

MEPA TURNS 50



BY STEPHANIE HEMPHILL | AUGUST 2023

IF YOU'VE EVER

driven on I-35E, south of St. Paul, you might have noticed the road takes a bit of a curve in Eagan to avoid Blackhawk Lake and Park, with its wooden fishing dock, hiking trail, and pavilion. That curve came about through the public's use of MEPA, the Minnesota Environmental Policy Act.

Back in the late 1950s, when the federal interstate highway system was in the planning stage, a line was drawn on a map showing I-35 crossing the lake on a bridge. But some area residents thought that was a bad idea. They appealed all the way to the Minnesota Supreme Court, which ruled in 1980 that there is "abundant evidence demonstrating that (avoiding a bridge over the lake) will have less of an adverse impact on water quality, wildlife habitat, aesthetics, and area quietude."

Citing MEPA, the court said the state's basic policy is that you can't pollute or damage the environment unless there's no alternative. There was an alternative to the environmentally destructive bridge, and the state had to use the alternative. Now, the highway curves, and residents continue to enjoy the peace and quiet of the lake.

This requirement to do things in the least environmentally harmful way is the core of MEPA, passed 50 years ago as Americans were noticing the fragility of the environment and the urgent need to protect it.

Public opinion changed dramatically after the post-World War II boom. People were influenced by Rachel Carson's 1962 bestseller, *Silent Spring*; they were shocked by disasters such as the 1969 oil spill off the coast of Santa Barbara, California, and the fire on the Cuyahoga River in Cleveland in the same year; they saw mothers marching against nuclear testing; and they found inspiration in photos of the little blue dot from space.

Many ordinary members of the public felt a new responsibility to do something to protect the Earth's precious resources. This was the era of Earth Day.

It was also a time of firm agreement across the political spectrum about the importance of protecting the Earth. In Minnesota, with Conservatives in the majority (that was the name for Republicans at the time), the legislature passed the Minnesota Environmental Rights Act (MERA) in 1971, 50-0 in the Senate and 95-38 in the House.

You can't pollute or damage the environment unless there's no alternative.



Bill Bryson of Freeborn County sued the county under the new Minnesota Environmental Rights Act to protect the marsh on his farm from being destroyed by a proposed roadway. Five years later the Minnesota Supreme Court sided with Bryson in a case known as "County of Freeborn v. Bryson" which also raised awareness for the importance of wetlands.

This measure declared it state policy to create and maintain conditions under which human beings and nature can exist in productive harmony so that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed. To help accomplish that goal, MERA allowed any person to sue in court to protect natural resources.

The legislative session of 1973 was a high-water mark for environmental legislation. With the Democratic party holding both House and Senate, and Wendell Anderson in the governor's office, laws were passed protecting wild and scenic rivers, requiring the Department of Natural Resources to review all wetland drainage proposals, and strengthening state authority over power plant siting, mine-land reclamation, and groundwater resources. Money was allocated to improve sewage treatment plants and begin ambitious recycling programs.

The measure we are celebrating in this review, the Minnesota Environmental Policy Act (MEPA), passed the Senate by 60-0 and the House by 119-7. Try to imagine that kind of unanimity today!

MEPA was designed, among other things, to corral a multitude of disparate state agencies and boards into a cohesive and responsive system to create — in language echoing MERA — “a more harmonious relationship between human activity and the environment.”

Effectively, MEPA provided a mechanism to enforce the MERA standard. In the intervening years, much has changed in the environment, but the essential philosophy and structure of MEPA has not. This may imply what a good law it is, how well-written and broadly conceived it is. But, most observers agree that it's time to re-examine and probably revise if not our basic environmental policy, at least how we implement it.

What is MEPA?

MEPA was modeled on the National Environmental Policy Act (NEPA), which was passed in 1969. Several other states created “Little-NEPAs,” but Minnesota's is generally considered one of the most rigorous, with enough scope and specificity to achieve its goals.

In lofty and inspiring words, Minnesota law [116D.02](#) declares it state policy to “create and maintain conditions under which human beings and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of the state's people.”

It directs all state agencies to use the “latest and most authoritative findings” in decision-making, and to ensure “environmental values... will be given at least equal consideration in decision-making along with economic and technical considerations.”

Most crucially, it establishes the need to study the possible impacts of projects before they are undertaken. MEPA requires that, “Where there is potential for significant environmental effects resulting from any major governmental action (including approval of private

actions), the action must be preceded by a detailed environmental impact statement (EIS) prepared by the responsible governmental unit.”

It also provides for environmental assessment worksheets (EAWs), “a brief document which is designed to set out the basic facts necessary to determine whether an environmental impact statement is required for a proposed action.” (MN Stat. 116D.04). This is the process of Environmental Review (ER).

Companion legislation created the Minnesota Environmental Quality Board (EQB), a group charged with creating policy for the state and overseeing the actions of individual state agencies.

For 50 years, Minnesota businesses, state agencies, cities and towns, Tribes, and individuals have followed these rules. To mark this milestone, EQB invited comments from businesses, agencies, environmental groups, and Tribal governments as to what MEPA has accomplished — how it does and doesn't work well — and what might be done to ensure it continues to work in the future.

