MEPA at 36: Perspectives on Minnesota's Little NEPA

by Kevin Reuther

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I. Background and Context

Two Minnesota statutes, both adopted in the early 1970s, were intended to establish bedrock protections for Minnesota's environment. The first is the Minnesota Environmental Policy Act (MEPA) of 1973,[1] considered the state's little NEPA [in reference to the National Environmental Policy Act[2]]. The second is the Minnesota Environmental Rights Act (MERA),[3] which establishes a general claim for environmental degradation.

MEPA, like NEPA, mandates an environmental review prior to projects that significantly affect the environment: "Where there is a potential for significant environmental effects resulting from any major governmental action, the action shall be preceded by a detailed environmental impact statement [EIS] prepared by the responsible governmental unit."[4] The procedures established in MEPA and its implementing rules are similar to those required under NEPA.[5]

Unlike NEPA, MEPA also contains a substantive standard. The statute provides that no state action shall be allowed, nor permit granted for private action, that will result in the "pollution, impairment, or destruction" of the state's natural resources, so long as a "feasible and prudent" alternative to the proposed action exists.[6] "Economic considerations alone shall not justify such conduct."[7] The intent of MEPA was to couple the substantive standard with the environmental impact statement (EIS) mechanism to determine and explore feasible and prudent alternatives.[8]

The prohibition against "pollution, impairment, or destruction" appears in MERA as well. Pollution, impairment, or destruction is defined as any conduct that violates, or is likely to violate, standards or limits set by rule or permit or "any conduct which materially adversely affects or is likely to materially adversely affect the environment."[9] A family farmer or family-owned farm corporation is not a "person" for purposes of MERA.[10] MERA was modeled after the Michigan Environmental Rights Act, and the Minnesota courts have looked to Michigan for guidance in interpreting its provisions.[11]

In theory, MEPA (and MERA) should ensure that Minnesota's environment is well protected from degrading impacts. It calls for ample NEPA-like procedures requiring environmental studies to make projects better and also provides for enforcement, where necessary, to ensure the choice of an environmentally favorable alternative. As the statute has been interpreted and evolved in practice, however, it has been sapped of some of its initial strength.

II. An Unfulfilled Promise

It didn't take long for MEPA to become less than what its champions had hoped for. By the late 1980s, those who had fought hard to get MEPA (and MERA) passed in the Minnesota Legislature were lamenting the unfulfilled promises of the statutes in practice.[12]

1. Minn. Stat. §116D.
2. 42 U.S.C. §§4321-4370f, ELR Stat. NEPA §§2-209.
3. Minn. Stat. §116B.
4. Minn. Stat. §116D.04, subd. 2a.
5. *See generally* Minn. Stat. §116D.04.
6. Minn. Stat. §116D.04, subd. 6.
7. *Id.*
8. *See* In re Winona County Municipal Solid Waste, 442 N.W.2d 344 (Minn. App. 1989) (holding that a supplemental EIS was needed because this was "substantial new information . . . that significantly affects the availability of prudent and feasible alternatives").
9. Minn. Stat. §116B.02, subd 5. The Minnesota Supreme Court has provided five factors to consider in determining whether conduct "materially adversely affects" the environment: (1) The quality and severity of any adverse effects of the proposed action on the natural resources affected; (2) Whether the natural resources affected are rare, unique, endangered, or have historical significance; (3) Whether the proposed action will have long-term adverse effects on natural resources, including whether the affected resources are easily replaceable (for example, by replanting trees or restocking fish); (4) Whether the proposed action will have significant consequential effects on other natural resources (for example, whether wildlife will be lost if its habitat is impaired or destroyed); (5) Whether the affected natural resources are significantly increasing or decreasing in number, considering the direct and consequential impact of the proposed action. The court "emphasize[d] that these factors are not exclusive and that each factor need not be met in order to find a materially adverse effect. Rather, the factors are intended as a flexible guideline for consideration as may be appropriate based on the facts of each case." State by Schaller v. County of Blue Earth, 563 N.W.2d 260, 267 (Minn. 1997).
10. Minn. Stat. §116B.02, subd. 2.
11. In the Matter of University of Minnesota Air Permit, 566 N.W.2d 98, 105 (Minn. App. 1997).
12. *See* John H. Herman & Charles K. Dayton, *Environmental Review: An Unfulfilled Promise*, Bench & B. of Minn., (July 1990); Robert Eleff & Kristin Sigford, Minnesota Center for Environmental Advocacy, Unful-

Here, I will highlight just three of MEPA's shortcomings. These reflect both structural failures of the statute and problems with agency and court interpretation that limit MEPA's effectiveness and have proven to be very difficult to correct.

A. 140 Environmental Assessment Worksheets and Only 10 EISs

MEPA, like NEPA, allows for a document called an Environmental Assessment Worksheet (EAW) that is supposed to function like an environmental assessment (EA). According to the MEPA rules, an EAW is "a brief document which is designed to set out the basic facts necessary to determine whether an EIS is required for a proposed project or to initiate the scoping process for an EIS."[13] One might expect in the land of 10,000 lakes, where state population grew by more than one million between 1970 and 2000, large numbers of projects would have been proposed that had the "potential for significant environmental effects" and triggered the need for an EIS. Not so.

