

Technical Representatives' Report to the Environmental Quality Board on Environmental Review

As Directed by the EQB at its January 2007 Retreat
April 11, 2007

Introduction

At its retreat on January 31, 2007, the EQB directed the EQB staff and Technical Representatives to review EQB's role as it pertains to the Environmental Review Program and report back to the EQB with recommendations.

In order to accomplish this task, EQB staff and Technical Representatives held two special meetings in addition to discussions at two regular Technical Committee meetings. A subgroup studied the issue in more detail and provided the structure and basis for each discussion. Specifically, the EQB staff and Technical Representatives:

1. Reviewed Environmental Review reform ideas coming out of significant reports, studies, and efforts from 1990 to 2002;
2. Sorted and grouped those reform ideas to discover the broad underlying issues/problems; and
3. Examined the history of Environmental Review reform efforts overall to glean what lessons could be learned.

This report briefly examines the EQB's role in the past and present and makes recommendations for the future. It focuses on the EQB's role in past Environmental Review reform efforts, since a majority of EQB's time spent on environmental review has been devoted to this task.

EQB's Historical and Present Role in Environmental Review

When the Minnesota Environmental Policy Act (MEPA) was implemented in 1974, the EQB was responsible for preparing and making the final decision on all EAWs and EISs. This placed a considerable burden on the EQB Board and staff. Consequently, in 1977, the program rules were amended to transfer most responsibility to other state agencies and local governments. State agencies and county and city governments now became the Responsible Governmental Units (RGU) for preparing and making decisions on EAWs and EISs. However, a decision could be brought before the EQB for review by a state agency or by citizens if 500 signatures were obtained. Appeals on decisions rested with the EQB. The appeals decision was moved to District Court in 1980 MEPA amendments (and the procedure for appeal to EQB by 500 citizen signatures was eliminated).

Today, EQB remains the overall Environmental Review Program administrator. EQB is the home of the Environmental Review rules and still has the authority to make decisions on EIS adequacy decisions and cost disputes, RGU assignment, variance requests, AUAR objections, and may order preparation of an EAW if no other unit of government is in a position to do so. The EQB may also initiate or intervene in lawsuits challenging RGU decisions. The EQB issues the EAW form and guidance and provides advice to RGUs on interpretations of the rules. The

staff carries out various administrative duties needed for the functioning of the process, including publishing the *EQB Monitor* and processing citizen petitions.

Almost since the beginning, EQB has fielded complaints about the Environmental Review Program from a wide spectrum of stakeholders. As a result, an almost constant task for EQB has been to attempt Environmental Review reform. The rules (chapter 4410) have been amended six times to accommodate some concerns, clarify parts of the rule, and add new or change category thresholds. Additionally, several major reform efforts were initiated by the EQB between 1990 and 2002 as discussed in more detail in the following section. The last attempt to make a major change to the statute (chapter 116D.04), which ultimately failed, was in 1995. Please refer to appendix A for a history of Environmental Review reform activities.

Significant Reports, Studies, and Efforts

In order to understand the depth and breadth of stakeholder criticisms regarding the Environmental Review Program, EQB staff and Technical Representatives reviewed recommendations for reform in reports, studies, and efforts undertaken from 1990 to 2002. These included:

- "Environmental Review: An Unfulfilled Promise," a July 1990 article in *Bench and Bar of Minnesota* by John H. Herman and Charles K. Dayton (pp 31-38)
- Recommendations by EQB Technical Representatives dated July 1991
- "Experts Recommend Changes to the Environmental Review Process," a 1992 report by the Minnesota Environmental Initiative (MEI) (pp 18-21)
- "Concepts for Revision of the Minnesota Environmental Review Program," a March 1993 report by the EQB Subcommittee on Environmental Review Program Revisions
- *Unfulfilled Promise: Twenty Years of the Minnesota Environmental Policy Act, a Program for Reform*, a March 1994 report by the Minnesota Center for Environmental Advocacy
- 1995 EQB-sponsored legislation (H.F. 1015. This legislation was not adopted)
- Interim Results from a 1995 advisory workgroup appointed by the EQB Chair
- "Public Input on Environmental Statutes, Processes and Rules" a summary of meetings conducted by the MPCA in 2000
- "EQB Topics & Issues for Environmental Review Special Advisory Committee to Consider", a report by the EQB Subcommittee on Environmental Review Program Revisions to the Special Advisory Committee on Environmental Review reform dated December 2001
- "EQB Analysis of SAC Recommendations" a report by the EQB at the conclusion of the Special Advisory Committee process, dated December 2002