This is just the latest in a series of efforts to get public input and improve the environmental review process in the state. A thorough report was prepared by the Office of the Legislative Auditor in 2011. The rules governing environmental review have been

changed nine times, mostly to increase thresholds for mandatory reviews thereby putting smaller projects out of reach of the ER process.

And most recently, EQB is working to create an ongoing Continuous Improvement Program. Staff are sifting through recommendations gathered from experts and the public to identify and prioritize possible changes.

Each idea is run through a matrix of nine goals (scientific integrity, environmental protection, measurability, inclusivity, user friendliness, accessibility, consistency, quality assurance, and accountability) to decide which idea might best advance the overall effectiveness of the ER program.



Mississippi River near Hastings, Minnesota 1963: A conservation officer shows the results of an estimated 2.5 million gallons of spilled oil from a soybean plant upstream, mixed with another petroleum spill.

HOW ENVIRONMENTAL REVIEW WORKS... OR GET READY FOR ALPHABET SOUP!

The core of the environmental review process is preparation and review of Environmental Assessment Worksheets and Environmental Impact Statements.

A review can be triggered by a "citizen petition," ordered at a Responsible Governmental Unit's (RGU's) discretion, initiated by a project proposer, or be mandatory as determined in rule. The process often starts when a project proposer conducts their review and submits a draft Environmental Assessment Worksheet (EAW) to an RGU. The law assigns which specific government unit is responsible for certain types of projects. About two-thirds of all reviews are conducted by local governments.



At a bill signing in the early 1970s, from left: Environmental lobbyists Chuck Dayton and John Herman, Rep. Willard Munger, chief author of many environmental bills, Gov. Anderson, Jackie Rosholt (Munger's aide) and Peter Gove, Governor's environmental aide.

Within 30 days the RGU must determine if the EAW is complete; then the document is published in the EQB Monitor and a 30-day public comment period begins. When the comment period ends, the RGU has 30 days to respond to comments and determine whether the project requires an Environmental Impact Statement (EIS).

EISs require much more information, including a comparison of potentially significant impacts of the proposal with impacts of other reasonable alternatives; these include environmental, economic, employment, and sociological impacts of the project and each major alternative. EISs also require a description of mitigation measures that could eliminate or minimize effects.

An EIS begins with a scoping process, in which the responsible governmental unit uses the EAW to define the breadth of issues the EIS will cover, holds at least one public meeting, takes public

comments, and issues a final scoping decision. Then the RGU issues notice that it will prepare a draft EIS. This kicks off a comment period and a public meeting. The RGU must determine the adequacy of the final EIS within 280 days of publishing the preparation notice. Finally, government units make decisions on permits.

Note that it's easy to confuse environmental review (ER) with the permitting process. Environmental review does not permit projects or stop projects. It provides information for the permit-issuing government, but it doesn't issue permits; that's up to state agencies, or local governments like counties and cities.

Here's the good news...



Positive impacts

Most of our respondents were happy to declare that the environmental review process in Minnesota is based on sound principles and works well most of the time. In fact, many of them express pride in Minnesota's long commitment to environmental protection.

Department of Natural Resources (DNR) Commissioner and Board member Sarah Strommen takes note of "the long history of leadership and pride that Minnesota has in environmental stewardship and the importance that the environment plays in our public policy." She also appreciates the commitment to public engagement written into MEPA.

"The environmental review process is inherently public facing: projects that meet certain thresholds should be vetted in a way that allows the public to see potential significant impacts and to understand those and weigh in on those," she says. "I think it's something that has been an important foundation of how we govern in Minnesota."

Retired EQB Director of Environmental Review, Gregg Downing, considers MEPA a tool. "Overall, it has improved things in the state and made the process

of reviewing projects better than it would be without it," he says. And it has probably contributed to public engagement by increasing awareness "through attention to disputes over certain projects in the news: helping better educate people and inform them about environmental issues," he says.

Former EQB member Kristen Eide-Tollefson appreciates the vision embodied in MEPA and its continued relevance. "Citizens really do expect this vision to be fulfilled and want to work on it together." She says MEPA sets up an "expectation of a certain level of awareness, cooperation, and collaboration on these goals."

Environmental attorney David Zoll says MEPA results in stewardship both directly and behind the scenes.

"The fact that applicants know that their projects will be subject to environmental review means that they are more likely to incorporate changes that mitigate potential adverse impacts into their plans before beginning environmental review."

- David Zoll

On a more concrete level, attorney John Herman, one of the original proponents of MEPA, lists high-profile projects he says were made better by going through the review process: the interchange of I-35E and Highway 494 in Dakota County, the Cedar-Riverside development, RiverPlace, and the Metrodome location.

The interchange of I-35E and Highway 494 in Dakota County takes a lot less space than it would as originally proposed; on the Cedar-Riverside development, the environmental review made it obvious that the scale and the nature of the project was inappropriate and later phases were never built; at RiverPlace, environmental review led to rehabilitation of a warehouse, a pleasing vista to a historic church, and buildings with varied heights; and three locations for the Metrodome were considered.

