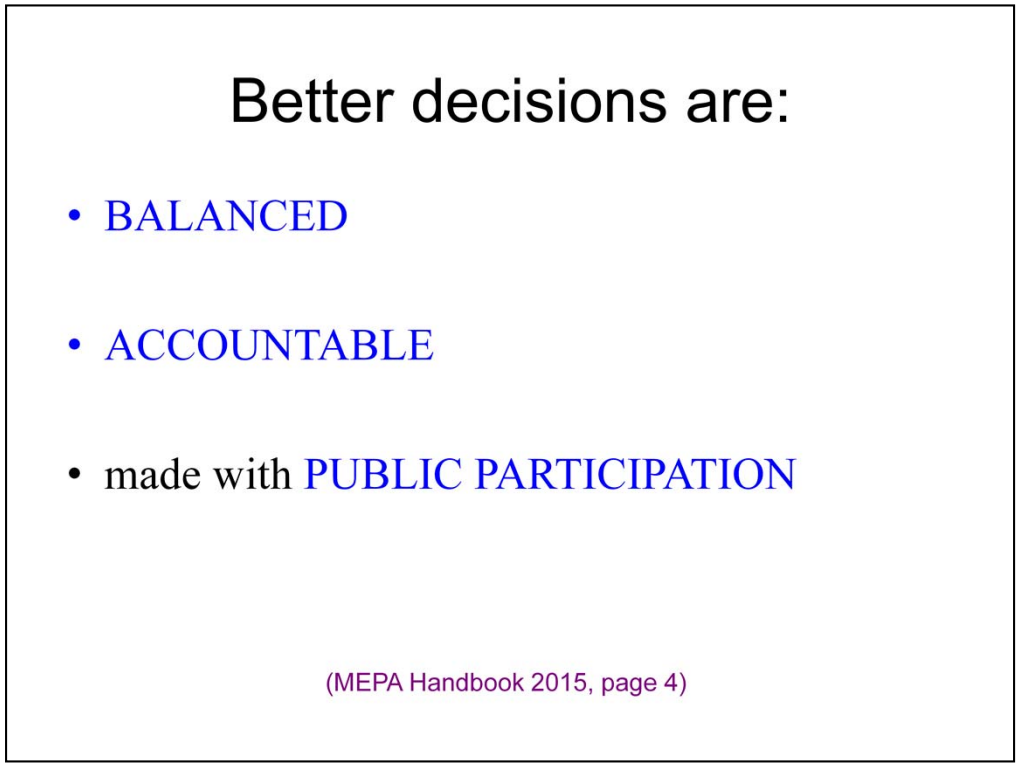
(next slide)

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, the Legislature has subsequently stated in statute that it enacted MEPA mindful of its constitutional obligation to a clean and healthful environment.

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



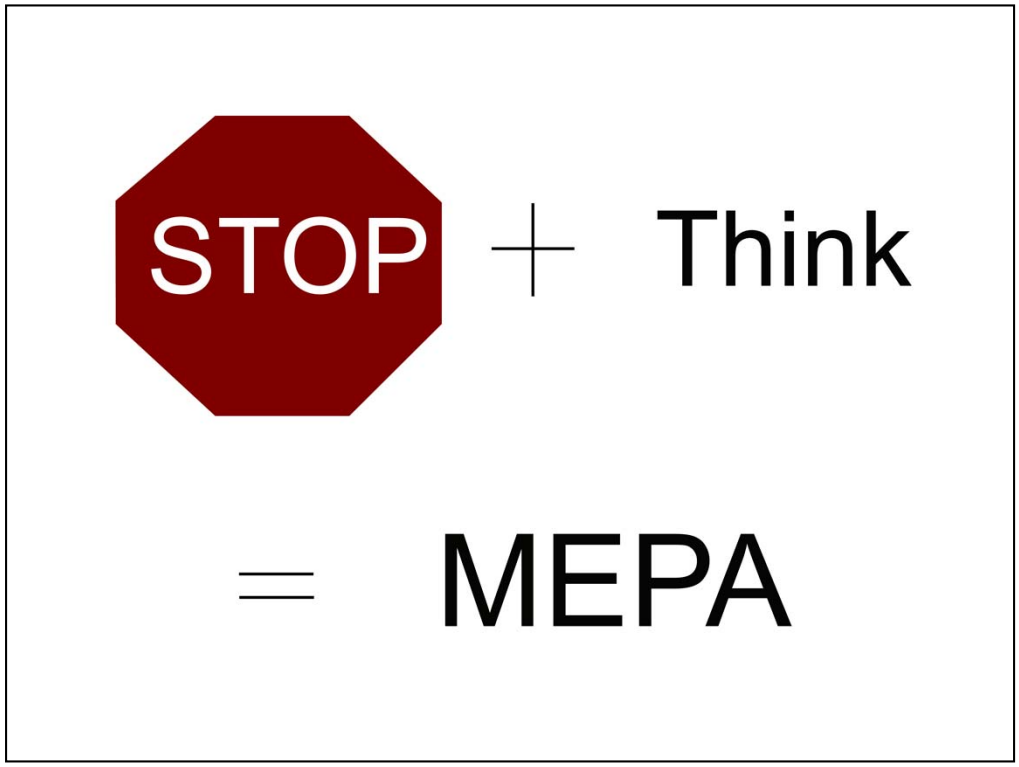
What does that mean?

Incorporating what statute and the constitution tell us, better decisions are balanced -- maintaining a clean/healthful environment without compromising people's livelihoods.

They're accountable -- clearly explaining the agency's reason for selecting a particular action.

And they're made with public participation.

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



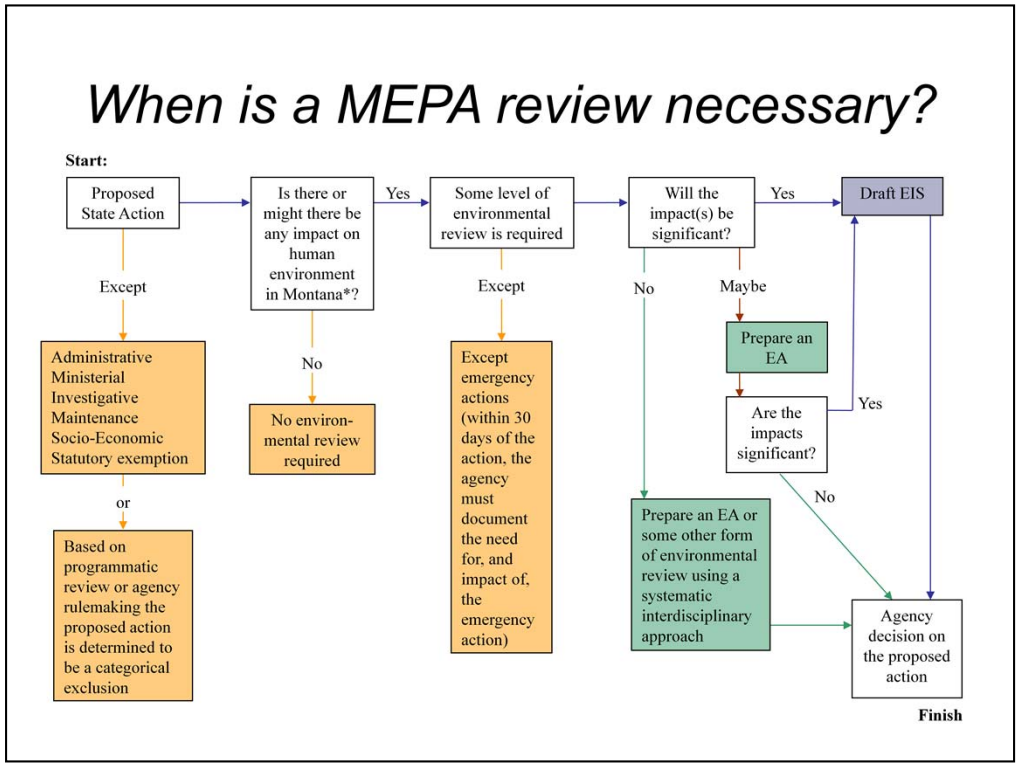
In essence, MEPA is a “think before you act” Act

Both state and federal courts have called it “the hard look”

(And have described MEPA as 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. Here we'll look at our core questions of when is a MEPA review necessary? And, what form will the MEPA review take?



As we work through the structure of MEPA we'll walk through the MEPA flowchart, a copy of which is provided.

When is a MEPA review necessary?

Our first core question today, when is a MEPA review necessary? To answer that question, we have to start with the proposed state action, 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 2015, page 114, 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.

A proposed state action can be:

•An agency project, program, or activity

i.e. land acquisition, highway/road construction, state park development, rulemaking

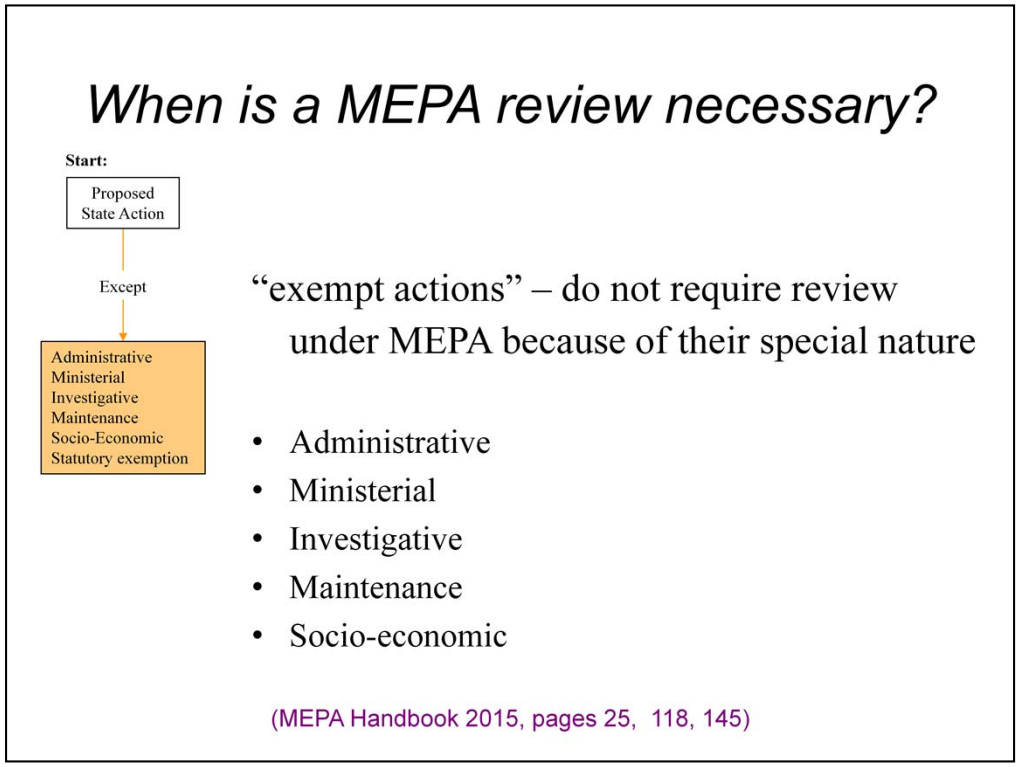
•A project or activity supported by any funding provided by or through an agency

i.e. contract, grant, subsidy, loan

•A project or activity involving issuance of a lease, permit, license, certificate, or other entitlement for use or permission to act by the agency

i.e. grazing lease, hard rock mining permit, roadside zoo permit, meat packing plant license

That word 'action' is pretty all encompassing. However, there are some state actions that are by their nature excluded from MEPA review.



These are called 'Exempt actions' and they don't require MEPA review because of their special nature. These are laid out in detail on page 25 of your handbook.

Administrative actions are those that involve only routine procurement, personnel, clerical, and other similar functions.

Maintenance includes minor repairs, operations, and maintenance of existing equipment and facilities.