Major Issues Underlying Environmental Review Reform Ideas

To aid their analysis, the EQB staff and Technical Representatives grouped the recommendations according to the underlying problems that these ideas were attempting to solve. These groupings were then given a heading that characterized the underlying problem. These are described in more detail below. Although there might have been agreement among stakeholders on what the problems were, there has been considerable disagreement about the proposed solutions. The discussion below attempts to capture the flavor of the opposing viewpoints.

- Substitution of EAW process for EIS. Recommendations in this category addressed the reality that EAWs have become more than just a “brief document which is designed to set out the basic facts necessary to determine whether an EIS is required for a proposed project.” Extensive new information now exists regarding environmental impacts then when MEPA was first enacted. Much of that information is now included in EAWs. Few ordered EISs are prepared in Minnesota when compared with other states with state environmental policy acts. Environmental and other interest groups have argued that project proposers tend to concentrate their efforts on generating substantial EAWs (or “mini-EISs”) in the hopes of avoiding EISs, when these groups believe an EIS should be ordered. They have suggested solutions that expand environmental analysis, such as requiring or encouraging more EISs or requiring an alternatives discussion in EAWs. Proposers generally have disliked the unpredictability of the EAW (i.e., that an EIS may be ordered by the RGU or by a court on appeal), and so have tended to favor solutions creating more finality.
- Perceived delay in EAW/EIS process. This issue has been a major concern for many project proposers. The issue not only includes procedural time delay, but also uncertainty (i.e., an EIS could be ordered, an appeal could be filed, etc.). Proposed solutions have been wide-ranging, including shortening timeframes specified in the Rule, and allowing the EAW to be a final document, rather than a screening document.
- Lack of checks and balances on RGU decisions. Since the 1977 statutory amendment decentralizing authority for environmental review from the EQB to RGUs, concern has been expressed about RGU decisionmaking. Environmental and other interest groups and concerned citizens have argued that the current structure, where the RGU is sometimes the proposer or sole permitting authority, is a case of the “fox guarding the henhouse.” Proposed solutions have included EQB oversight and different RGU selection criteria (i.e., not the proposer or permitting entity). Proposers have been less concerned about this issue.
- Confusion/ambiguity about cumulative impacts. This is an issue mainly about how much information to include in EAWs regarding cumulative impacts. Environmental and other interest groups and citizens have expressed concern that the impact of the proposed project together with other projects is often inadequately considered. Proposers, on the other hand, have expressed concern about the extent of a cumulative impacts analysis. Solutions have generally involved further specifying how cumulative effects should be treated in environmental review documents. This issue is being addressed currently in the Phase 2 rule amendments.
- “Scope creep”. This is an issue mainly among proposers, who have expressed belief that the scope of EISs tends to be overly broad. Consequently, proposed solutions have been

to keep the scope more narrow; for example, to limit the scope to only issues that have a potential for significant environmental effects.