As noted above, MEPA requires all state agencies to ensure the “latest and most authoritative findings” are used in decision-making. Over the years, research to back up decisions on the environment has leaned on academics and state workers to develop good science across many fields, from health to forestry to wildlife management. Scientific knowledge brings us to a deeper understanding of the complexities of life, which are often difficult to describe in the environmental review process.

Even the business community appreciates some aspects of Minnesota’s environmental review process. Chet Bodin, Business and Community Developer at the Department of Employment and Economic Development’s Business First Stop Advantage program, says the steps in the process make sense. “The public comments come up front; that can take longer, it’s thorough, but by the time you get to permitting you’ve addressed a lot of the issues. In some other states, first you go through permitting, and at the end public comments can uncover issues you didn’t anticipate.”

WHAT CAN WE DO FOR THE NEXT 50 YEARS?



Let's not kid ourselves. There are plenty of gaps in Minnesota's environmental and political worlds of which EQB is acutely self-aware. Otherwise, there wouldn't be bills regularly presented in the legislature related to the EQB and its work and authorities. Many of these problems come from increasing rifts between political positions.

Project proposers and critics seem to think they have little in common and basic motivations that conflict. But in a state of good government, with lots of well-informed communities involved, surely there is much we can do to help MEPA live up to its lofty goals — goals that seem even more important in our current climate.

In recent years, environmental groups have pressed for inclusion of greenhouse gases in environmental review, and the RGUs and courts seem to have implicitly accepted this. Now that greenhouse gas questions are included on the EAW form, project proposers will at least be asked to make an inventory of a project's potential emissions. Also, proposers and reviewers have begun considering the potential impacts of climate change on the project itself.

EQB is strategically envisioning how environmental review might look in the next 50 years. Suggestions tend to fall into several topic areas for improving the system and living up to MEPA's intent.

General Critiques

Environmental review is designed, among other things, to provide information to permitting entities. But what they do with that information is up to them. Many proposed projects have ended up in court recently, as environmental groups and Tribal nations contend that permits are issued erroneously or arbitrarily.

This does not necessarily mean the environmental review was done badly. But the environmental review is meant to lay the groundwork for the permits, so it makes sense to ask what we are missing in that process.

Several of our respondents used the term "weaponized" to describe the ER process. Willis Mattison, who held positions of responsibility at both the DNR and the Minnesota Pollution Control Agency (MPCA), says, "When an environmental review document is written that hides or obfuscates, or in any other way does not tell the truth about what a particular project will do to our environment, it is being used as a weapon. It continues to justify the unjustifiable." In other words, Mattison says, the proposer can use the review documents to slip undesirable elements through the process.

Consultant Ann Glumac (Glumac Executive Enterprise) uses the same term to describe project opponents rather than project proposers. "It's my perception that EAWs and EISs have been weaponized by opponents. And I think perhaps if project proposers perceive it not as an attempt to generate data but as an attempt solely to stop something from happening, the reaction might be to try to just get in under the wire."

So, we get proposals for 999-head feedlots instead of the 1,000 that would trigger a requirement for environmental review. We get plans for housing developments just smaller than the cutoff point, and proposals for mines that would ship the ore to another state for processing.

Does this mean that project sponsors are irresponsibly avoiding the rules, or that they are using the rules to tailor their projects to fit Minnesota's requirements?

Environmental campaigner Don Arnosti says too often RGUs don't take the process seriously enough to really identify the likely effects of a proposed project. "The process of environmental review has become performative, regarded as a hurdle, a thing to check off," he says.

Glumac makes a similar comment. "It becomes a numbers game," she says. "How many letters can you generate in support of or in opposition to something? How many people can you get to show up in opposition or support of something? It has become a stand-in for true public or proposer merit, and not only does it overburden the agencies responsible, I think it's a misuse of the original intent."

With email and social media, organizers can flood an agency's mailbox with identical comments, and it sounds impressive that ever-increasing numbers of people are involved. The ease of communication encourages public participation, but it's also easy for decision-makers to discount form letters.



Sherry Enzler, General Counsel for the Minnesota DNR, has overseen many environmental reviews. She affirms some of these observations. "We have to get away from the attitude that 'this is a big burden that everybody has to go through and at the end, we're just going to stop the project.' Our attitude should be: 'how can we get the most robust information we can possibly get on a proposal and its impact on the environment, so we can make a wise decision.'"

She says some project proposers resist the process. "They seem to think that if they do environmental review, they're admitting that their project has negative impacts. And they don't want a project that's bad for the environment. Sometimes they feel no matter how well they do ER, people will attack their projects anyway."

The reality is that all developments will have some impacts, and the question is whether the impacts might be so harmful that we should not permit them. The Environmental Impact Statement includes the option of a "no-build" alternative, but this has probably never been used.

It also seems the EAW and EIS forms have not caught up to current scientific understandings of how ecosystems work. There are questions about rare and endangered species, but too often the result is simply to propose a way to protect a particular species, just enough so it won't disappear, leaving the plant or

animal teetering on the edge of extermination. Meanwhile, the surrounding community which supports that species continues to be diminished or lost. Ecosystems are a complex web of dependency and interdependency and competition, and no Environmental Impact Statement describes those relationships.