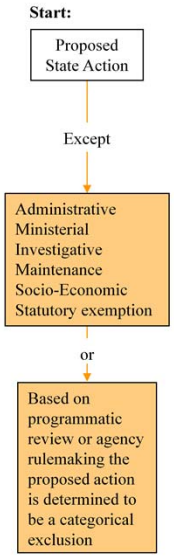
Investigation and enforcement include data collection, inspection of facilities, or enforcement of environmental standards;

Ministerial actions are those in which the agency acts upon only a given state of facts in a prescribed manner and exercises no discretion. (i.e. the sale of a fishing license by Fish, Wildlife, and Parks)

Also exempted are actions that are primarily social or economic in nature, which don't otherwise affect the human environment.

The Legislature has also exempted certain actions from MEPA Review, These statutory exemptions are included in appendix C of the MEPA Handbook on page 143.

When is a MEPA review necessary?



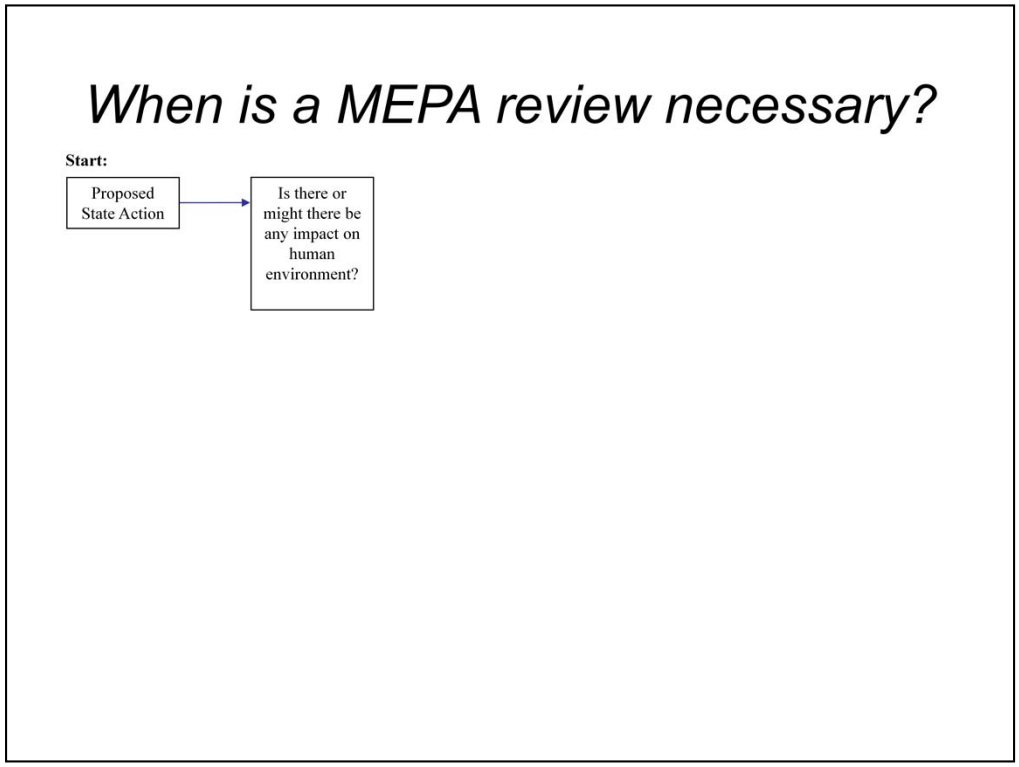
"categorical exclusion (CE)" – applies to actions that don't individually, collectively, or cumulatively cause significant impacts to the human environment in Montana, as determined by rulemaking or programmatic review, and for which it's been determined an EA or EIS is not required

(MEPA Handbook 2015, pages 25, 144)

Aside from exempt actions, there's another category of actions that don't require a MEPA review. These are called categorical exclusions. (read slide)

Typically, in determining what qualifies as a categorical exclusion, your agency has already conducted a MEPA review as part of the rulemaking or programmatic review to determine in fact that the actions don't individually, collectively, or cumulatively cause significant impacts.

DEQ's categorical exclusions are listed in your agency rules. 17.40.318 Time:11:51



Once you consider whether your proposed action is exempt from MEPA, and for the sake of continuing our training, we'll say it's not…you must ask whether the proposed action would impact the human environment. To determine this, it helps to know the definition of human environment (next slide)

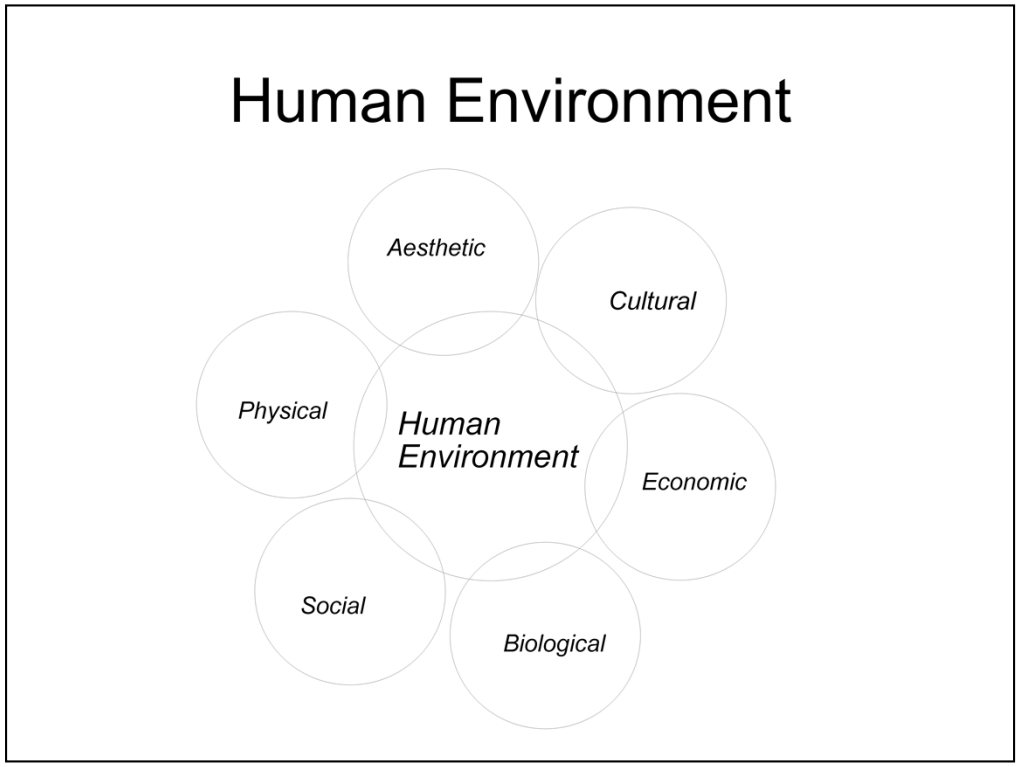
MEPA, Terminology

"human environment" –
that which could be affected by state action
including but not limited to biological, physical, social, economic, cultural, and aesthetic factors that interrelate to form the environment

(MEPA Handbook 2015, page 116, MEPA Model Rule II: Definitions)

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

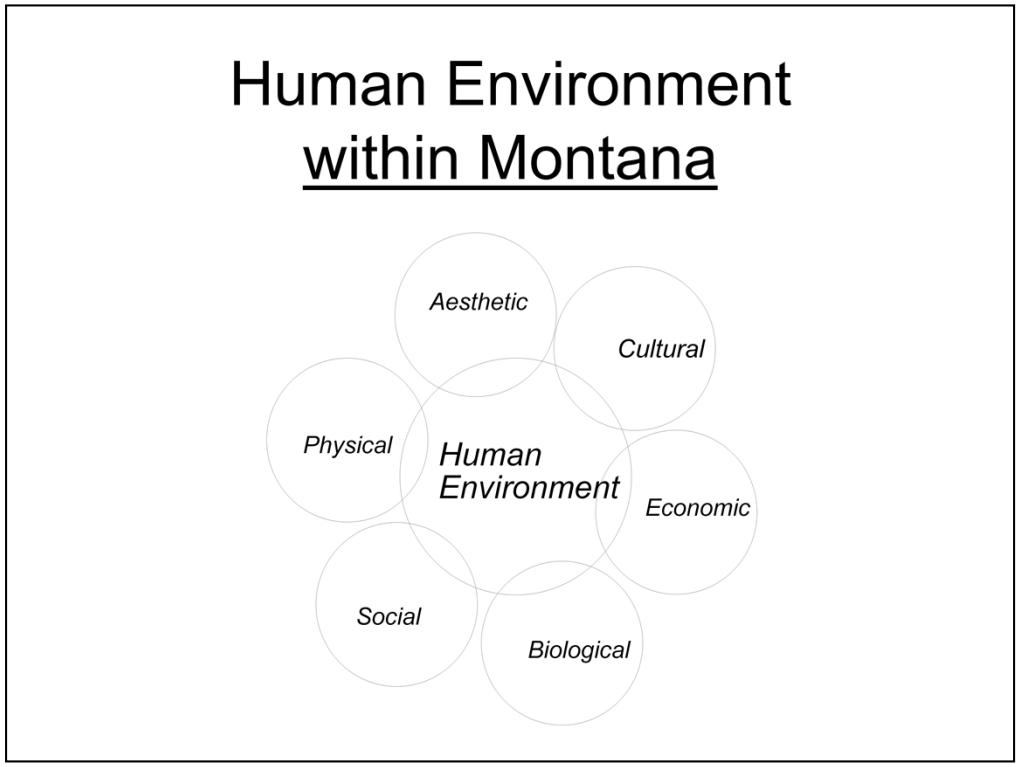
(next slide for picture)



It looks something like this.

Now remember from the earlier discussion of exemptions, if the impact of a proposed action is primarily social or economic in nature, and the human environment is otherwise not affected, a MEPA review is not required

Here's where we need to note one of the changes made to MEPA by the 2011 Legislature.



The Legislature has put some geographic arms around the term human environment by limiting it to the human environment within Montana's borders.

Previously, MEPA said that when conducting an environmental review, agencies had to recognize national impacts….and lend appropriate support …to maximize cooperation in anticipating and preventing a decline in the quality of the world environment.

Now MEPA says an environmental review may not include a review of actual or potential impacts beyond Montana's borders or consider actual or potential impacts that are regional, national, or global in nature.

The heart of that legislative change is the debate over climate change, which we are not going to get into today. I will say previously that climate change presented a challenge to MEPA practitioners when it comes to thinking about how far the impacts of a proposed action reach and especially cumulative impacts, how far you have to draw the line in time and space to determine the cumulative impact of your proposed action and whether it's significant.

A national guideline has been developed for NEPA, the National Environmental Policy Act, to provide some assistance on that front. But that doesn't apply under MEPA.

The 2011 Legislature says you are now to consider the human environment within Montana

But the legislature 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

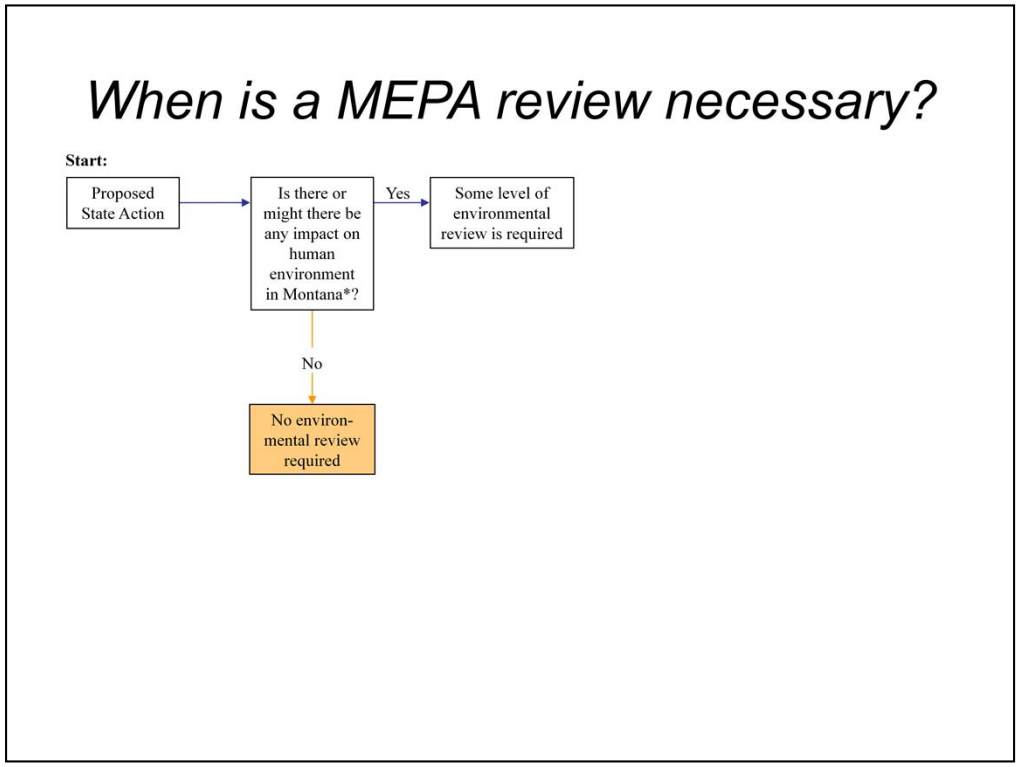
The 2011 Legislature said that an environmental review may include a review of actual or

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)



Now, going back to the MEPA flowchart. Will your proposed action have an impact on the human environment in Montana? (or in certain circumstances, outside of Montana?)