Historical records are spotty on the number of EAWs versus EISs that are completed in Minnesota. In 1996, records showed 137 EAWs and only 2 EISs.[14] Staff administering MEPA report that the number of EISs for most years is below 10, while the number of EAWs can reach 150. Reportedly, more EISs have been conducted recently—up to 14 last year—because of increased interest in mining and energy projects. (Many of these are done jointly with a federal agency because the project needs federal permits requiring NEPA review.)

The failure of Minnesota's state and local agencies to require EISs significantly undermines the purpose and efficacy of MEPA. In Minnesota, an EAW does *not* present or evaluate alternatives. As a result, for the great majority of projects, the "heart of environmental review"—the alternatives analysis—is absent. It is common for project proponents to prepare lengthy EAWs, sometimes with more detail than one would find in a typical EIS, but without any alternatives analysis. Rather than looking at alternatives that could reduce impacts, the focus, instead, becomes justification for a FONSI.[15] In addition, the Minnesota courts have applied the most deferential standard to review of agency finding in environmental review—reversal of a finding that a project does not have the potential for significant environmental effects is very rare.[16]

B. Farmers Don't Pollute

Minnesota is an "ag-state." It is home to nearly 80,000 farms that cover over 50% of the state's land area.[17] Minnesota Democrats are members of the "Democratic—Farmer-Labor Party." Cargill and General Mills are among the businesses headquartered in Minnesota.

The predominance of agriculture in Minnesota has certainly had a significant influence on the development and evolution of Minnesota's environmental laws. Farmers are excluded from the definition of "person" in MERA. As a result, pollution, impairment, or destruction of the environment that happens on a farm or is caused by farming is not actionable. (On its face, the definition also means that a farmer cannot bring a MERA action as a plaintiff. That has yet to be challenged.)

Under MEPA, most agricultural activities don't require governmental action. Many of those activities that do have been exempted.[18] In 2006, the Minnesota Center for Environmental Advocacy (MCEA) petitioned the Minnesota Department of Agriculture requesting an EAW for the registration of certain pesticides. The petition was rejected. The Department asserted that it would need to know the precise location of pesticide applications to conduct environmental review.

What is clear is that, despite (or because of) this hole in Minnesota's environmental protection laws, agriculture-related activities *are* a huge source of pollution that is degrading the state's environment. Last year, Minnesota listed, for the first time, a stream in a state park as impaired for atrazine. Many of Minnesota's streams and lakes are impaired for nutrients, nearly all of which result from agricultural runoff. A draft nutrients total maximum daily load (TMDL) for Lake Pepin, a reservoir on the Mississippi with a huge watershed and over 500 wastewater dischargers, concludes that more than 90% of the nutrient loading comes from agricultural sources.

C. Alternative Forms of Review

MEPA provides the state Environmental Quality Board with the authority to approve alternative forms of environmental review if the review could be accomplished "in a more timely and efficient manner."[19] Any alternative rules should "address the same issues and utilize similar procedures as an environmental impact statement."[20] The state has approved a variety of alternative forms of review, including alternative forms for urban planning and development and for most energy-related projects.

In many cases, the alternative rules do not live up to MEPA's requirement that they be the same or similar to an EIS. For example, the state's pipeline routing rules were approved as an EIS alternative. Currently, the state Public

filled Promise: Twenty Years of the Minnesota Environmental Policy Act, A Program for Reform (Mar. 1994).

13. Minn. R. 4410.0200, subp. 24.
14. Stacy Lynn Bettison, *The Silencing of the Minnesota Environmental Policy Act: The Minnesota Court of Appeals and the Need for Meaningful Judicial Review,* 26 Wm. & Mary L. Rev. 967, 975 (2000).
15. *See* Bettison, *supra* note 14, n.36.
16. *See generally* Bettison, *supra* note 14 (arguing that Minnesota courts have applied a too deferential standard in reviewing agency decisions not to require an EIS).
17. U.S. Department of Agriculture website, State Fact Sheets: Minnesota, http://www.ers.usda.gov/stateFacts/MN.htm.
18. *See* Minn. Stat. §116D.04, subd. 2a(d); Minn. R. 4410.4600, subp. 19.
19. Minn. Stat. §116D.04, subd. 4a.
20. *Id.*

Utilities Commission (PUC) is permitting two new pipelines that will traverse northern Minnesota, one running south from Canada and transporting heavy tar sands crude from the Alberta tar fields to Midwest refineries, the other running in reverse direction and transporting light hydrocarbons, or diluent, from Midwest refineries back to the Alberta tar fields. While the pipelines will disturb about 6,000 acres of land (twice the size of the strip mine pit for one of Minnesota's oldest taconite mining operations) and cross hundreds of water bodies, including important wetlands and streams, there has been little environmental analysis or consideration of alternatives provided. Instead, the PUC is relying on an EA written wholly by the project proponent. The procedural elements of MEPA/NEPA, including scoping, publication of a draft, comments, and issuance of a final environmental review document have been absent. Connected actions and cumulative effects are not addressed, as they would be in an EIS.

