

Reforming Environmental Review

Since the early days of the environmental movement Minnesota has been a leader in environmental protection, but the environmental review process today has become so complex and inefficient that neither effective environmental protection nor expeditious implementation of needed projects is assured. Reform of the Minnesota Environmental Policy Act is a necessary first step to restore its effectiveness for all concerned.

By Peder Larson and Julie Perrus

Most memorable 1970s Minnesota moments? How about Gov. Wendell Anderson holding a northern pike on the cover of *Time* proclaiming “The Good Life in Minnesota”? Is playing and losing four Superbowls a good memory or a bad one? Minnesota was a technology leader, with Seymour Cray leading the way with a “supercomputer” capable of making 240,000 calculations per second (your cell phone can now do better than that). If you were around you might have been recovering from your Hippie travels, serving in Vietnam, or spending a night at the disco with your best polyester shirt or platform shoes. Today Facebook is handy and iPhones are amazing, but back then having a Betamax in the family room and playing Pong on your buddy’s Atari were worth talking about.

And great changes in society were producing great changes in the law. It was the decade when modern environmental regulation was created. The burning Cuyahoga River in Cleveland in 1969 might be the most iconic image of environmental challenges leading to Earth Day in 1970. Less famously but more locally, Lake Minnetonka was suffering from pollution from seven municipal sewage treatment plants discharging to it.¹

President Richard Nixon signed the National Environmental Policy Act (NEPA) on January 1, 1970, declaring it the Year of the Environment. The year included the first Earth Day and the birth of EPA. Nixon signed the Clean Air Act of 1970 on December 31, stating, “1970 will be known as the year of the beginning, in which we really began to move on the problems of clean air and clean water and open spaces for the future generations of America.”² The decade continued with creation of the Clean Water Act, the Endangered Species Act, the Safe Drinking Water Act, and countless other environmental laws and amendments.

The Minnesota environmental lawyer rose to public prominence that decade. Today’s most experienced environmental lawyers earned their reputations fighting over disposal of Reserve Mining’s tailings on the north shore of Lake Superior and the use of the Boundary Waters Canoe Area. In 1974 U.S. District Court Judge Miles Lord presided over a 139-day trial over the discharge of mining tailings to Lake Superior, sparking controversy, shutting down Duluth’s water supply, and ordering the immediate shut-down of the Reserve Mining facility.

Minnesota's first major environmental review battle began in 1972 in a fight over the BWCA. Minnesota Public Interest Research Group (MPIRG) sought an injunction in federal district court, claiming that an environmental impact statement (EIS) was required under NEPA before the U.S. Forest Service could allow logging in the area. Following an 8th Circuit Court of Appeals decision upholding a district court injunction, the Forest Service issued an EIS which was challenged by both MPIRG and the Sierra Club. In late 1978 the United States Supreme Court denied a final appeal and the injunction was dissolved. While the BWCA wilderness advocates' efforts ended with a loss in court, legislative efforts had been ongoing during the court battle. In 1979, Congress passed the Boundary Waters Canoe Area Wilderness Act, establishing the area as a paddle-only wilderness area.

Environmental review under NEPA has had huge impacts well beyond the BWCA. Nuclear power plants, off-shore drilling projects, and public libraries have been influenced or stopped due to NEPA review.³ An EPA history of NEPA describes the concurrent creation of NEPA and national environmental litigation organizations, stating that "NEPA was like grain dust to the environmental litigators' match."⁴

In 1973 Minnesota adopted its own version of NEPA, called the "Minnesota Environmental Policy Act" (MEPA), creating a state law structure for environmental review. MEPA has been a factor in some of Minnesota's most important environmental issues. In the 1980s a large increase in timber harvesting sparked production of a generic environmental impact statement on timber harvesting. In the 1990s feedlot controversies produced a raft of contentious environmental reviews and litigation, focused largely on whether environmental programs had kept pace with the potential environmental effects of a rapidly changing animal agriculture industry. Today, the future of new mining ventures in Minnesota is being framed through an EIS on a proposal to excavate and process a sulfide mineral deposit in northeastern Minnesota.