If the answer is no, you don't have to conduct an environmental review.

If the answer is yes, or there might be, 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.

Impacts

(MEPA Handbook 2015, 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

Impacts

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 2015, page 40)

There are four types of impacts.

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

Residual impacts are not eliminated by mitigation measures.

Regardless

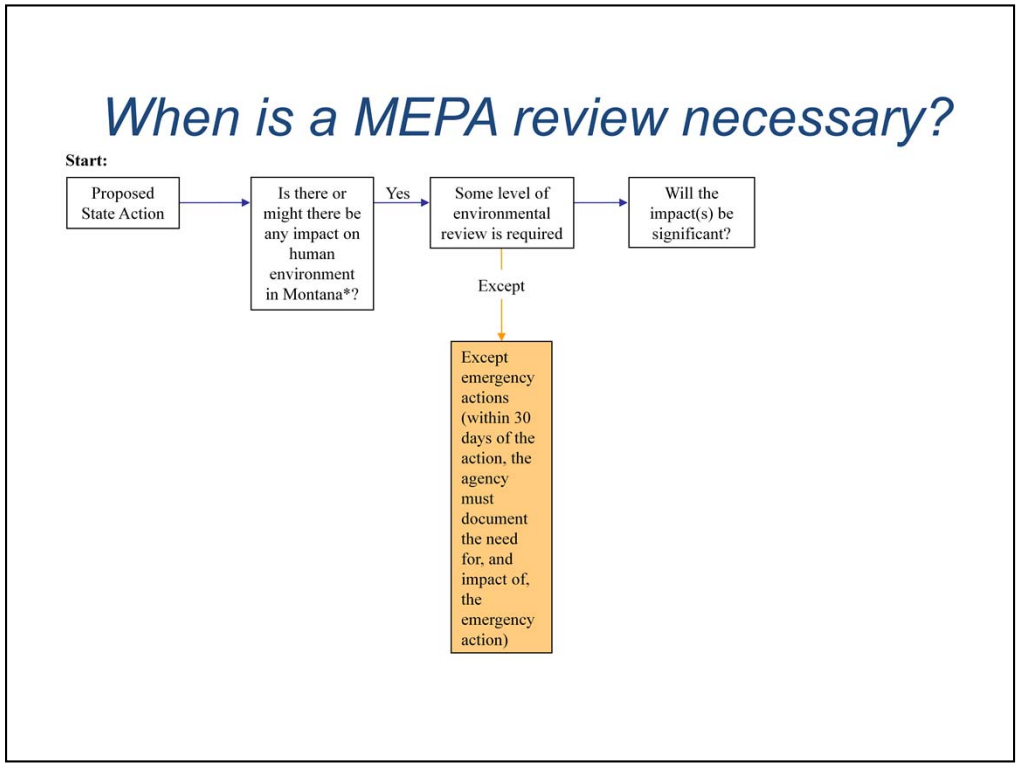
…of the degree or intensity of an impact, or whether its adverse or beneficial or both, if there is an impact an environmental review must be conducted

Except:
-for actions that are exempt
-in an emergency

Impacts

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



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. (hit key to fly in significance box)

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, and the rules your agencies have subsequently adopted, provide you guidelines, but no actual threshold. That will be up to you to figure out.

So, how do you 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

Impacts

(MEPA Handbook 2015, 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 the grizzly bear or bull trout

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

Impacts

(MEPA Handbook 2015, page 119
MEPA Model Rule IV: Determining the Significance of Impacts)

(Run through criteria on slide.)

Each agency or division within an agency may have developed its own criteria; you should be aware of this and be sure to find out; DEQ's significance rule (17.4.608) does not differ from the MEPA model rules, fyi.

if there's a call to be made, it will be the agency's decisionmaker who settles the question; it will be up to you as the MEPA practitioner to provide the necessary data and analysis for that person 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.

Significance Exercise

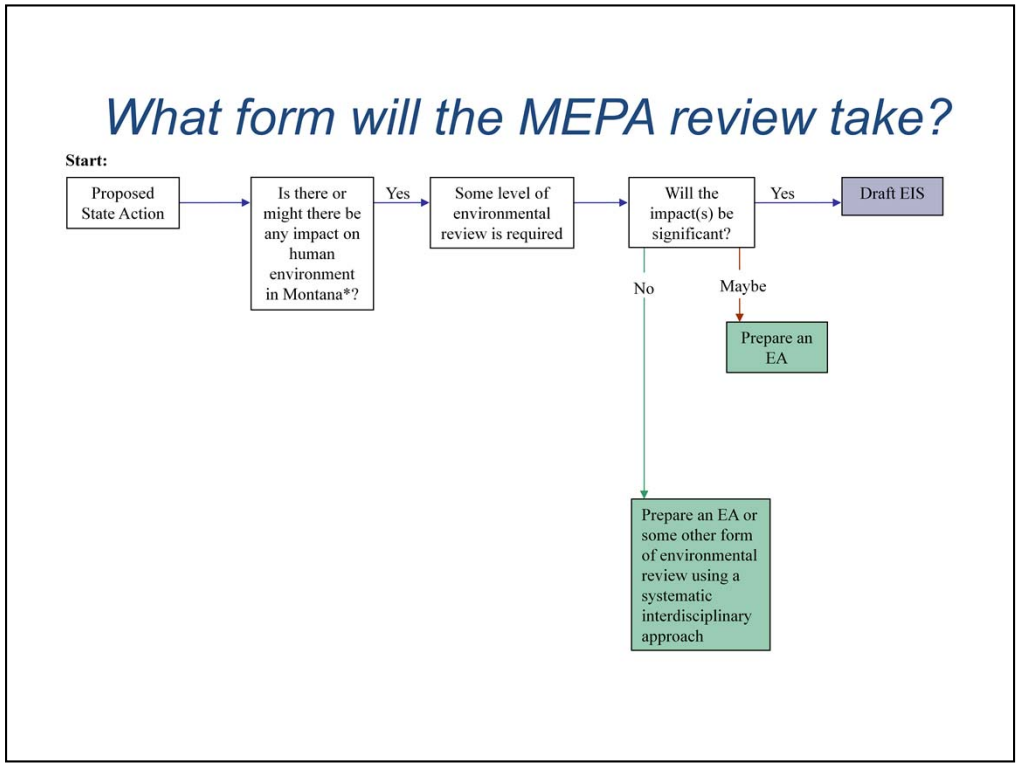
Impacts

(MEPA Handbook 2015, page 119
MEPA Model Rule IV: Determining the Significance of Impacts)

To get you thinking about significance, we're going to do a quick significance exercise. Using the criteria in MEPA Module Rule IV on page 119 of the handbook, determine whether these potential impacts would be considered significant. The first few are just for fun, the latter ones may be similar to a situation you would encounter. Work in a group with the people at your table. Then we'll check in and see what you've come up with.

Time: 18:03

Exercise should take 15 minutes or so.



As said before, determining whether impacts of a proposed action are significant will determine what form your MEPA review will take. If you determine the impact or impacts will NOT be significant, (click mouse) then you will prepare an EA, using a systematic, interdisciplinary approach, as required by MEPA

If you're not sure whether an impact will be significant, (click mouse) you can prepare an EA to analyze the situation further

If you determine the impacts <u>will</u> be significant, either from the get go or by going through the EA process, 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 2015, page 118
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.

A good example of this is gravel pits.

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 2015, page 64)

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

In other words, the people assigned to conduct the analysis must have the requisite expertise in the affected areas of the human environment.

And when I say that this interdisciplinary analysis must be systematic, that means the elements of the analysis must be logically organized and complement and build upon one another.

Recall that MEPA employs a systematic, interdisciplinary approach to ensure consideration of all impacts and to ensure a public decisionmaking process; as said before, if implemented properly this 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

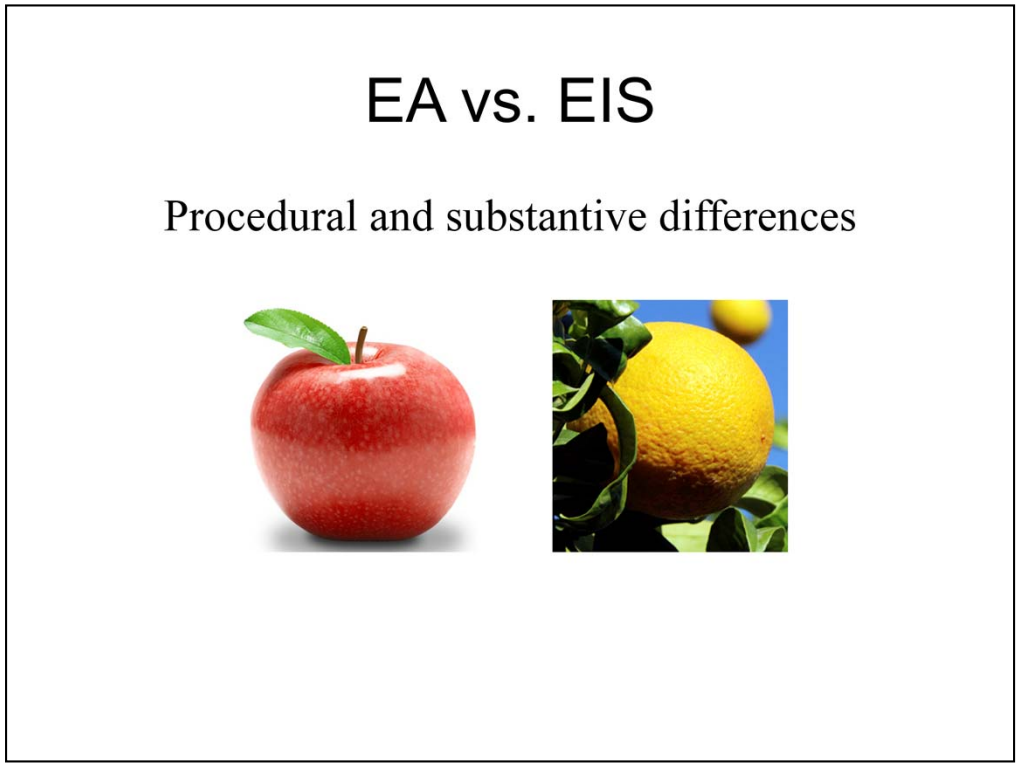
In your binder, for use as an office reference, we've included lists and statutes and rules that apply to an EA and an EIS. They look like this. Hot pink in color.

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



There are two other references we've included in your binder that detail the substantive and procedural differences of an EA and an EIS. (printed on what color?) Look at the first and you'll see that 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. On the second sheet, you'll see that 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. And also, if your agency has developed those policies, be consistent in your use of them because the public you typically interact 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. For example, although a public comment period isn't required for an EA, your agency may have set a policy establishing a 30-day comment period for EAs. If you aren't going to follow that policy in your MEPA process, be sure to say so upfront.