The rifts that plague our political leaders have long tails that can get in the way of environmental protection, says Consultant Brian Murdock (Condition Services). He served on the EQB for four years and wishes for smoother resolution of issues.

"I wish the EQB wouldn't go in spurts and stalls," he says. "I understand that during a Republican majority, they might consider getting rid of environmental review altogether. It would be nice if it operated in a way that was close enough to just doing well for the environment and project proposers, so that one group or the other wouldn't be having to slingshot it back in the other direction each time. I wish it was maybe a little less political."

This raises the image of a MEPA threading its way around and about projects, slipping through controversies with decisions that try to satisfy everyone without challenging anything. That is not what the originators of MEPA intended.

Some of the pioneers of MEPA are deeply discouraged by the shift that occurred early in the law's existence from routine preparation of rigorous Environmental Impact Statements to reliance on the far more basic Environmental Assessment Worksheets. The EAW was meant to be used to decide whether a project required further study; if the answer was yes, it could be used to outline the areas that a deeper EIS should focus on.

"The process has devolved into the preparation of numerous and lengthy Environmental Assessment Worksheets, which almost always conclude that there is no potential for environmental effects," says Chuck Dayton, an attorney with the Sierra Club in the 1970s who helped write the law and push it through the legislature in 1973.

The EAW doesn't require an examination of alternatives, and it's this omission that Dayton focuses on.

"The consideration of alternatives is the heart of the substantive standards of MEPA," he says. "The law tells us how important the concept of 'feasible and prudent alternatives' is. If there is such an alternative, that prevails."

Indeed, that's why there is a curve in I-35E to avoid crossing Blackhawk Lake.

What kind of review?

Dayton suggests several options to rectify this omission. The EQB or Chair could change the EAW form — as it recently did by adding questions about greenhouse gas emissions — to require a discussion of alternatives to the proposed project. If the Board is unwilling, members of the public could petition the EQB to do this or challenge the adequacy of MEPA's implementation in court.

In recent years, so few EISs have been prepared that they can be listed in single digits, while EAWs range from fifty to more than eighty yearly.

"We're not getting to alternative analysis soon enough," agrees attorney Byron Starns, who represented the state in the landmark Reserve Mining case in the late 1970s.

"That violates the basic principle of environmental law, which is the land ethic. The whole thing is all about preserving the land where you can and locating human activities where they won't do so much damage."



Taconite tailings ponds from mining operation in Silver Bay, Minnesota, 2010.

And it is possible to do extensive analysis of alternatives. Back in 1975, when Reserve Mining (now Northshore Mining) was under a court order to stop dumping its tailings, or waste rock, into Lake Superior, the state “went and looked at locating them all over the place, including 30 miles away, and the ultimate decision was to put the waste basin several miles away from Lake Superior,” says Starns. (Northshore Mining is currently applying for a permit to expand the 40-year-old basin).



The DNR's Sherry Enzler says a thorough analysis of alternatives is more likely to be done on a government project than a private one, and on a new project rather than an expansion or change.

"For example, with the Stillwater bridge our goal was to cross the river, and there you can have a lot of alternatives: north of Stillwater dam, south of Stillwater, going through the city of Stillwater, and we really looked at all of those, because it's a public project," she says.

By contrast, a business typically has a more specific need. "And so, I think they're trying to narrow down the need, narrower and narrower to make sure that the alternative that ends up as the best one is the one that meets their business need," says Enzler.

Certain types of projects illustrate this pattern. "For a pipeline, going across northern Minnesota would be cheaper for them to build because they wouldn't have to buy farmland in southern Minnesota," she says.

In a current case, Nelson Aggregate wants to mine for gravel at the bottom of the Mississippi River. "They wouldn't have to go out and buy farmland or other land that has aggregate in it, so it's cheaper. I think a lot of it comes down to cost," Enzler says.

Attorney David Zoll says the requirement to analyze alternatives was “intended to put teeth into MEPA but, for a variety of reasons, it has not been effective.” He notes that projects typically have gone through extensive planning and engineering before entering the environmental review process, which “means that it is more challenging to incorporate alternatives identified during the course of environmental review.”

The main reason project proposers want to avoid doing an EIS is that it can take a very long time. It took ten years for the state to accept the PolyMet EIS. It took four years to write the first draft, which the EPA labeled “Environmentally Unsatisfactory,” and it took five years to get a second version approved. Since then, courts have rejected several permits issued to the company.

But now, many project proposers are putting so much data into EAWs that they could be called EISs, although, they typically don’t consider alternatives in them.

Board member Mehmet Konar-Steenberg says it doesn’t make sense to have so few EISs done. “Why do EISs almost never happen?” he asks.

“How is it possible that so many projects that are significant enough to require a government permit somehow don’t carry even the ‘potential’ for significant environmental effects? I think these questions deserve some focused attention.” - Mehmet Konar-Steenberg

Frequently, an EAW will conclude that the project will cause “no significant effects” because there are rules in place that provide ways to mitigate the impacts. This does not guarantee that the rules will be implemented; neither does it consider cumulative impacts.

Former Board member Kristin Eide-Tollefson says, “This issue of trying to avoid alternatives by doing massive EAWs and not adequately addressing alternatives is really a core problem that we should try to fix.”