- Criteria for "potential for significant environmental effects" are subjective. "Potential for significant environmental effects" is not defined in Minnesota statutes or rules. Court decision interpretations have only muddied the water. This has been an issue for all camps: proposers, environmental/interest groups, citizens, and RGUs. The restrictiveness or expansiveness of proposed solutions has varied among the groups. Proposed solutions have included establishing a list of indicators or criteria that would specify a "significant environmental effect"; for example, if the project violates a water standard.
- Mitigation measures are not followed through. Environmental and other interest groups and citizens have argued that mitigation measures relied upon in the EAW are not necessarily incorporated into proposed projects or enforced by permitting agencies once projects are built. Various mechanisms for ensuring follow-through have been proposed.
- Inconsistency with the venue for appeals of other state agency decisions. Environmental review decisions are appealed to District Court. State agency permit decisions are appealed to the Court of Appeals. Other than inconsistency, a concern from all camps has been that district courts are not as familiar with the review standards for appeals as is the Court of Appeals, leading to inconsistency of the court decisions. The venue of District Court also creates a potential extra step in an appeal process, as a District Court decision can then be appealed to the Court of Appeals (and then to the Supreme Court).

There are other reform ideas that have been put forward through the years that are not included in the above discussion. The EQB staff and Technical Representatives determined that some of the ideas proposed:

- 1) had been or were being implemented through prior or current reform efforts;
- 2) were impractical or beyond EQB's control; or
- 3) were no longer relevant because of changes in circumstances.

These ideas are provided for your information as Appendix B.

Implications

From their review, the EQB staff and Technical Representatives concluded that solutions to perceived problems with the Environmental Review program fall into two groups: 1) major structural reform that generally involves statutory changes; and 2) less substantial changes that can be accomplished through rule revisions.

The EQB has been successful at addressing the second group of problems as they have arisen over the past 30 years. However, several efforts have been made at major structural changes without success. This is because major Environmental Review reform is controversial; factions become polarized and entrenched. Experience has shown that each side tends to see room for improvement, yet fears that change may lead to reversals of progress from their points of view. Consensus or "win-win" solutions have proven to be elusive.

The most recent attempt at major structural reform was during the Ventura Administration in 2001 and 2002. A representative stakeholder group called the "Special Advisory Committee" was appointed by the Governor. The Committee used a consensus process, and after 13 meetings, it issued a one-page report. One of the Committees' conclusions was that:

"The current Minnesota environmental review program is not perfect, but as a group the committee was not able to come to agreement on a better system."

Recommendations

Policy and Assistance

The EQB administers the Environmental Review program and makes certain decisions at the policy level as described in "EQB's Historical and Present Role in Environmental Review" section of this report. Overall, EQB staff and Technical Representatives do not recommend any changes in this role.

Major Structural Reform

After several attempts and significant time spent, successful resolution of major structural reform issues has proven elusive. These failed attempts have resulted in a degree of fatigue and frustration for all participants, including EQB staff and Technical Representatives. EQB staff and Technical Representatives believe that many of the issues are important and still relevant. However, unless a different approach is used, new attempts at major structural reform are likely to result a similar impasse as in past efforts. The EQB staff and Technical Representatives recommend that any new effort to restructure Environmental Review be attempted only if the following conditions are met:

1. There is a clearly defined problem or opportunity that EQB members, given the EQB's mission, feel would be irresponsible of them not to address now;
2. Significant resources (money) are secured for the effort and a workplan is clearly defined; and
3. If, to move structural reform ahead, the Board feels that some level of consensus among stakeholders is needed, the process should be headed by professionals with expertise in consensus-building/conflict resolution and ideally experience with similar issues. The EQB staff and Technical Representatives believe that state agency staff should not embark on Environmental Review reform again without leadership from a qualified outside party, possibly from outside the state system and selected through a nation-wide search.