Other types of assessments

A Programmatic Environmental Review

- Used when an agency considers a series of agency-initiated actions, programs, or policies that in part or total may significantly impact the environment
- Can take the form of an EA or EIS

(MEPA Handbook 2015, page 129, MEPA Model Rule XVII: Preparation, Content, and Distribution of a Programmatic Review)

A quick word about two other types of environmental reviews. A programmatic review is used when an agency considers a series of agency initiated actions, programs, or policies that in part or total may significantly impact the environment. Can take the form of an EA or EIS

A Supplemental Review

…is prepared for either a draft or final EIS:

- when the agency or applicant makes substantial changes in the proposed action
- when there are significant new circumstances discovered prior to a final agency decision bearing on the proposed action or its impacts; or
- following preparation of a draft EIS and prior to the completion of a final EIS, the agency determines there is a need for substantial, additional information to evaluate the impacts of the proposed action or reasonable alternatives

(MEPA Handbook 2015, pages 126-127
MEPA Model Rule XIII: Supplements to Environmental Impact Statements)

There's also the supplemental review, which is prepared for either a draft or final EIS whenever…(read slide)

Other than this, we're not going to spend a lot of time talking about the use of programmatic or supplemental reviews; just be aware of their existence.

Break

Significance Analysis:

Severity – Much Needed
Duration – 30 minutes
Geographic Extent – Capitol Complex?
Frequency – next break at noon
Probability of Occurrence – Guaranteed
Growth-inducing? – Depends on how many snacks you eat
Quality/quantity of resource – Coffee, tea, water, snacks, etc.

When we get back, we're going to get into the mortar of MEPA, the analysis.

Time: 22:31

Quick Review

When is a MEPA review necessary?

What form will the MEPA review take?

How is a MEPA document completed?

The first bit of this morning, we looked at the Foundation of MEPA, the statutes and related constitutional provisions, and then we looked at the bricks of MEPA, the possible impacts and their significance. In doing so, we answered our first two core questions for this course:

(click mouse)

"When is a MEPA review necessary?" (get crowd input)

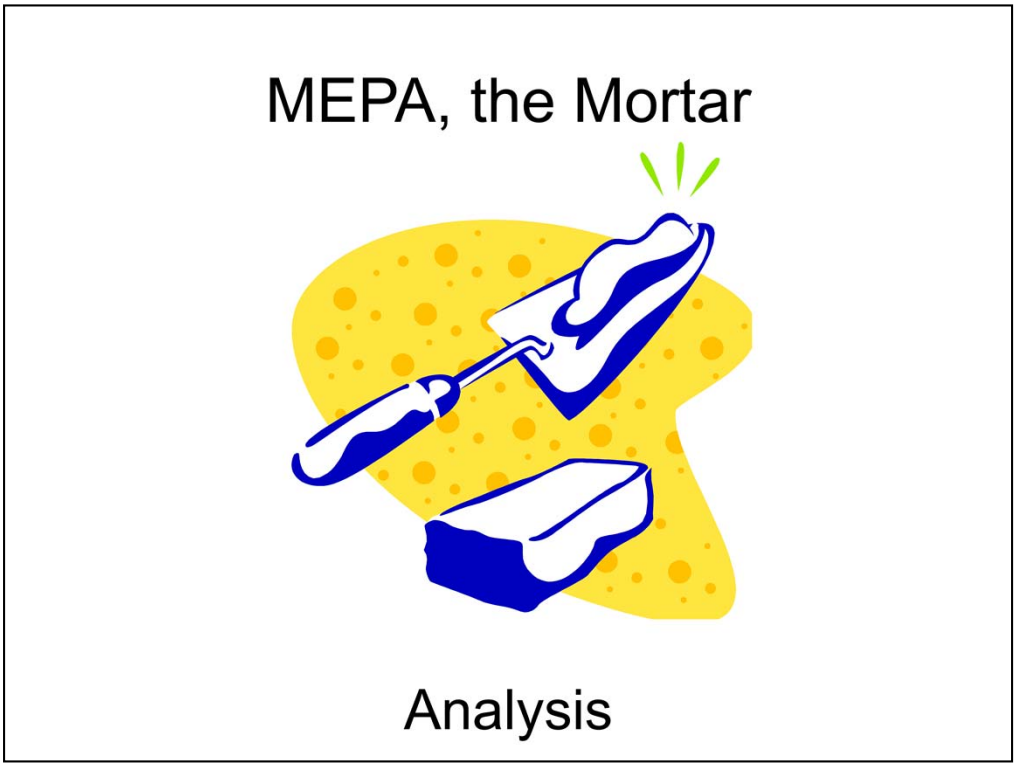
--when you have a proposed state action that may affect the human environment in Montana and that action is not exempt from MEPA review by its nature, by statute, by categorical exclusion, or in an emergency

(click mouse)

And we answered "What form will the MEPA review take?" (get crowd input)

--that depends on whether the impact of the proposed action on the human environment will be significant. If it's not significant, an EA may be prepared, if it's significant, an EIS is required.

For our third core question, (click mouse) "How is a MEPA document completed?" – We're going to get to the mortar of MEPA, the analysis. (click mouse)



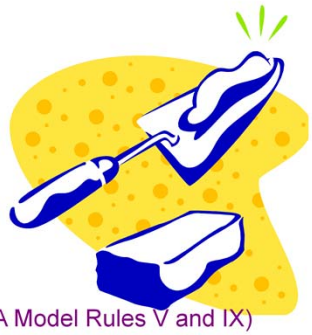
A MEPA document is driven by its analysis, and the steps that go into producing that analysis.

We are going to walk through the conceptual components of the MEPA document, which can apply to either an EA or EIS.

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 2015, pages 33, 119, & 123, MEPA Model Rules V and IX)

Onto the question of how to complete a MEPA document. Regardless of whether you're preparing an EA or EIS, MEPA Model Rules V and IX require that your document include:

(click mouse)

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

(click mouse)

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

(click mouse)

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

(click mouse)

An evaluation of the impacts

(click mouse)

And a listing and evaluation of appropriate mitigation measures

How to complete a MEPA document?

Proposals come from many places…

-walk in the door/public ideas

-special initiatives

-staff recommendations

-landscape/wildlife/forest conditions

-availability of funding

-permit requests

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

Starting with the proposed action, ideas for proposed actions can come from many places.

A permit request is DEQ's most common scenario, yes? Funding too?

How about FWP?

DEQ?

How to complete a MEPA document?

Determine purpose & need

What are the objectives?

Describe and compare:

•Existing condition

•Desired condition

Determine the difference/gap between the two

When an action is proposed, MEPA Model rules require you to think about the purpose and need for that action. The purpose and need describe the problem that the agency intends to solve or the reason why the agency is compelled to make a decision to implement an action.

--Page 33-34 of MEPA Handbook: the purpose and need include five general elements. (read from bk)

A good, solid purpose and need statement is fundamental for your environmental review. It is the cornerstone and sets the stage… If down the road you're having difficulty ….

(click mouse) To help you describe the need for the action, think about and compare the existing condition of the affected resource with the condition desired by the proposed action. What's the difference or gap between the two? That gap becomes the basis for your need.

--Some other things to think about:

- •Does the purpose and need fit within your agency's mission?
- •Does it conform to law and rule?
- •How broadly or narrowly should it be written. Depends. Too broad can open you up too far, too narrow can pin you down. This is important to the scope of your analysis, but can also be important in litigation

Careful consideration and writing is important.

Communication is also important – will talk about throughout, but right now, I'm talking about communication within your agency. Communication can never start too soon in the MEPA process and may help head off problems down the line. I understand there's not much worse when you're getting ready to put out a draft or final document and a coworker comes to you and points out a problem you hadn't even thought of or you find that analyses from different resource specialists conflict. We'll talk more about how to head that off later, but the first step is starting with good communication from the beginning. Ask for feedback on the purpose and need from people in your agency. They may point out potential issues that will help you either rethink your plan or rethink how you craft it so that you're off to a solid start.

(one technique--short, sit down meeting, go around the circle)

How to complete a MEPA document?

Describe the proposed action

WHO is proposing the action

WHAT is the action being proposed

WHERE the proposed action would occur

WHEN the action would start and what its duration would be

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

Once you have your purpose and need fleshed out, describe the proposed action to close the gap between the existing condition and the desired condition.

This is the who, what, where, and when of the proposed action.

How to complete a MEPA document?

Purpose & need: The Real World

Time: 5:20

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

Back to the list of things your environmental review should include:

We've covered the purpose & need and description of the proposed action.

You'll develop everything else as you consider the scope of the proposed action; scoping is the next big step in your MEPA process. A reminder from your table about the procedural differences between and EA and EIS…public involvement and scoping are not required for an EA, but may be useful and necessary depending on the complexity of the proposed action.

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 2015, pages 35-36)

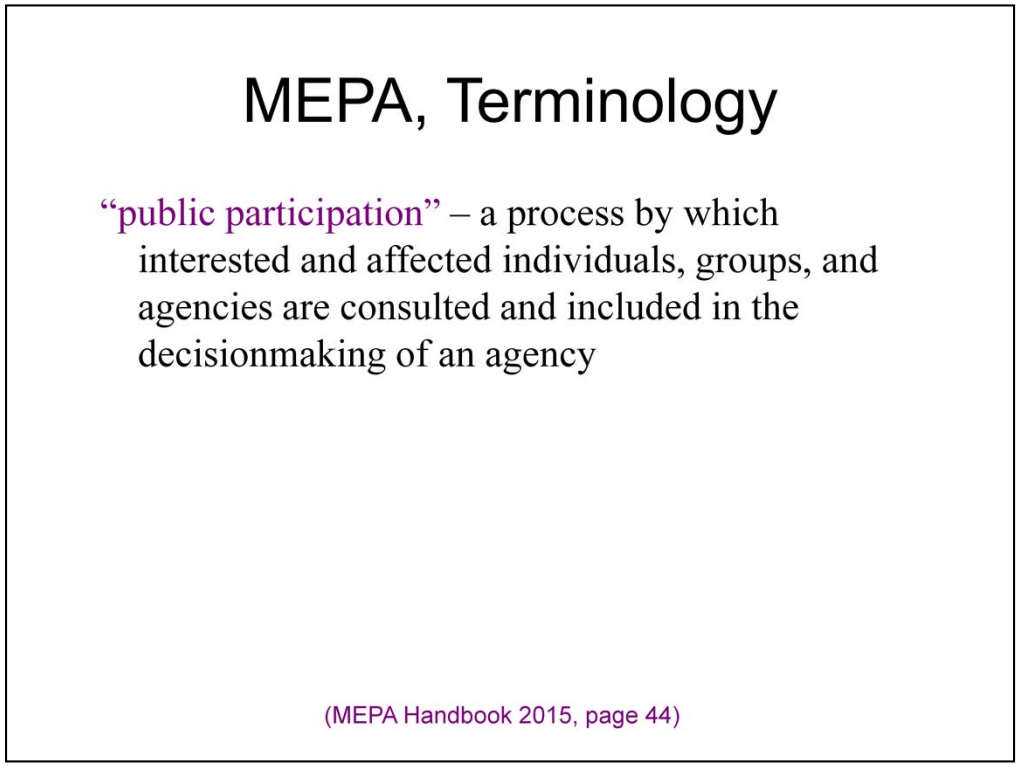
Scope is the full range of issues that may be affected if an agency makes a decision to implement a proposed action.

(click mouse) Scoping is the process used to identify all issues relevant to the proposed action, which will help you develop the rest of your MEPA document. Scoping includes public participation.

(click mouse) An issue is a clear statement of a resource that might be adversely affected by some specific activities that are part of a proposed way to meet some objective(s). 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 of environmental impacts, and the complexity of the analysis.



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

Recall 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.

MEPA, Terminology

"public participation" is NOT

- Public relations
- A popularity vote
- Public information

(MEPA Handbook 2015, 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.

The benefits of public participation are listed on pages 45 of your handbook. They include:
Early identification of relevant and irrelevant issues
Gathering broad information upon which to make decisions
Clarification of the public's concern and values
Support for decisionmakers to make better decisions
Enhanced agency credibility
Increased likelihood of successful implementation of the agency's decision

Look further on page 45 and 46 and you'll see a list of effective strategies for public participation.
Early involvement and involvement throughout the process
Obtaining input representative of all interested parties
Using personal and interactive methods to relate to people
Demonstrating how public input was used in the review and in the final decisionmaking

Scoping is 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

Time: 10:26

How to complete a MEPA document?

