



Sarah Clerget

Of Counsel & Government Affairs
Director
406.896.4628
Billings
SMClerget@hollandhart.com

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

Insight — October 23, 2024

This article originally appeared in Treasure State Resources Association of Montana News, October 24, 2024, and is reproduced with permission.

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

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

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

In the 2025 session, the legislature will focus on MEPA, and we can expect bills ranging from proposals to entirely eliminate MEPA to recommendations to add substantive additional requirements, like a social cost of carbon and climate change analysis for Environmental Assessments (EAs) and Environmental Impact Statements (EISs). To achieve balanced, precise, and defensible MEPA reform and that avoid continuous project disputes, it will be important for the legislature to carefully consider all perspectives.

How Does MEPA Work?

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

Key Concepts to Consider

- MEPA review is separate from a substantive permit review and can be contested more easily in a standalone court challenge. If the

state agency's MEPA analysis is found insufficient, it can cause the permit to be stayed or vacated, potentially halting or even terminating a project.

- MEPA review is time-consuming. Larger or more controversial projects require more in-depth review, which usually takes more than a year to complete.
- Often, the entity seeking the permit has to pay, even if it is not challenged in court. If the state conducts a comprehensive EIS, the permit applicant must cover the significantly high cost of the EIS, which is typically five or six figures.
- MEPA documents are published for public comment. This can increase public scrutiny and opposition to a project. Sometimes the only way the public learns of a project is through the MEPA process.

Court Decisions

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

- *Held v. State* (appeal pending): The District Court found that “the State must either: 1) exercise discretion to deny permits for fossil fuel activities when the activities would result in [greenhouse gas] emissions that cause unconstitutional degradation and depletion of Montana's environment and natural resources, or infringement of the constitutional rights of Montana's children and youth; or 2) the permitting statutes themselves must be unconstitutional.” If the District Court's finding is upheld, all state agencies must include an analysis of greenhouse gasses and climate change in an EA and EIS.
- *MEIC v. DEQ (a.k.a. Laurel Generating Station)* (pending): Whether the air quality permit should be vacated or stayed (preventing construction) pending a MEPA appeal; if climate change and greenhouse gas emissions must be considered; and whether the agency adequately considered noise and light impacts in the air quality permit.
- *Trout Unlimited v. DEQ (a.k.a. Tintina)* (decided, 2024 MT 36): MEPA was utilized to challenge the highly technical substantive aspects of the Black Butte copper mine permit, including engineering, water, and tailings disposal. The challenge was successful in the district court but was defeated at the Montana Supreme Court. It took 12 years to permit and litigate the project, including a lengthy EIS process.
- *Cottonwood v. DEQ* (decided, 2024 MT 105N): A MEPA challenge seeking to prevent the Yellowstone Club from using wastewater to make artificial snow for skiing. Although the court decided that DEQ's MEPA analysis was sufficient, it took three years to litigate, under the threat of an injunction.

- *Protect the Clearwater v. DEQ* (pending): Groups used MEPA to challenge a dry land opencut gravel mining project near Elbow Lake. Despite some preliminary rulings by the Montana Supreme Court and the District Court on procedural issues, the project remains enjoined until the case is completed (permit application was submitted three years ago).

Legislative Revisions Through Agency Bills

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

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

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.