MEPA's importance as a tool to address environmental concerns in Minnesota is unquestioned. Fans and critics alike know that it will continue as part of the fabric of Minnesota environmental regulation. MEPA's design, implementing regulations, and procedures however, have been regularly questioned. Today the call for change might be stronger than ever. Changes to MEPA are justified and should be implemented in a way that maintains its value while eliminating clear and often-mentioned problems.

A Brief History

The Minnesota Legislature was already focused on environmental policy reform when President Nixon signed NEPA in 1970. The Minnesota Pollution Control Agency had been created in 1967. The Minnesota House had passed a resolution in 1969 directing a study of the state's water resource and pollution issues, drainage laws, and flood control. The study concluded that the "piece-meal" approach that had been taken to address land- and water-related issues throughout the state required a legislative fix, the purpose of which would be to create a "comprehensive state policy" addressing the environmental issues facing the state.⁵ From that study, and following the principles of NEPA, MEPA was passed overwhelmingly by the Minnesota Legislature in 1973.

MEPA was created to achieve a number of policy goals, requiring the state to act as a "trustee of the environment for succeeding generations."⁶ The goals have expanded over time, but the underlying mandate to state departments and agencies has remained the same: to "identify and develop methods and procedures that will ensure that environmental amenities and values, whether quantified or not, will be given at least equal consideration in decision making along with economic and technical considerations."⁷

Since MEPA's passage, a number of important changes to the law have occurred, which some believe negatively impacted its effectiveness as a tool for environmental

protection. Major changes include limiting petitions to those projects or actions of “more than local significance” and decentralizing the environmental review decisions from the state Environmental Quality Board to the “local, county or state agency having the most approval authority over a project.”⁸

In addition, over the years, a number of categories have been created to expressly mandate or exempt projects from environmental review, regardless of localized impact or significance, and often with head-scratching results. The types of categories include feedlots, mixed-use residential and industrial-commercial developments, campgrounds, highway projects, nonmetallic mineral mining, ethanol plants, and sports facilities. Categories are not defined in terms of resource impacts, but rather in terms of size, density, or type of development or expansion. Successful industry and interest-group lobbying has played an important role in the development of these categories over time, contributing to the sometimes inconsistent and arbitrary results.

For example, two similarly situated fuel-conversion facilities would be required to prepare mandatory Environmental Assessment Worksheets (EAW) under different circumstances. A facility constructed or expanded for the conversion of coal, peat, or biomass sources to fuel requires an EAW based on the facility’s capacity to utilize 25,000 dry tons or more per year of input while a facility constructed or expanded to produce alcohol fuels, like ethanol, requires an EAW if it has capacity to produce 5 million gallons per year of output.⁹

Battles over ever-larger feedlots have raged for years in Minnesota. Disputes have arisen over issuance of permits; lawsuits have challenged environmental review decisions, local government controls, and regulation from entities ranging from the Minnesota Department of Health to the EPA; agencies have addressed the laws and regulations regarding environmental review several times, altering the overall size and scope of projects requiring environmental review.¹⁰ These changes arguably have been made based more on political, social and economic concerns than on science.

Environmental Review

Still, the primary purpose of environmental review remains the same—to gather information that will be used to mitigate and/or avoid the potentially significant environmental impacts of an action. The basic process most often occurs through several steps, each including an opportunity for public comment. If environmental review is necessary, the responsible unit of government prepares an EAW and publishes it for public comment, determining whether the project “has the potential for significant environmental effects.” If so, it prepares an environmental impact statement (EIS). Preparing the EIS involves in-depth analysis of environmental, social, and economic aspects of the project as well as identification of potential mitigation actions and alternatives that might reduce environmental impacts. Finally, the responsible unit of government determines whether the EIS adequately addresses the required issues. Permitting authorities use the EAW and EIS information to impose restrictions on the project to mitigate any potential environmental impacts.