Conducting Scoping

Consider:

- Complexity of the proposed action
- Seriousness of potential impacts
- Level of public interest

Because the nature and complexity of each proposed action is different, there is not one single technique for scoping. When you're setting up your scoping process, keep in mind that as the complexity, number of issues, and the number of people and agencies affected increases, the scoping process must in turn be more comprehensive. Your agency is responsible for providing opportunities for public comment that are commensurate with the seriousness and complexity of the situation.

STATUTORY Requirements:

60 day scoping process (for an EIS)

Notification is presented in objective and neutral manner and doesn't speculate on the potential impacts of the project

How to complete a MEPA document?

Conducting Scoping

Objectives:

- Involve the affected public
- Identify potentially significant issues
- Identify non-significant impacts
- Identify existing environmental review/data and other documents you may be able to build upon (tiering)
- Identify possible alternatives

(MEPA Handbook 2015, page 122, MEPA Model Rule VII: Determining the Scope of an EIS)

Here are some objectives for scoping. These are taken from MEPA Model Rule VII, found on page 122 of your handbook.

•Involve the affected public

This includes any affected local, state, federal, and tribal agencies, the applicant, and interested persons or groups.

•Identify potentially significant issues

Scoping is used to identify potentially significant issues that will need to be analyzed in depth and non-significant issues, which will likely be addressed only briefly in your MEPA document.

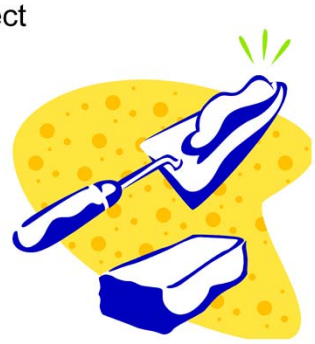
•Through scoping you may also identify issues that have been adequately addressed by previous environmental review, such that the discussion of these issues in your MEPA document can be limited to a summary of and a reference to the other environmental review.

•Scoping may also help you identify possible alternatives to address issues that have been raised with your proposed action.

How to complete a MEPA document?

Conducting Scoping

- Start scoping AFTER you have enough information
- Prepare an information packet
- Design the scoping process for each project
- Issue public notice



Some tips for successful scoping include:

-start scoping <u>After</u> you have enough information. Scoping isn't useful until the agency knows enough about the proposed action to identify most of the affected parties and to present a coherent proposal. Otherwise, there's no way for other agencies and the public to know what you want them to comment on.

-send out a brief information packet, including a description of the proposed action, any maps, photos, or drawings, and other references you think might help the public understand what is being proposed. Include an explanation of what scoping is and how it will be used to provide participants a context for their involvement. Reiterate that no decision has been made and specify topics you would like the public to address.

-design your scoping process on a case by case basis in a way that accounts for the nature and complexity of your proposed action. Remember there is no one set procedure for scoping. It can include public meetings, small group meetings, telephone conversations, written comments.

-If you use public meetings, be sure to follow the public notice requirements of MEPA Model Rule XXIII (23), page 131 and 132.

-don't forget to ask other agencies for input…you may send a scoping letter to them and the information packet. But why not go the extra step in making a courtesy call to follow up with them. This is helpful hint #2 for improving communication within your agency and with other agencies throughout the MEPA Process. This gets into the realm of avoiding surprises down the road. …

unexpected letters of opposition… take the initiative and get in touch with people in the beginning, be respectful of course at all times…

How to complete a MEPA document?

Scoping: What to do with comments

- Respond to comments
- Date, document, index comments
- Evaluate and judge comments for
  - significant and non-significant issues
  - relevance

What to do with the comments?

Most importantly perhaps, respond in some manner. People appreciate feedback. Even if you send a simple email response back saying “thank you for your comment, it has been received and will be used in our analysis” – this will go a long way toward building relationships and credibility with interested parties. That relationship and credibility may prove crucial in maintaining a forward moving, efficient process, especially for complex and controversial reviews.

-Date, document, and index each comment -- this will help you manage all the comments received, especially if there are a bunch. Be sure to document phone calls, conversations, and comments received in the field; file them to the record.

-Each comment received must be evaluated and judged for issues that are significant or not significant and for relevance.

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

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

Relevance

Scoping information is relevant if it identifies an issue, ways to measure effects of impacts, the potential significance of those effects, and ways to mitigate impacts including alternatives to the proposed action.

How to complete a MEPA document?

Scoping: Relevance

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"

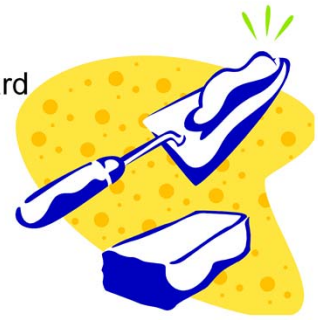
Scoping information is NOT relevant if it is beyond the scope of the proposed action, if it's unrelated to the decision being made, it's already decided by law, regulation, or policy, it's conjectural or not supported by scientific evidence, or it's a general comment or position statement

How to complete a MEPA document?

Scoping: What to do with comments

Tips

- Involve your decisionmaker and the interdisciplinary team
- Track how the comment was considered
- Keep public informed about what was heard



Involve your decisionmaker and the interdisciplinary team if need be, especially if you'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.

-Your analysis should be guided by these concerns.

-When you're going through comments, every comment you identify as a priority matter, should be addressed in some manner in the environmental review, either by in-depth analysis, or at least a short explanation showing that the issue was examined. Maybe you decided it wasn't significant, but be sure to explain why.

-You may want to send out a post scoping document that makes public the decisions you have made about what issues to cover in the environmental review.

Time: 15:25

How to complete a MEPA document?

Scoping: The Real World

Lunch Break

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)

Welcome back.

We left off this morning with the scoping process. After scoping, use your results – the identified issues -- to help develop and analyze reasonable alternatives for your environmental review. Alternatives provide different ways to accomplish the same objective as the proposed action. Put another way, alternatives provide different ways to fulfill the purpose and need, while addressing unresolved conflicts related to the proposed action.

Depending on the proposal, you may or may not have to conduct an alternatives analysis.

When considering alternatives, the MEPA Model Rules require you to consider reasonable alternatives to the proposed action, including the "no action" alternative.

(click mouse) The No Action alternative has two interpretations, 1) what happens if the proposed action does not take place or 2) what happens if the current management continues, the status quo. The no action alternative can be useful in providing a baseline condition for estimating the effects of other alternatives. MEPA requires that the agency shall complete a "meaningful no-action alternative analysis". The no-action alternative analysis must include the projected beneficial and adverse environmental, social, and economic impact of the project's noncompletion.

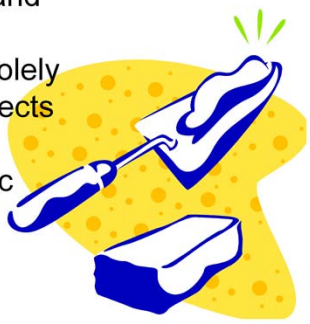
If done objectively, the alternatives analysis provides a clear basis for choice by comparing impacts and sharply defining the issues. Comparing alternatives may help to either identify hidden assumptions or validate the rationale behind a proposed action.

How to complete a MEPA document?

"Reasonable" Alternatives

Practical and/or feasible from a technical and economic standpoint – using common sense

- Achievable under current technology; and
- Economically feasible as determined solely by the economic viability for similar projects having similar conditions and physical locations without regard to the economic strength of the specific project sponsor.



MEPA requires you to consider "reasonable" alternatives. "Reasonable" alternative means one that is practical and/or feasible from a technical and economic standpoint.

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'."

Alternatives should fulfill the purpose and need of the proposed action and should address significant and relevant issues.

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

Now here's another change the 2011 Legislature made to MEPA: 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 neither the alternatives analysis nor the resulting recommendations bind the project sponsor to take a recommended course of action, but the project sponsor may agree to a specific course of action. 75-1-201, MCA

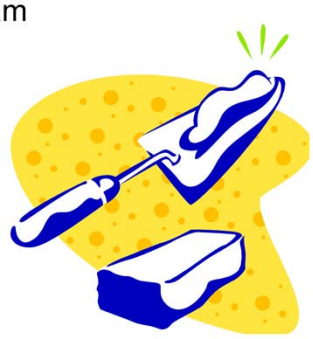
The 2011 Legislature also specifically defined "alternatives analysis" such that for a non state-sponsored project – again that private actor for instance wanting a permit – the analysis cannot include an alternative facility or an alternative to the project itself. 75-1-208, MCA

How to complete a MEPA document?

Developing Alternatives

Generate using:

- Ideas from the public scoping process
- Brainstorming with the interdisciplinary team
- Modify the proposed action by changing the timing or location of actions



Ideas for alternatives can come from almost anywhere, the scoping process, within your team, just by changing some of the key components of the proposed action.

One way to brainstorm alternatives…Where there is an unresolved issue with the proposed action, write down an alternative for each point of view. The MEPA Model Rules require you to identify mitigation measures to reduce or prevent undesirable effects or impacts of state actions. You can cluster like-minded mitigation measures into reasonable/feasible alternatives to the proposed action.

How to complete a MEPA document?

Developing Alternatives

Mitigation measures:

- Not taking the action
- Limiting the action
- Rehabilitation
- Maintenance
- Compensation/replacement

There are a number of ways to accomplish mitigation and you can develop your alternatives to reflect those possibilities. They include:

- You can avoid the impact by not taking action.
- Minimize the impact by limiting action
- Rectify the impact through rehabilitation
- Reduce the impact by maintenance
- Compensate for the impact by replacement

How to complete a MEPA document?

Developing Alternatives

Reasons for eliminating alternatives:

- Legality
- Feasibility
- Fails to meet purpose and need
- Unreasonable
- Duplicative
- Too remote/speculative

As you consider alternatives, make sure you fully and concisely document how each reasonable alternative was developed. If you eliminate an alternative, explain the reasons for doing so. Possible reasons include:

- The alternative is illegal
- The technology is unfeasible
- Fails to meet the purpose and need of the proposed action
- It's clearly unreasonable
- Analyzing the alternative would result in duplication
- The alternative cannot be implemented
- Alternative is too remote or speculative

Whatever the reason for elimination, always thoroughly document it! This would be important for instance if someone challenged the MEPA document in court for failing to consider an alternative. Maybe you had considered it, and ruled it out for one of the reasons above, but because you failed to document that no one knows you actually did due diligence.

How to complete a MEPA document?

Describing Alternatives

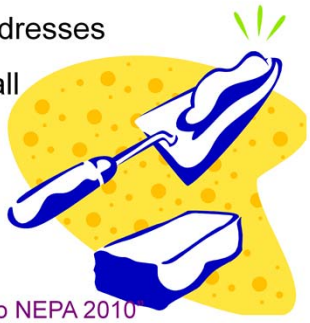
Describe in an unbiased, equal, and consistent format.

Include:

- unresolved conflicts that the alternative addresses
- The who, what, how, where, and when of all actions

Do NOT include (at this time):

- Effects of the actions



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

When describing alternatives in your MEPA document, be consistent. Do not show a preference, state each in a consistent, unbiased manner. Alternatives are not a time for creative writing!

Include in your description of the alternative:

The unresolved conflicts that the alternative addresses, and the who, what, how, where, and when of the alternative's actions. This may include standard design criteria, best management practices, operating procedures, relevant mitigation measures, and any monitoring activities.