Who should review?

Consultant Ann Glumac agrees. “EAWs are really an excellent tool to lay out the scope of the potential impacts and how they can be best studied and reviewed so a good decision can be made. I like that tool a lot; it can prevent an EIS from becoming just everything and the kitchen sink.”

Former EQB administrator Gregg Downing says a well-done EAW is better than a poorly done EIS.

He cautions: “It's darn hard in a lot of cases to really do a good analysis of alternatives to a project. Because the developer was not particularly interested; they may have considered alternatives, but they don't really want to talk about other alternatives.”

As originally designed, the body conducting environmental reviews was to be the EQB, with staff help. Very quickly the Board — dominated by busy state agency heads — decided this was too much work, and they began assigning proposals to other “responsible governmental units” (RGUs) so they could spend their time on broader and more far-reaching questions. They also believed local governments had better knowledge of local conditions and would do a good job.



“Ever since then, there’s been the question of, should we go back the other way, or should the EQB, or somebody else have more veto authority over decisions,” says Gregg Downing.

On the one hand, the Board was freed to take on other responsibilities, such as thinking ahead about environmental issues. On the other hand, frequently the RGUs were ill-prepared to conduct reviews. And guess what — they were busy too!

After years of trying to help local governments handle the challenges, Downing says the effectiveness of a review ultimately comes down to commitment and hard work by the RGU. “They need to make a good faith effort to answer the questions, get the information, stick to the facts, that sort of thing: they need to put the staff resources into it or hire resources.” And he says it’s sometimes tempting for inexperienced or smaller units of governments to skew the review.

“If you’ve got a government that’s all gung-ho about some project, despite some opposition, and despite any flaws the project might have, if they want it to go through, they may do a kind of poor, superficial job and avoid disclosing and dealing with the issues that are there,” he says. “And then the process hasn’t done its purpose; it hasn’t served anybody very well, except the development project.”

Resources are undoubtedly a challenge for any government doing environmental reviews, but especially so for smaller local governments. The reviews often require a lot of technical information which is not readily at hand.

Even the procedures are unfamiliar if the city or county rarely deals with ER. Local governments can ask the EQB for help, and EQB provides some technical assistance. However, ultimately the review needs to be completed by an RGU.

“We need to provide them with some help,” says Sherry Enzler. “I have seen that they have gotten in way over their head. And it’s not intentional. Sometimes they just turn it over to the project proponent.”

Sarah Strommen, who chairs the EQB’s Environmental Review Implementation Subcommittee, agrees that local governments need the EQB’s help.

“It’s important to create some consistency both for members of the public who rely on that process to feel assured that potential environmental effects are considered and for project proposers to know their project is going to be fairly evaluated,” she says.



Tribal nations in particular are skeptical about the assumed better knowledge of local authorities.

“MEPA has allowed too much decision-making capacity to local government entities that often have little if any understanding of the unique socio-political status of Tribes,” says Margaret Watkins, Water Quality Specialist for Gitchi-Onigaming, the Grand Portage Band of Lake Superior Chippewa.

“There’s often a conflict of interest,” says Amanda Wold, formerly with the Upper Sioux Community and current Environmental Director at the Leech Lake Band of Ojibwe. “I’ve seen it at city and county levels all over the state.”

Brandy Toft, Air Quality Specialist for the Leech Lake Band, says she has asked the EQB to reassign projects to different RGUs. “There really needs to be a check on whether an RGU can do the job,” she says.

There is at least one built-in mechanism for assistance: state agencies — often agencies that issue permits — see drafts of EAWs and are expected to weigh in

and raise issues that aren’t obvious to the RGU.

“It’s really good for the developer, to get an early heads-up on what issues might be raised for the permit,” says Eide-Tollefson. “It’s good for everybody. But the limitation of time and resources sometimes intervenes.”

Some projects are reviewed by a city or county but when it’s time for permitting they move to a state agency. This can produce a challenge for follow-through, including tracking information from the environmental review across the different processes and entities involved throughout the project. If, for example, mitigating measures included in the environmental review are not enforced, the result is that the project looks better during the ER process than it ultimately turns out.

On the other hand, Tony Kwilas at the Chamber of Commerce says it’s often easier for project proposers to deal with smaller units of government. “Local governments tend to be more efficient than state agencies; it’s easier to get answers,” he says.



Transparency, public involvement

Many respondents praise the culture of transparency required in the ER process. But they acknowledge that it sometimes gets clouded.

Board member Joseph Bauerkemper says the system is set up to allow for public engagement, but not cultivate it. "The solution to that is not just to sit and wait and hope that it happens. All the existing opportunities are good, and we should maintain them, but we also need to cultivate and encourage and become a place where the opportunity to weigh in on decisions is understood to be meaningful and valuable."

In other words, members of the public need to participate, and governments need to pay attention to their concerns.

Commissioner Strommen expresses a similar idea: "It's one of the strengths of the environmental review process that it does have this public-facing focus. (But) I'd say you have to be pretty dedicated and probably already have a base of knowledge of how Minnesota does business to have that process feel accessible." Particularly with Minnesota's changing demographics, "we have to create an environment where there is enough comfort to open things up," she says.