Appendix A
History of Environmental Review Rulemaking
Compiled by EQB staff and Technical Representatives
March 2007

- 1974 Environmental Review Rules become effective
- 1977 Rules amended for the first time:
→Previously EQB staff wrote all EAWs, now they are assigned to City and State "RGUs"
→Decision on EAW can be brought before the EQB if 500 signatures are obtained
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- 1980 Statutes are amended:
→Now ER is completely decentralized from EQB; appeals go to the courts, not EQB
→EIS Categories appear for the first time (before were all discretionary or because of an EAW)
→Petition process changes to need only 25 signatures
- 1982 Rules changed to reflect statute
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- 1986 Rule are amended – noncontroversial (no hearing), fixed minor glitches in 1982 rule
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- 1988 Rules are amended
→Solid waste and hazardous waste mandatory categories are overhauled
→AUAR process is added
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- 1990 **End of Perpich Administration**
In August, EQB Members hold a retreat where they talk extensively about Environmental Review. Extensive discussion triggered by Chuck Dayton and John Herman's article in the Bench and Bar of Minnesota called, "Environmental Review: An Unfulfilled Promise" The main issue in the article is the "over-reliance" on EAW compared to EIS, contrary to the intent of the program designers. EQB assigns agency Tech Rep Committee to study program and recommend changes.
- 1991 **Carlson Administration**
January EQB sends out Request for Comments for Environmental Review Rule Revisions
July Tech Reps/EQB staff submit written report on recommended changes to EQB subcommittee on Environmental Review
Nov EQB holds "focus group" to review July recommendations. Main recommendations are to replace EAW and EIS with a single document and process (or variation) and re-establish EQB oversight over RGU decisions.
- 1992 MEI holds its own meeting on ER revisions and gives report to EQB

- 1993**
 March EQB issues, "Concepts for Revision of the Environmental Review Program" and holds two public meetings on the report. Recommendations include three options for changing nature of EAW process; limited EQB oversight of RGU decisions; and various others that have since been adopted.
- 1994**
 March EQB spends much of this year is spent preparing legislation for 1995 session. MCEA issues Environmental Review program audit study, "Unfulfilled Promise," which outlines 33 recommendations for changes the program.
- 1995**
 Spring EQB tries to pass statutory changes through the legislature; passed House 122-0; failed to get hearing in Senate. Legislation included:
 →EQB oversight: remand authority for Chair; "gatekeeper" review of EAW content
 →No changes to basic nature of EAW; changes to enhance completeness and quality of data and consideration of mitigation measures, including explicit requirement that mitigation relied on in EAW process must be implemented
 →Changes to citizens petition process; 150 signatures and restrict timeframe for filing petition if proposer gives adequate early notice of project
- April EQB resend out Request for Comments for ER rule revisions originally sent in 1991
 July Public meetings held on the proposed revisions
- Sept EQB Chair initiates an Advisory Workgroup of various stakeholders, with the goal to reach consensus on how MEPA (ER statutes) could be revised. The workgroup met for 4-4 hour meetings and decided they were making progress, but needed more time to reach consensus. Not convinced of any real progress, the EQB Chair disbands the workgroup in November.
- 1996**
 March, EQB published Request for Comments once again after eliminating most of the controversial issues.
- 1997**
 Rules changes become effective. Rule changes include changes to mandatory categories and "housekeeping" items (very similar to 2006). "Phased actions" is clarified by the 3-year look-back" provision.
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- 2000 Ventura Administration**
- Feb MPCA Board has retreat where they identify ER as top priority
 March MPCA Board authorizes staff to solicit citizen input on ER; EQB Chair Hugoson forms ER subcommittee
 April MPCA holds "Citizen Focus Groups" in St. Paul, Brainerd, and Rochester
 August EQB holds 1-day stakeholder meeting in St. Paul to conduct and initial scope of issues
 End of year MPCA gives EQB all their collected information and the process moves forward through EQB only
- 2001**
 May EQB sends list of names to the Governor's office for appointment to a "Special Advisory Committee (SAC)" on ER revisions.

2002

- SAC meets January through July and cannot come to any consensus. They report out:
- 1) The committee discussed the important issues presented to it by the EQB as well as other issues that the member identified as of concern.
 - 2) The current Minnesota environmental review program is not perfect, but as a group the committee was not able to come to agreement on a better system.
 - 3) The current system balances competing interests.
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2003

Pawlenty Administration

EQB holds retreat in November; PCA and DEED Commissioner want EQB to look at revising ER rules. Recognizing past failed attempts at an overall structural change, EQB staff/Tech Reps are asked to focus on where projects enter ER – mandatory category thresholds.