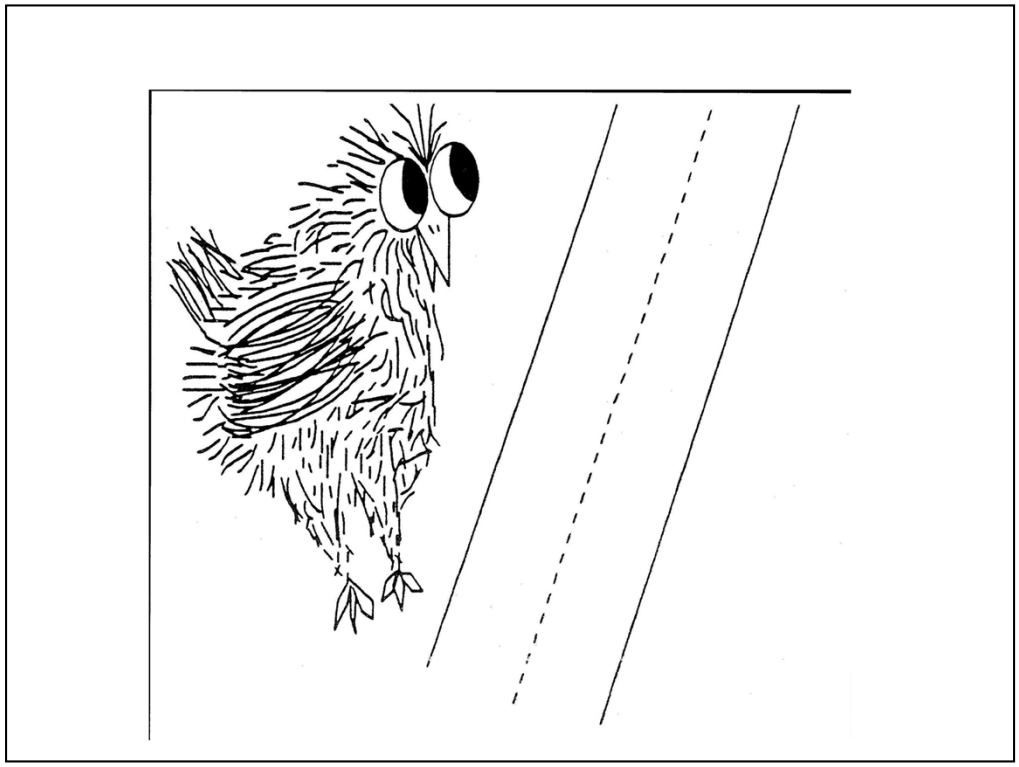
(click mouse) When describing the alternative, do NOT describe any effects of the alternative's actions. Save that for the impacts analysis section of your document.

How to complete a MEPA document?

Developing Alternatives

To get you thinking about developing alternatives, we're going to take a stab at that age old question:

Why did the chicken cross the road?



Chicken used in 1990s training example, just for kicks.

The chicken and the road

Hypothetical:	Why did the chicken cross the road?
Purpose & need:	To get to the other side
Proposed action:	Walk across the road
Alternatives:	Run
	Fly
	Dig a tunnel
	Do nothing at all (no action)

Read slide

A cute little example, but you get the point.

Time: 7:15

How to complete a MEPA document?

Alternatives: The Real World

(10 minutes for exercise, 10 minutes for discussion)

How to complete a MEPA document?

Impacts Analysis

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

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

Once you've developed your alternatives, its time to analyze their impacts. Their effects. I'll warn you I may use the words impacts and effects interchangeably, but I mean the same thing.

When analyzing impacts, you need to consider direct, indirect, and cumulative impacts, site-specific impacts, how you're going to measure the impacts, and you'll have to document your analysis and provide evidence to support your conclusions.

Think outside your work box. (e.g. truck traffic at water pump sites in eastern Montana) – use other agencies' expertise, resources for data

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.

Impacts

(MEPA Handbook 2015, page 39)

A reminder from this morning's discussion of impacts. Impacts are the "effect" half of a cause/effect relationship. Your proposed action is the cause, the impact is the effect. An action proposed in an alternative is the cause, the impact of that action is the effect.

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

Impacts

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 2015, page 40)

Recall there are four kinds of impacts.

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

Residual impacts are not eliminated by mitigation measures.

How to complete a MEPA document?

Impacts Analysis

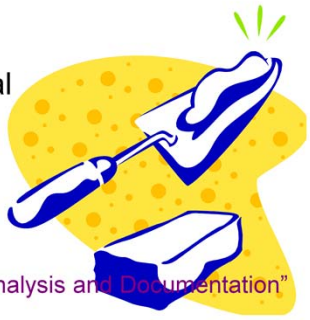
Consider adverse AND beneficial impacts

Be site-specific

Tips:

Start by listing all the actions in the proposal

Develop a network of impacts for each



Source: The Shipley Group "NEPA Cumulative Effects Analysis and Documentation"

As you think about the potential impacts of your proposed action, consider:

1) Adverse and beneficial impacts alike

2) Be site-specific

•Where will the proposed action occur, what is the affected environment

•What will be the impact at that location, given its existing state

*Field visits are very important for this reason.

(is it the last 20 acres of critical habitat for a particular species? In a timber sale, are there existing roads you can use, or will you have to create roads? The impacts will be different depending on the affected environment.)

It may be helpful to start your impacts analysis by first listing all of the actions in the proposal.

A tip I got at a Shipley training is to develop a network of impacts for each action. They called it cause/effect sequencing or diagramming.

Drawing a diagram on paper or use post-its on a wall.

Exercise: diagram actions/impacts related to removing all of the snow from downtown and relocating it to the top of Red Mountain

How to complete a MEPA document?

Impacts Analysis

Best advice:

- Be specific in order to be meaningful
- Use appropriate measures of change
- Write clearly and concisely
- Rely on professional judgment, not personal opinion

Once you get into the analysis of each of the impacts, some of the best advice is that

-it should be specific in order to be meaningful, use measurements that provide meaningful data

-Appropriate measures of change are understandable, quantifiable, and sensitive

-your writing should be clear and concise, so it's understandable

-rely on professional judgment, not personal opinion

How to complete a MEPA document?

Impacts Analysis

Professional Judgment – when scientific training and your experience qualify you to be able to predict with some degree of certainty the results of a proposed action or to reach a conclusion based on interpretation of facts

Personal value judgment (opinion) – judgment you make about the value of something relative to some other thing

Professional judgments are judgments you make when your scientific training and experience qualify you to be able to predict with some degree of certainty the results of a proposed action or to reach a conclusion based on interpretation of facts. Another expert in the field should be expected to make the same prediction or reach the same conclusion, recognizing there are times when competent professionals may legitimately disagree. Professional judgments are substitutes for facts that are not available.

(click mouse) Personal opinions are personal value judgments you make about the value of something relative to some other thing. Other persons may have different opinions. These are not right or wrong, though a person might profess that, but are strictly individual preference. Personal value judgments should not be used in your impacts analysis and the MEPA process. They should be kept out of official correspondence and official record material.

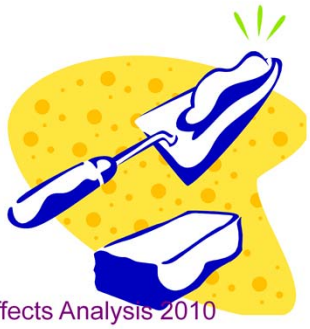
Handout in binder -- a document written by Douglas Larson, a retired planning staff officer for the Medicine Bow National Forest in Wyoming.

How to complete a MEPA document?

Impacts Analysis

Ways to measure change

- Magnitude – degree of change, i.e., unit of time or space
- Extent – spatial/geographic area
- Speed – how quickly change will occur
- Duration – how long will effect last
- Likelihood – probability of occurrence



Source: U.S Forest Service Advanced NEPA Effects Analysis 2010

When you're measuring change, think of your measurements in terms of the following dimensions. These are all linked to the cause/effect relationship of your action and impacts:

Magnitude – the value per unit of time or space, i.e. an acre

Extent – span of the influence in terms of geographic area, i.e. a stream or a lake, this could also be a structural characteristic or functional process

Speed - the time to reach a value

Duration – the length of time the value will continue

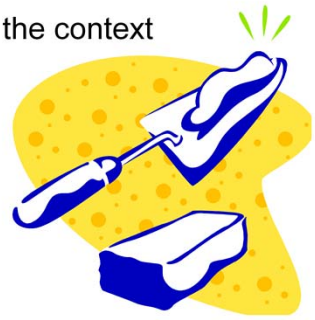
Likelihood – the probability of the value become a reality

How to complete a MEPA document?

Impacts Analysis

Writing the analysis:

- Provide context (the existing condition of the affected environment)
- Describe the change (intensity) relative to the context



As you consider each impact of each alternative and the measurement of the change that will occur, provide context to your analysis.

What does that mean?

Start with the existing condition of the effected environment. For instance, an action that could result in the growth of spotted knapweed has more of an impact in an area where there's currently little or no knapweed, compared to an area that is overrun with it. Is this 2 acres of critical habitat for a sensitive species -- the last two acres? Or is it part of a complex of 10,000 acres across the landscape. Context will make the difference in determining whether an impact is significant or not. 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 the decisionmaker and the public can understand how those conclusions were reached.

Describe the change relative to that context.

Draw conclusions based on supporting evidence, and then write those conclusions in a way that shows your line of thinking. My conclusion is X, because … explain

your evidence, your reasoning. Tie it back to a cause/effect statement if that helps. Being this specific and clear about why you made the determinations you did will improve your legal defensibility if someone raises questions later. 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)

Time: 7:50

Impacts Analysis: The Real World

Impacts

(MEPA Handbook 2015, page 119
MEPA Model Rule IV: Determining the Significance of Impacts)

Break

Impacts Analysis:

Magnitude = bladder capacity
Extent = Capitol complex
Speed = immediately
Duration = 30 minutes

Cumulative Impacts when we get back.

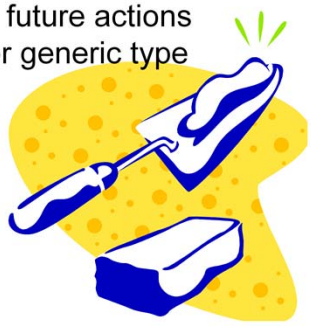
How to complete a MEPA document?

Cumulative Impacts

Definition:

The collective impacts on the human environment within the borders of Montana of the proposed action when considered in conjunction with other past, present, and future actions related to the proposed action by location or generic type

75-1-220(4), MCA



We just did some exercises involving direct and indirect impacts. We're going to spend some extra time now talking about cumulative impacts.

Cumulative impacts are the collective impacts of past, present, and future actions that affect the existing resource condition. These are actions that are related to the proposed action by location or generic type. These can be actions taken by state and non-state entities.

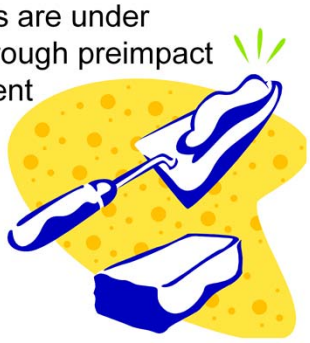
How to complete a MEPA document?

Cumulative Impacts

Statutory directive:

An agency shall, when appropriate, consider the cumulative impacts of a proposed action. However, related future actions may only be considered when these actions are under concurrent consideration by any agency through preimpact statement studies, separate impact statement evaluations, or permit processing procedures.