Public meeting hosted by Minnesota Pollution Control Agency in Minneapolis

It is easy and comfortable to follow the standard procedures about public notification and outreach. But these observers are saying that the EQB needs to do more, needs to be creative about connecting with the public, especially those who have not been involved in the past. This can be challenging and time-consuming, but it is part of keeping the agency relevant.

Of all the missteps that can occur in the environmental review process, legislative intervention can have impacts on the transparency and consistency of the process.

In 2021 the legislature exempted a planned oriented strand board plant in Northeastern Minnesota from a required EIS on the project. The Leech Lake Band of Ojibwe sued, and the court ruled in the Band's favor, prompting the company to leave the state rather than conduct the study.

"All we wanted was for them to do it right," says Leech Lake's Brandy Toft.

"Since legislators got involved, we fought like hell to make sure they were following the correct process. And we heard from many state and even federal agencies that were bewildered at why this was going this way, and how this could happen."

Transparency can suffer in other parts of the process too. After the public comment period closes, many activists feel the review goes into a black hole, with no public eyes on the process. Short of filing a Minnesota Government Data Practices Act request, we can only wonder what the RGU and the proposer discuss or negotiate.

Kate Fairman, Planning Director at the DNR's Environmental Review Unit, says technology can help with that. She points to a docketing system at the Department of Commerce that offers real-time tracking of documents and decisions.

On a basic level, information should be shared in an understandable way, says EQB Executive Director Catherine Neuschler. "A lot of the information we have is so technical, but there's such huge public interest in projects, we need to think about how to improve people's ability to understand."



Cumulative effects, environmental justice

Both Board member Bauerkemper and the Minnesota Center for Environmental Advocacy (MCEA) say more attention should be paid to cumulative environmental impacts.

“The EQB should explore methods to improve the cumulative analysis undertaken by RGUs in all forms of Environmental Review,” says MCEA.

Researchers are documenting the many ways in which environmental and health damage affect low-income communities, especially people of color. These range from ingestion of lead paint to pollution from busy streets to a lack of grocery stores.

Some people and communities are so badly harmed by historic pollution, environmental degradation, and neglect that they need protection from new assaults.

This kind of information is not included in the permitting process, nor is it always included in the EAW form.

According to the MPCA, “low-income neighborhoods and communities of color have higher potential exposures to outdoor air pollutants and have more sources of pollution. In addition, the social, economic, and health inequities that these populations face can make them more vulnerable to the effects of air pollution. For instance, 32% of all communities in the state have air pollution-related risks above health guidelines. However, in low-income communities, the number is 46%. In communities of color, it’s 91%.” This is a shocking number, and agencies are beginning to look for ways to take it into account during ER.

Humans have such short memories; it takes work to recognize all the ways a given place has been impacted by development. We are only just beginning to learn about the ways ecosystems work. We need to include human health impacts in environmental review.

But the techniques of measuring effects of pollution on the environment may not work to measure its effects on humans. Mitigation measures will be different.

In 2012 the Minnesota Department of Health studied the feasibility of incorporating health and climate change considerations into the ER process. Agency staff are studying what might be the best approach.



Efficiency

Environmental reviews need to find a balance between efficiency and thoroughness. For project proposers and for the public, RGUs need to make clear what's involved and offer a rough idea of how long the process will take.

"Businesses look for certainty on timelines," says Chet Bodin. "More often than not, any timeline is okay as long as we have an accurate idea ahead of time."

The Chamber of Commerce's Tony Kwilas sees inefficiency in complex EISs. "The state has developed robust regulatory programming in the last half century; the permitting stage now includes more attention to public participation, alternatives and mitigation," he says. "So, the information collected in ER is not as valuable as formerly. It can add time, duplication, cost, and uncertainty to the process."

Environmental advisor Don Arnosti says the efficiency goal can be taken too far.

"Beginning with Reagan the vision changed: instead of controlling contamination with good information, it became about efficiency: the customer needs its permit," he says.

"Under Gov. Arne Carlson, PCA Commissioner Chuck Williams said. 'Our customer is the permittee, and we need to serve our customers better, and we need to be faster.' The legislature required shorter times for reviews to be completed and many agency staffers began to think they were required to issue permits. They look for the maximum allowable pollution and write that into the permit."

How closely ER and permitting should be related is a thorny issue. Governments stress that EAWs and EISs are not decision documents, but the road from ER to permitting should be made clearer.

Documents and discussion between proposer and permit issuer should be easily available to the public. This would be in strong contrast to current practice, and it would be challenging, given the technical nature of this process.