2004-2005

Focus is on Mandatory Category Thresholds Study (Housekeeping items also added)
Outreach activities and data collected:

- Comprehensive list compiled of ER done in each category between 2000-2003
- Survey to Local Government RGUs
- Focus Groups specific to a particular category: historic places, aggregate, residential and commercial development
- Met with state RGUs: PCA, DNR, DOT
- Gathered data on fate of petitions
- Conducted a Petitioner's Survey
- Extensive research into PCA categories of Air Pollution and Wastewater Systems
- Questionnaire for WWTF proposers
- MDA and PCA hold animal feedlot stakeholder meetings
- Whole project had a "stakeholder" group, but it was more for communication and not as a working group to reach consensus

2006

October, rule amendments are effective (Phase I)

2007

Continue to work on Phase II rulemaking. Issues are those that were not addressed in Phase I for the following reasons:

- AUAR process (became controversial)
- Shoreland Development Category (not ready)
- Cumulative Effects (waited for court decisions)

Appendix B: Environmental Reform Ideas Not Included in Analysis

Ideas Already Implemented

- Add to the rules specific requirements that when alternatives must be examined, the analysis must cover a standardized list of types of alternatives^{1,2,7,8}
- Add to the rules provisions specifically recognizing the use of “tiered” review where such review is appropriate^{1,2,7}
- Reconsider the definition/application of ‘phased actions’ to animal feedlots and to other types of projects³
- Clarify that ‘plans’ are not ‘projects’ and thus are not subject to environmental review³
- Voluntary extension of EAW process (after comment period) to gather supplemental info.⁴
- Make decisions quickly; Obtain information about other state’s processes to settle time debate⁵
- Revise Mandatory Category Thresholds^{1,2,6,7,8}
- Alternatives in EISs:⁵
- Revise the way of applying mandatory category thresholds so as to count past project stages as well as the presently proposed stages in order to address cumulative impacts; add EAW question regarding cumulative impacts.^{7,8}
- All projects should provide a short description of the project’s purpose in environmental documents⁸
- Add questions to the EAW form regarding criteria pollutants, stormwater discharge, inconsistencies between state and local plans⁶

Ideas Deemed Impractical, Out of Scope, or No Longer Relevant

- Legis appropriate additional funds for permit review of alternatives at PCA/DNR⁹
- Citizen groups should pursue test cases under MERA and MEPA: pro bono work needed from attorneys⁹
- Create an environmental forecaster to examine future cumulative impacts of a series of developments⁹
- Permitting agencies should consider alternatives whether or not an EIS is required⁹
- State agencies be decisive on decisions of “significant impact” and whether further review is required. Letters ramble and do not give the information needed for decision making.⁵
- Do not use MEPA to clarify the relationships between environmental review and state agency permitting¹
- Separate debate is need on environmental agency consolidation⁵
- Postpone consideration of revising GEIS process until after the Timber Harvest GEIS is completed – use that experience to shape views on the GEIS process itself⁴
- In addition to Monitor, publish notice in newspaper, and other means to get the word out⁶
- EAW form should direct RGUs to MnTAP for toxic related projects for P2 ideas⁶
- PCA had conflicting roles when it come to Solid Waste Facilities and ER⁶

¹ Tech Rep Report on changes to ER 1991

² 1995 Advisory Workgroup (preliminary agreement, never published)

³ “EQB Topics & Issues for Environmental Review Special Advisory Committee to Consider”, 12/17/01

⁴ EQB Analysis of SAC Recommendations, 12/02

⁵ MEI Program Findings and Recommendations 1992

⁶ Citizen Meeting Summary, MPCA 2000

⁷ Concepts for Revision of the Environmental Review Program, EQB 1993

⁸ Unfulfilled Promise, MCEA 1994

⁹ From *Environmental Review: An Unfulfilled Promise*, Dayton and Herman 1990

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