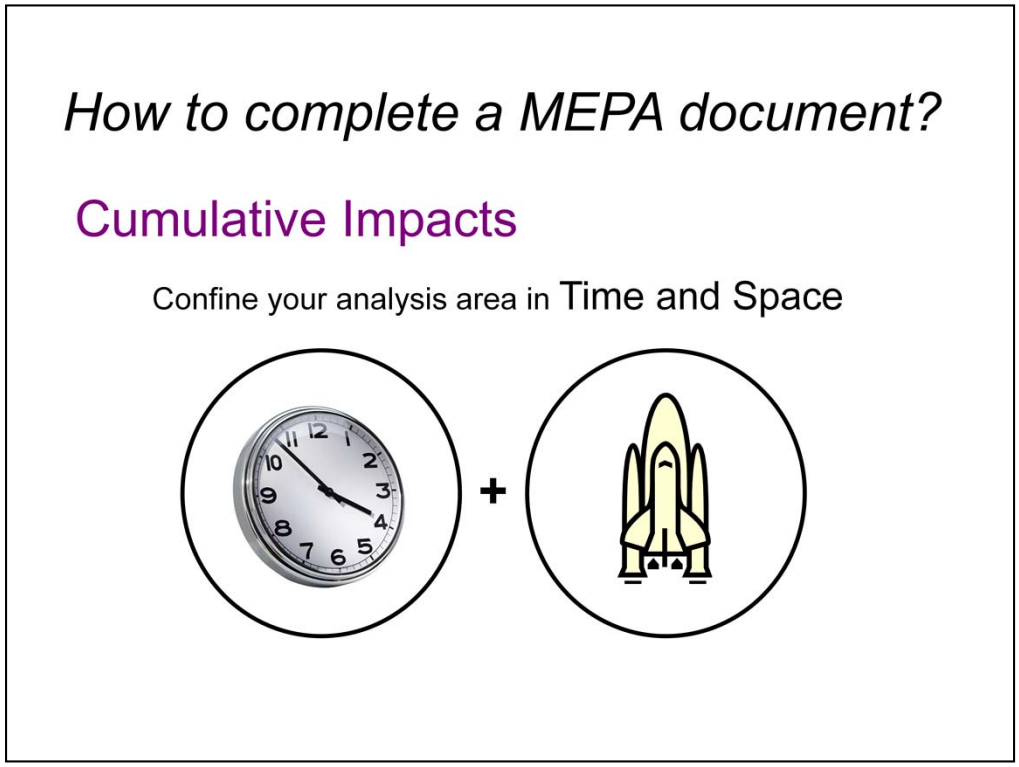
75-1-208(11), MCA



Despite that broad definition, another statute narrows the future cumulative effects you must consider to those that "are under concurrent consideration by any agency through preimpact statement studies, separate impact statement evaluations, or permit processing procedures."

When it comes to statute, the more narrow provisions trump the more general provisions.

Despite the statutory guidance, thinking about the expansiveness of cumulative impacts analysis (past, present, future) can be daunting. Taken literally, it's an analysis without any ending point. The key is to create rational boundaries – limit your review to meaningful and realistic evaluations relevant to the proposal at hand.

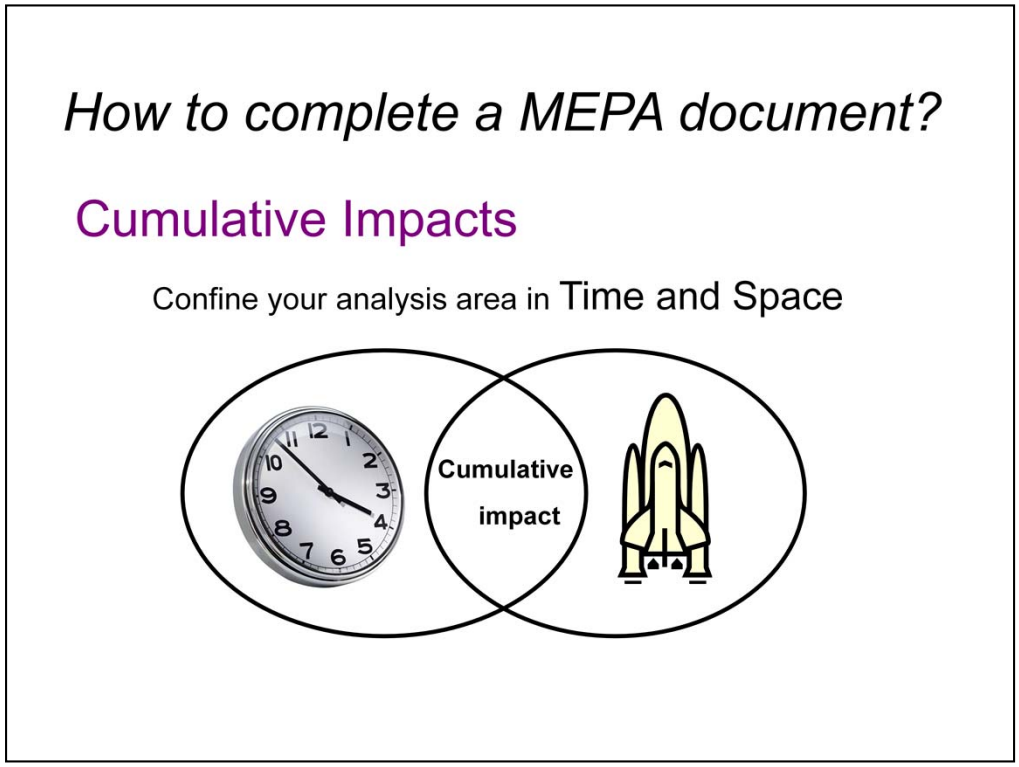


To do that, you have to confine your cumulative impacts area in both time and space.

First, (click mouse) define the spatial boundaries of the affected environment, in what geographical space do the direct and indirect effects of past, present, and future actions occur? – i.e. within the boundaries of x watershed

When you consider geographic boundaries, be sure to look at the effects of the past, present, and future actions, instead of administrative or ownership boundaries. Don't get caught on political boundaries.

Next, define the temporal boundaries of the impacts – how long will the direct and indirect impacts of past, present, and future actions last? (duration)



Doing these two things helps identify overlapping activities in time and space. That overlap is the cumulative impact. (Handout Shipley area chart.) Could look like this.

Keep in mind that the temporal and spatial boundaries will vary by resource. E.g. a viewshed versus a watershed

This can be tough because too large a bounding and you will devote energy and work to the analysis that's not needed. Too narrow a bounding and you will be deficient in adequately considering cumulative impacts.

To find the outer reaches of your cumulative impacts, continue expanding your area of analysis until a trend is established showing a stable or decreasing influence from the action, or the impacts from the project diminish to very low levels.

(refer to Shipley area chart) You're looking to see at any time the collective effects of all these actions approaches or exceeds a threshold or important limit.

Bounding is a professional judgment. Make assumptions as necessary, provide your best estimate of impacts, and document your rationale. If your analysis indicates there are no cumulative impacts, document this determination.

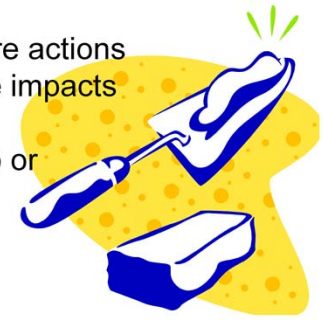
Documentation is so important!

How to complete a MEPA document?

Cumulative Impacts

5-Steps for Sound Analysis:

1. Identify your cumulative impacts analysis area (by resource)
2. Identify ownership of parcels within the cumulative impacts analysis area
3. Identify past, present, and related future actions
4. Summarize the *trend* of the cumulative impacts on the given resources
5. Identify how your project contributes to or defies that trend



When we put this training together back in 2010, Sonya Germann at DNRC and Emily Corsi, formerly at DEQ, put together this cheat sheet for cumulative impacts analysis – 5 step process check list (hand out)

(talk through handout, and after reviewing step 5 click to next slide for extra advice)

Identifying ownership helps us identify what kind of activities might be going on in the area – i.e. Forest Service

How to complete a MEPA document?

Cumulative Impacts

Step 5: Identify how your project contributes to or defies that trend

Avoid using vague modifiers without explanation to explain the degree of cumulative impacts.

- "Cumulative impacts to surface water quality from mine waste water disposal would be minimal."

Quantify or explicitly explain the degree of cumulative impacts.

- "Nitrogen concentrations in surface waters would increase .01 mg/L over ambient concentrations as a result of mine waste water disposal. This degree of change would cause minimal cumulative impacts to surface water quality."

Time: 4:51

How to complete a MEPA document?

Cumulative Impacts Analysis

The Real World

How to complete a MEPA document?

Impacts Analysis

Focus the analysis

EA and EIS

- Focus on the issues
- Describe impacts in terms of context and intensity
- Provide sufficient evidence/analysis to determine significance or no significance

Once you've identified any impacts, direct, indirect, cumulative, you can start focusing your analysis.

-This may seem like common sense, but be sure to focus on the issues, the resources for which the action has a cause/effect relationship. They drive your analysis.

-Describe the impacts in terms of context (where they fit in the affected environment) and their intensity (recall that list we showed you this morning to determine significance, it includes: severity, duration, geographic extent, frequency, likelihood, is it precedent-setting, etc.. The full list is in MEPA Model Rule IV)

-Determine significance and provide the evidence to back up your determinations. Remember, there's no defined threshold. Significance is based on the context of the situation. Laying your evidence out clearly is important so that your decisionmaker and the public can understand how those conclusions were reached.

Relevant case law:

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.

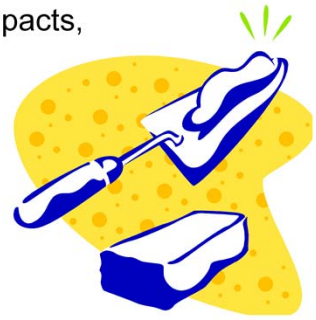
How to complete a MEPA document?

Impacts Analysis

Focus the analysis

EIS

Fair and thorough analysis of significant impacts, in proportion to their significance.



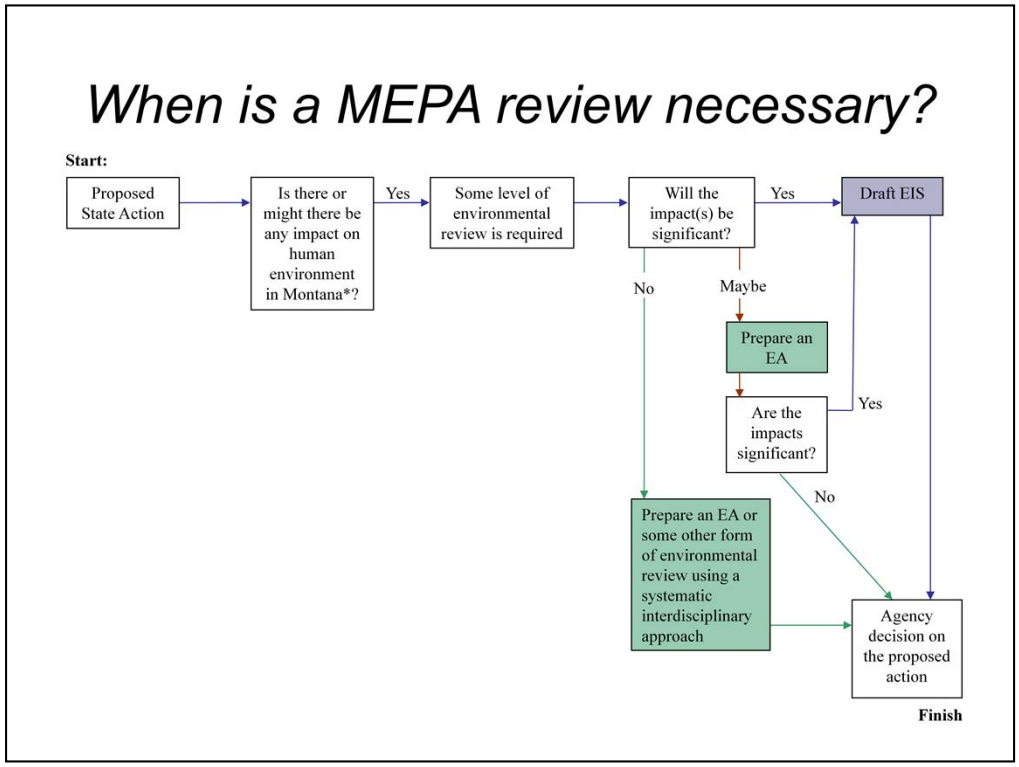
If the issues are significant, and an EIS is required,

focus your analysis on a fair and thorough discussion of the significant impacts.

Discuss each impact in proportion to its significance. Giving the most attention to the most significant impacts.

Be sure to analyze any cumulative impacts and provide evidence and analysis to back up your conclusions, again so that everyone can see how the determination was reached.

For any MEPA document, get into the habitat of writing your conclusions in a way that they tie back to the purpose and need for the proposed action. Writing in this way and providing sufficient evidence and analysis to back up your conclusions will help you defend the decisions, if they're ever challenged.