Missing in this description is the lengthy nature of the process for a controversial, large, or novel project. The environmental review process can take numerous twists and turns, particularly as an EAW is prepared and the responsible unit of government determines whether an EIS is required. Multiple agencies are often involved, extending the period of review and decision making. MEPA has always provided for public involvement in the environmental review process, including a petition process and multiple opportunities for the public to provide comments that must be addressed. While providing for public input is critical, this involvement can also lead to delays in review.

The complicated nature of environmental review is most evident during the process of preparing an EAW and deciding whether an EIS is required. Although an EAW is

defined as a “brief document which is designed to set out the basic facts”¹¹ regarding a project, in practice there is nothing brief or basic about many EAWs. A more apt definition would be that an EAW is “an in-depth description of a project and its potential for significant environmental effects that contains, in the body of the document or appendices, a detailed analysis of the project’s most important potential environmental effects and regulatory authority that exists to mitigate those effects.”

In reality, projects often avoid environmental review. Project proposers and government officials try to avoid the cost and expense by addressing potential environmental problems before a project is formally submitted for approval. Some units of government might also be biased by economic considerations or not informed enough of the science underlying environmental concerns. When an EAW must be prepared, project proposers often submit voluminous and detailed information for the EAW in hope that a detailed analysis will avoid a costly and time-consuming EIS.

Attempts at Reform

Since the 1970s interested parties have made multiple attempts to reform the environmental review process. Staff of the Environmental Quality Board (EQB) noted that “an almost constant task ... has been to attempt environmental review reform.”¹² The rules implementing the statutory authority for environmental review under MEPA have been amended half a dozen times, and several major reform efforts have been initiated by the EQB (the last in 1995).

Certain issues arise consistently in reform discussions: Does environmental review work now that extensive environmental regulatory requirements and advancements in the measurement and analysis of environmental impacts have transformed many an EAW into a sophisticated document more akin to a “mini-EIS”? Can the goals of MEPA be served with less expensive and time-consuming processes? Are mitigation measures identified in environmental review implemented and effective? Is the appeals process accessible and consistent? Is it possible to do a narrowly scoped EIS?¹³

Most recently, the Minnesota Legislature directed the Pollution Control Agency (MPCA) to prepare a “report on streamlining Minnesota’s environmental review process while maintaining or improving air, land, and water quality standards.”¹⁴ The report must include “options that will reduce the time required to complete environmental review and the cost of the process to responsible governmental units.”¹⁵

Not surprisingly the MPCA received a wide range of recommendations.¹⁶ Some support the streamlining effort. Others question whether “streamlining” really means “weakening” and criticize MEPA’s ability to produce positive environmental results. The MPCA report concludes that “identifying options that could reduce the cost and time of environmental review while maintaining or improving the environment has proven to be a difficult task.”¹⁷ The MPCA also concluded that there is a significant divide over the need for environmental review streamlining and the potential environmental impacts of streamlining ideas.¹⁸

MEPA Today

Any discussion of environmental review reform should consider at least this question: How would MEPA be designed today? MEPA was created when federal and state environmental laws were brand-new or yet to be created. Rules and regulations were almost nonexistent and regulatory agencies were a small fraction of their current size. Environmental problems were once measured with the human eye and are now measured in parts per million or parts per billion. Computer programs designed to model environmental impacts literally take days to produce results after data is entered. Clearly, many important problems remain unsolved and unknown risks will appear, but whether one thinks that the current regulatory system is overly burdensome or just a

good start, it is universally accepted that the breadth and sophistication of regulatory and technical tools have improved enormously since the early 1970s.

Minnesota is a recognized leader in environmental regulation. It implements most federal environmental laws directly and in many cases adds additional, more stringent requirements. Numerous state laws impose state-specific requirements on those who propose projects, including the Minnesota Ground Water Protection Act passed in 1989 requiring that “groundwater be maintained in its natural condition, free from any degradation caused by human activities”¹⁹ and the Wetlands Conservation Act passed in 1991 creating a “no net loss” policy for the state. Each state law is matched with rules adopted by state and local governments.