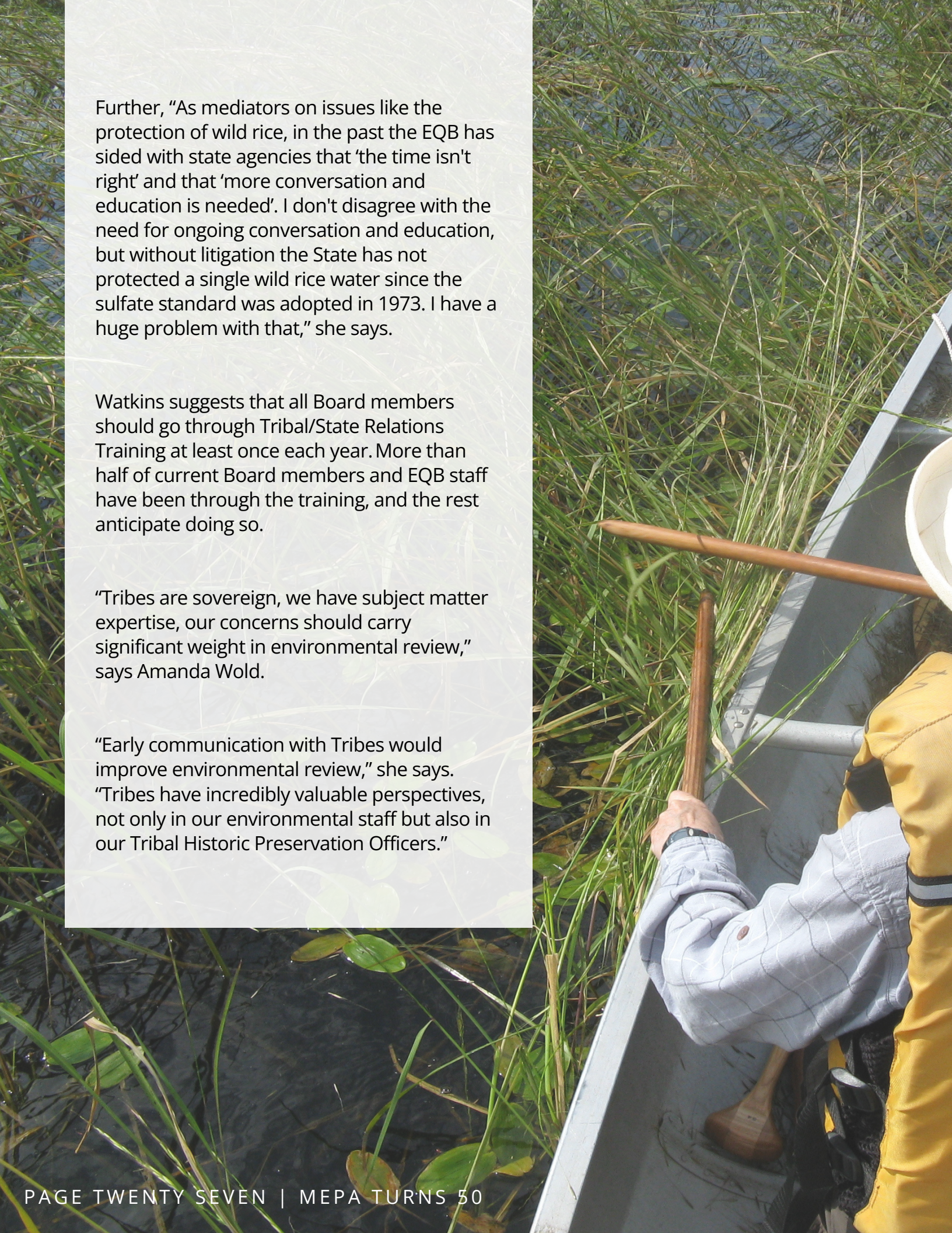
Tribal concerns

The relationship between Tribal and state governments has historically been strained. For 150 years most Minnesotans did not understand the need to recognize Tribal sovereignty and the contributions to natural resources protection Tribes can offer.

This basic misunderstanding is at the root of the many tensions between state, local and Tribal governments. The Environmental Director at the Leech Lake Band of Ojibwe, Brandy Toft, says, "If you have any project that remotely affects a Tribe, you don't understand if it affects the Tribe until you understand Tribal sovereignty, reservations, and ceded territories." She recommends that every state employee should take Tribal/State Relations training, which is now offered at all state agencies.

Leech Lake hosted that training last fall, and Toft says everyone learned significant and useful things. "There's 200 to 150 people in the room and they come out just kind of wide-eyed and light bulbs going off," she says. "So, we just need more of that."

It's not just state agencies that haven't quite grasped the unique status of Tribes; local governments have this problem as well. Yet, the EQB delegates many decisions to local governments, says Margaret Watkins, Water Quality Specialist at the Grand Portage Band of Minnesota Chippewa.



Further, “As mediators on issues like the protection of wild rice, in the past the EQB has sided with state agencies that ‘the time isn’t right’ and that ‘more conversation and education is needed’. I don’t disagree with the need for ongoing conversation and education, but without litigation the State has not protected a single wild rice water since the sulfate standard was adopted in 1973. I have a huge problem with that,” she says.

Watkins suggests that all Board members should go through Tribal/State Relations Training at least once each year. More than half of current Board members and EQB staff have been through the training, and the rest anticipate doing so.

“Tribes are sovereign, we have subject matter expertise, our concerns should carry significant weight in environmental review,” says Amanda Wold.

“Early communication with Tribes would improve environmental review,” she says. “Tribes have incredibly valuable perspectives, not only in our environmental staff but also in our Tribal Historic Preservation Officers.”