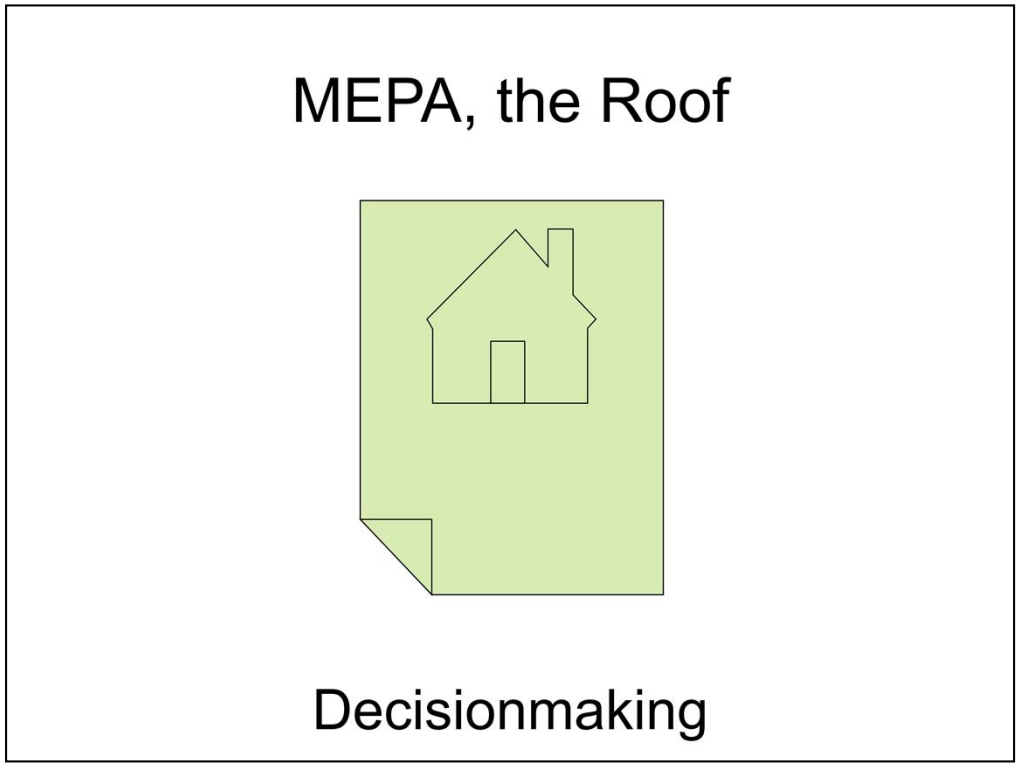


Round out the MEPA flowchart here.

Last time we saw it, it looked like this:

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. (click slide) 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. (click slide)



Now to put the roof on the House that MEPA Built and answer our fourth and final question

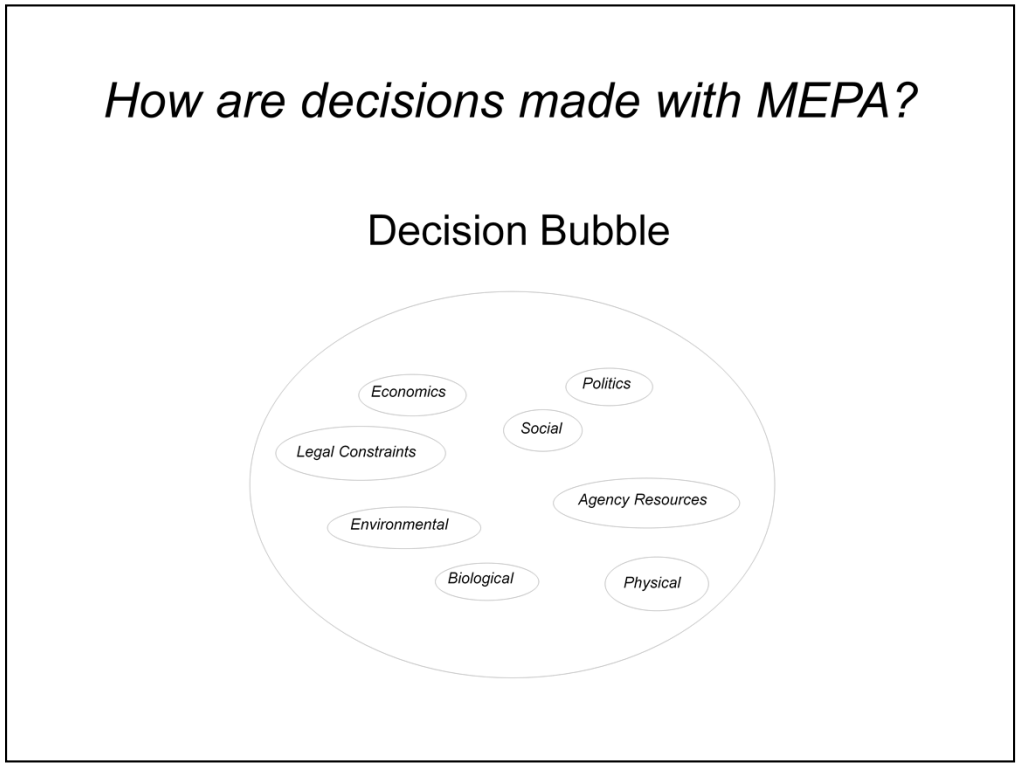
How are decisions made with MEPA?

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.

The objective information gathered through that environmental review can then be used by agency decisionmakers to make effective and strategic decisions.

The decisionmaker—the person whose responsibility it is to approve the environmental review document and to decide whether to implement the proposed action (to grant a permit, to construct a facility, etc.)—plays a critical role in the MEPA process. The decisionmaker must be someone different from the person(s) who is responsible for writing the environmental review and must be someone who has the authority to make decisions on behalf of the agency. The individual who fills

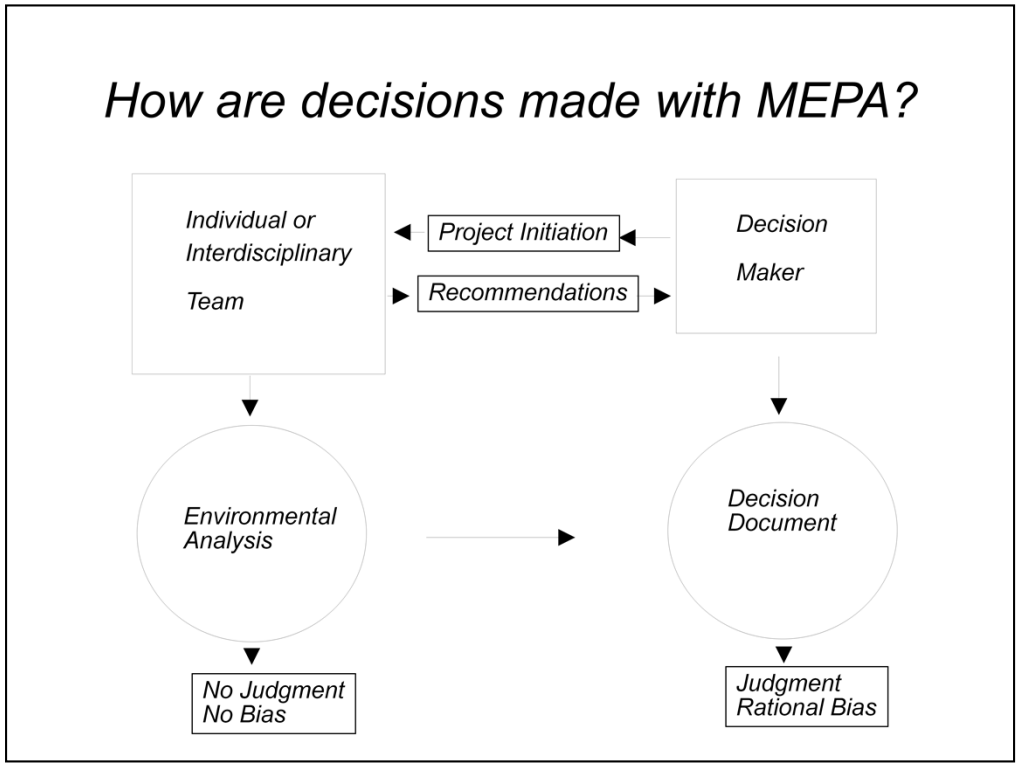
the role of decisionmaker may vary from agency to agency or even between programs within the same agency.



Many considerations, in addition to environmental factors, make up the decisionmaking process.

Here's a look at some of the factors (review slide)

Therefore, although 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 that decisionmakers.)



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

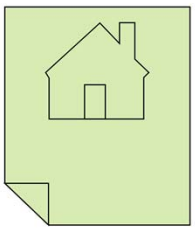
The basis for that decision/judgment must be founded, at least in part, on the unbiased MEPA analysis, and the rationale must be included in the final document.

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 XVIII on page 129 and 130 of your handbook.



Now, what does that final document look like…

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)).

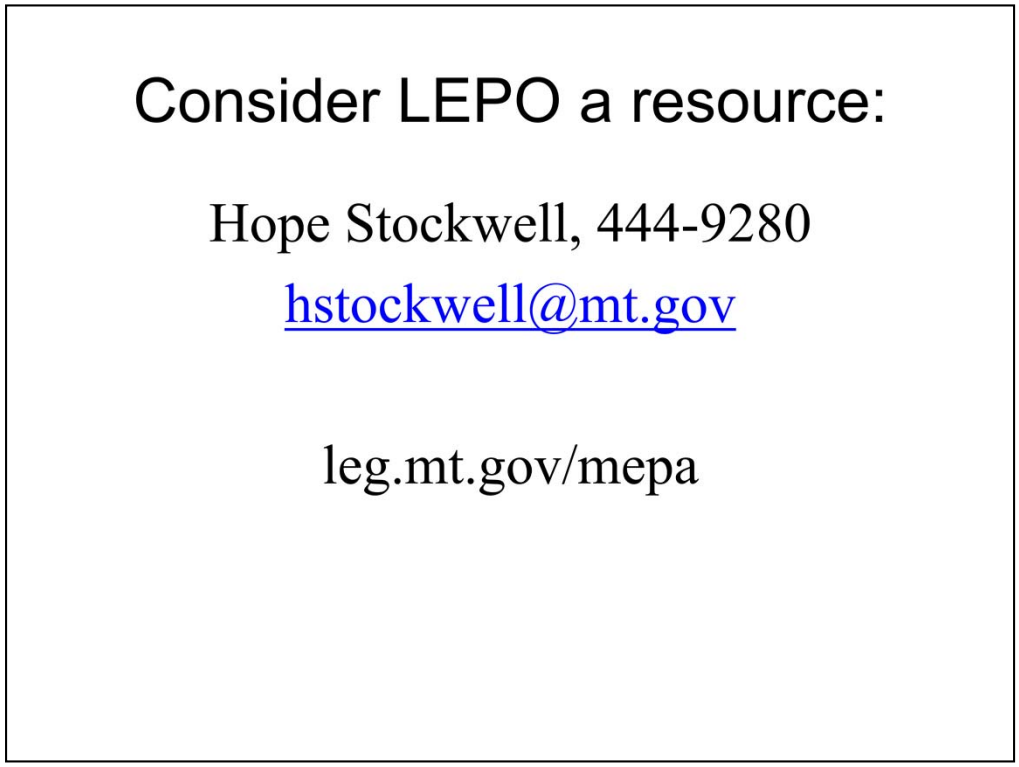
Some agencies use a ROD for an EA. On a checklist EA, sometimes it's just an affidavit and signature at the bottom that the EA found no significant impact. If you hear the acronym FONSI, that's what it means (finding of no significant impact).

DEQ has its own protocols for how decisions are documented. Be sure to ask. Documentation and thorough documentation at that is very important.

The MEPA Database

- LEPO is the repository for MEPA documents
- Please send electronically to legmepa@mt.gov
  - Electronic documents may be viewed by public
- Your EIS decisions aren't final until 15 days after you send us the document!
- Be sure to include a description of the proposed action and the location
- Please submit regularly!

Please send regularly!



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
-online version of the MEPA handbook
-a legislative history of MEPA
-copies of MEPA training courses for state employees, including today's PowerPoint
-documents pertaining to all of the MEPA court cases, since it was enacted