MEPA sanctioned the use of alternative forms of review for laudable reasons, timeliness, and efficiency. But where alternative forms have been adopted, environmental protection has been weakened, not strengthened.

III. MEPA's Future

One gauge of MEPA's efficacy and relevance in the future is its ability to deal with the challenge posed by greenhouse gas (GHG) emissions and climate change. MCEA's litigation and legislative proposals related to MEPA and climate change demonstrate the significant challenges ahead.

A. Is MEPA as Written "Up to the Task"?

MCEA is currently engaged in litigation designed to require state agencies conducting EISs to evaluate climate change impacts, GHG emissions, alternatives, and mitigation measures. The case challenges the EIS for a new steel mill proposal. The proposed mill will use an electric arc furnace requiring 450 megawatts annually. Total GHG emissions from the project will be approximately 5 million tons $CO_{2\text{-eq}}$ per year. This represents approximately a 25% increase in Minnesota's industrial emissions and a 3.6% increase in total statewide emissions. Minnesota has GHG reduction goals in statute: 15% below 2005 levels by 2015; 30% below 2005 levels by 2025; and 80% below 2005 levels by 2050.[21]

The district court judge reviewing the case was unwilling to apply MEPA to help address climate change: "MEPA, as now written," he opined, "does not seem to be up to the task of analyzing how greenhouse gas emissions from projects like [the steel mill proposal] should be accounted for on the local, regional, state, national or even global scale."[22] The judge applied the court's most deferential standard of review in finding that the state's EIS, which did not analyze climate change impacts or evaluate any alternatives or mitigation measures related to GHG emissions, was adequate. In the judge's view, the case demonstrates "some glaring gaps between the current status of the law and the scientifically established connection between greenhouse gas emissions and climate change." The judge wrote that although the state had acknowledged the significant adverse impact of GHG emissions on the environment, "MEPA, as currently drafted, is geared to analysis and modeling of state, regional, and local effects on the environment."

The case is currently on appeal.[23]

B. Will the Minnesota Legislature Use MEPA to Confront Climate Change?

Having heard from the court that MEPA wasn't "up to the task" as written, MCEA pursued a legislative fix. Minnesota Senate File No. 549 and House File No. 868 would have required all environmental review documents to "identify and consider alternatives and mitigation measures that will reduce, eliminate, or offset any greenhouse gas emissions resulting from the project." Notably, the provision would have applied to EAWs and all forms of alternative review, requiring all projects to look for ways to reduce emissions and mitigate effects.

A number of committee stops significantly changed and ultimately killed the proposal. The experience reflects some of the same deficiencies from which MEPA suffers identified above.

First stop: Farms. The bill was amended to exempt any agriculture-related emissions to avoid certain death in the agriculture committees. Although agriculture, after transportation and electricity use, is the third-highest contributor to statewide GHG emissions, the agriculture lobby is very resistant to any requirement that new projects evaluate options for reducing their emissions.

Next stop: Alternatives. At the request of local government lobbyists, the bill was stripped of its requirement that the environmental review consider alternatives and mitigation measures. The bill, as amended, would have required only that environmental review documents "consider greenhouse gas emissions."

Third stop: Only certain projects. In response to industry concerns, the bill was limited to "transportation and land-use" projects where an EAW is already mandatory under existing rules.

Fourth stop: Death.

MEPA's shortcomings appear entrenched and will likely hamper in the near term the use of this statute as a tool in the battle against global warming. That said, advocates will be back next year with a new approach and even more supporters for a common sense requirement that project proponents consider their GHG emissions (and ways to mitigate those emissions) during the planning of their projects.

21. Minn. Stat. 216H.02.
22. MCEA v. Holsten, Minn. Dist. Ct, 9th Dist., File No. 31-CV-07-3338 (Oct. 15, 2008).
23. MCEA v. Holsten, Minn. Ct. App., File No. A08-2171.

IV. In Sum

MEPA's shortcomings have persisted (and, many would argue, grown worse) over the last three decades. A January 2007 report issued by the state Environmental Quality Board noted with frustration that addressing some of the major deficiencies with the way environmental review has evolved in practice appears politically impossible:

> 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.[24]

Certainly the urgency of the environmental challenges ahead requires that we continue to work toward realizing the potential MEPA had in the eyes of its drafters. That potential includes the ability for the statute to evolve and confront new challenges when they arise, including addressing GHG emissions and climate change. It makes common sense to use already existing environmental review processes for that purpose. If we can plan/design/build in such a way as will reduce emissions, we must. MEPA's original promise was to do just that, and we will continue to seek ways to use Minnesota's little NEPA to that end.

24. Environmental Quality Board, Technical Representatives' Report to the Environmental Quality Board on Environmental Review as Directed by the EQB at Its January 2007 Retreat (Apr. 11, 2007), *available at* http://www.eqb.state.mn.us/documents/2007-04-12EnvRevReformReportbyTReps-v5a.pdf.