Local land-use planning has become more detailed and, well, comprehensive. The Metropolitan Land Planning Act in 1975, the Community-Based Planning Act in 1997, and other policies enacted over the years provide local governments with authority to tie zoning and regulatory approvals to the goals of the community—including environmental concerns. From local stormwater regulations to overall sustainability plans, local governments are managing environmental needs in ways that were not contemplated by the designers of MEPA. The city of Winona, for example, is attempting to protect local bluffs through changes to its zoning ordinance that include stringent setback requirements to control erosion and protect the bluffs from habitat loss.

Local governments include the various state controls on shorelands and wetlands in planning decisions. Local review of conditional-use permits and planned-unit developments often entails high levels of scrutiny related to transportation, energy efficiency, and stormwater. Finally, the LEED® rating system and other “green” building standards are providing concrete metrics to help cities and businesses address these issues on both building-specific and neighborhood development proposals.

Changes for Consideration

Attempts at major environmental review reform in Minnesota have not been successful, perhaps because it seemed safer to live with problems that were familiar than with solutions that were not. Regardless, Minnesota environmental review is due for improvements. Environmental review should be designed to reflect the revolution in environmental regulation that has occurred since 1973. It must also be redesigned to reduce delays and expense. Whether one is concerned about shrinking government agency budgets or the global competition for capital and jobs, environmental review is too slow and too expensive.

Two changes should be strongly considered. First, the law and process of environmental review should be reformed to focus on environmental impacts that will not otherwise be addressed by existing regulatory programs. Second, the processes of environmental review should be improved to ensure that the time and expense of environmental review produce environmental results.

Minnesota environmental review rules already allow a responsible unit of government to decide that an EIS is not required for a project because the project’s potential environmental effects “are subject to mitigation by ongoing public regulatory authority.”²⁰ Minnesota courts have recognized that this is appropriate if the decision maker has taken a hard look at the potential environmental effects and the mitigation measures are “specific, targeted and certain to be able to mitigate the environmental effects.”²¹

While “ongoing regulatory authority” is often cited as the reason not to perform additional review, determining that the authority exists often takes a tremendous amount of time and effort. As an extreme example, environmental review of one ethanol facility

required the MPCA to expend thousands of hours of staff time to prepare an EAW and present its recommendations to the MPCA Citizens Board. The MPCA Citizens Board determined that, while the project had some opposition, no additional environmental review was needed, primarily because the potential effects of the project could be properly mitigated by existing regulatory authority.

Decades of public investment in laws, rules, and government agency staff have produced a system that will mitigate most environmental impacts of most projects. MEPA should be amended to specifically state that an EIS will be prepared only when preexisting regulatory oversight does not require mitigation measures to be put in place to prevent such significant environmental effects before they occur. With this change, an EAW would contain a section that briefly describes potential environmental effects and the programs that exist to address them, including opportunities for public participation. The government body responsible for that program should then be held responsible for implementing requirements that mitigate the potential environmental problem.

Detailed analysis, including analysis needed to determine whether an EIS is required, would be reserved for other issues. Environmental review resources would be focused on newly identified environmental threats, including potential problems from new types of projects and processes and on potential cumulative effects from numerous projects that alone might not be addressed by existing regulatory programs but might be damaging when combined with past projects and other projects that are expected.

This revised process would put pressure on existing regulatory agencies to address new and emerging problems. It would be publicly acceptable if a new type of project or a newly discovered environmental risk was identified as not properly addressed in an existing regulatory program and requiring study through an EIS. The public would be justifiably concerned if it was determined later that that same environmental risk or that same type of project still required environmental review through an EIS because ongoing regulatory programs had not yet adjusted to provide reliable mitigation.

In addition, MEPA laws, regulations and procedures must be changed to reduce costs and speed decision making. This cannot be an excuse for more lax review, but the world economy is too competitive and government resources for environmental protection too scarce to waste time and money under the current program.

MEPA should be amended to codify the rule that an EAW is a “brief document designed to set out the basic facts” regarding a project, potentially reducing the number of EAWs that are really “mini-EISs.” MEPA should also be amended to establish a clear policy goal of timely decision making. EAW rules should be amended to define categories of environmental impacts to be addressed in existing regulatory programs, creating a presumption that those will not be subject to detailed environmental review analysis. EQB rules requiring environmental review for some projects and exempting others should be revisited to ensure that they are properly designed.

The EIS process needs close examination. Changes should be implemented to reduce public and private costs of preparing an EIS and reduce the time from when a project is first described to a government agency to the time a draft EIS is ready for public review. Determining the scope of an EIS requires greater discipline by the responsible units of government to ensure that detailed analysis is focused on the right issues. In addition, changes should be made to eliminate the waste of time and money due to duplication of effort by multiple consultants hired by project proposers and government agencies working on the same issues.

Successful Reform

Successful reform will mean that detailed review of potentially significant environmental impacts and required mitigation will take place in existing regulatory

programs to the maximum extent possible. Environmental review of individual projects should then produce three things. First, it should produce a concise and understandable description of potential environmental effects of a project that will be mitigated by preexisting regulatory oversight. Second, it should provide a detailed description of other environmental risks and an analysis to determine whether additional environmental review is required. Finally, when necessary it should provide an EIS prepared in a timely and cost-effective manner that provides important information for use by the public and permitting authorities.

The pace of commerce has changed drastically since MEPA was created. Minnesotans will continue to value public participation in project assessments and protection of the environment. Minnesota policy makers must make tough decisions to uphold those values while also valuing expeditious approval of worthy projects.

Notes

- 1 City of Orono Community Management Plan 2008-2030 at page 1-3 to 1-4.
[http://www.ci.orono.mn.us/City%20Code/Comp%20Plan%202030/\(COMBINED%20CMP%20Part%201\).pdf](http://www.ci.orono.mn.us/City%20Code/Comp%20Plan%202030/(COMBINED%20CMP%20Part%201).pdf), last visited 12/30/09.
- 2 Richard M. Nixon, Remarks on Signing the Clean Air Act Amendments of 1970.
<http://www.presidency.ucsb.edu/ws/index.php?pid=2874>, last visited 12/30/09.
- 3 Alvin L. Alm, "NEPA: Past, Present, and Future," EPA Journal (January/February 1988). <http://www.epa.gov/history/topics/nepa/01.htm>, last visited 12/30/09.
- 4 Id.
- 5 State of Minnesota, House Research Department, Final Report: House Land and Water Resources Committee, Subcommittee on Water Resources and Pollution, Subcommittee on Minnesota River Flooding and Drainage, October 28, 1970, pgs. 7-8.
- 6 Minn. Stat. §116D.02, subd 2 (1973).
- 7 Minn. Stat. §116D.03, subd. 2(c) (1973).
- 8 Minnesota Center for Environmental Advocacy, Unfulfilled Promise, Twenty Years of the Minnesota Environmental Policy Act: A Program for Reform, March 1994, pg. 32.
- 9 Minn. R. 4410.4300, subp. 5.
- 10 Minn. R. 4410.4600, subp. 29.
- 11 Minn. R. 4410.0200 subp. 24.
- 12 Technical Representatives' Report to the Environmental Quality Board on Environmental Review: as Directed by the EQB at its January 2007 Retreat, April 11, 2007.
- 13 Id.
- 14 Minnesota Pollution Control Agency, Environmental Review.
http://www.pca.state.mn.us/programs/envr_p.html, last visited 12/30/09.
- 15 Minnesota Session Laws, Chapter 37, H.F. 2123, Article 1, Sec. 65 (2009).
- 16 Minnesota Pollution Control Agency, Environmental Review Streamlining; A Summary of Past Efforts, Current Ideas and Stakeholder Input, (December, 2009) at 1.
<http://www.pca.state.mn.us/publications/lrp-ear-3sy10.pdf>, last visited 12/30/09.
- 17 Id at 20.
- 18 A full listing of the comments received is available at
<http://www.pca.state.mn.us/publications/er-comments-1009.pdf>, last visited 12/30/09.
- 19 Minn. Stat. §103H.001.
- 20 Minn. R. 4410.1700 subpt. 7.
- 21 Citizens Advocating Responsible Development v. Kandiyohi County, 713 N.W.2d 817 at 834 (Minn. 2006).

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