She cites an example of the state not treating a Tribe with due respect: "The Upper Sioux Community's governing board requested an EAW on a drainage ditch proposed in Yellow Medicine County. EQB told us to present a petition with 100 signatures. This was highly inappropriate. Tribes should not be put on the same playing field as a landowner expressing a concern. If the DNR or another state had made the same kind of request, the EQB would have accepted it as legitimate."

Tribal participation helps everyone, Wold says. "When the Tribes step up to the plate to say, 'We don't want to see this' or 'This is a concern,' it's not just for Tribal members; it's helping all Minnesotans."

It's protecting the resources for everyone.

The Tribes historically are one of the few groups willing to step up and put everything on the line, and it's frustrating when the state puts all these barriers up even to get an EAW."

Wold and Toft say things are getting better. Governor Walz in 2021 required all state agencies to direct certain staff to complete the state's Tribal Relations training mentioned above, to foster a

collaborative relationship between the state of Minnesota and Tribal governments, and to facilitate timely and meaningful consultation.

"In the years since, there's been a lot more engagement and communication and understanding of Tribal sovereignty," says Toft.

"And I think that's been difficult for these state agencies to comprehend and process. It's a change for them to realize that we do have experts here, we do have concerns and that our concerns need to be incorporated. So, we're working to be engaged in the processes before it gets to public comment," she says.

When Tribes are engaged early in the process, "not just the state but the project proposer gets the benefit of our involvement. In that respect, there's been a lot of forward movement and progress," Toft says.

EQB Chair and Minnesota Department of Transportation Commissioner Nancy Daubenberger appreciates the improved relationships.

"I think of how we strengthened our government-to-government relationships with Minnesota's Tribal nations, in our partnership to protect the resources of the earth."

In addition to serving as the body responsible for environmental review, the Environmental Quality Board is also designated as the place for identifying and studying environmental issues, especially those that cross agency boundaries and those just beginning to show themselves.

The law requires it to review state agency programs and coordinate programs that are interdepartmental in nature. And it may review permitting rules and resolve conflicts of interest among agencies.

What emerging issues could have significant impacts in Minnesota? How can we prepare to deal with them? What expertise do we have in state agencies and local governments for managing emerging concerns? Could in-depth studies and broad analysis help prepare us before we need to deal with specific project proposals? Answering these questions could be of immense value.

This work has happened sporadically in the history of the EQB. In 1979, the EQB published a massive study of possible copper-nickel mining in northeastern Minnesota, with five volumes covering technical issues and the physical, biological, and human environments.

This research on the topic began before there was any significant exploration or mine proposal.

Broader leadership





Unfortunately, says Byron Starns, “people have forgotten about all that work, or they think it was no good; they say it's old; but it's basic science, so there's a lot of good stuff in there. It could be a building block if you know about it.”

In the early 1990s, the Board looked into sustainable development planning, and Gregg Downing recalls “all kinds of task forces and groups looked into various topics; we had a big conference with people from all around the country, produced a big report, and there was some follow up to it, but it kind of died out, I think, later in the ‘90s.”

In 1994, responding to a petition, the EQB produced a generic environmental impact statement on timber harvesting. It resulted in an implementation roundtable, guidelines for more responsible forestry, and establishment of the state's Forest Resources Council, which continues to oversee forestry activities in the state.

In 2013 the legislature directed EQB to lead a study of silica sand mining and to create new rules and a guide for local governments unexpectedly forced to deal with mining proposals. Board member Brian Murdock says this was very helpful. “EQB took a position that they weren't interested in promoting it, but they came out with an entire educational platform to help units of government come up to speed on the issue.”

In 2018 the EQB convened an 'Interagency Pollinator Protection Team' that provides operational support, ensures interagency cooperation, develops cross agency policies and programs, and reports annually on progress to protect pollinators.

"I think this historical look back provides examples where people took these tough issues and were able to work together to get a solution, as opposed to the way we think now, as winners and losers," says Byron Starns. "I think that history gives us a lot of examples that we could use to think creatively about how we might apply some of those concepts today."

One obvious challenge calling for study and planning is climate change. In a familiar pattern, climate groups pressed for inclusion of climate change in Minnesota's environmental review system for 15 years before EQB added questions about climate change and greenhouse gases to the EAW form last

year. But these questions include no guidelines or requirements for reducing greenhouse gases; they simply ask how much the project will produce.

However, since understanding the amount of greenhouse gases is important to reducing them, the information is intended to be a first step toward reductions.

This year the legislature showed leadership on climate change, requiring the state's utilities to generate one hundred percent of their electricity from carbon-free sources by the year 2040, appropriating millions in grants to help cities deal with the climate crisis, and creating a "green bank" to finance energy projects.

Perhaps the example of these new laws will embolden the EQB to be more proactive.



“Getting ahead of emerging issues is beneficial for all Minnesotans, says Amanda Wold. “New technologies are coming forward; pollutants that we didn’t understand before — these things can allow problems to slip through before the EQB decides how to handle them. We should require study and rulemaking on new concerns rather than just allowing counties to give conditional use permits,” she says.

Attorney and MEPA pioneer, John Herman, says the EQB probably doesn’t think of itself as the place where big ideas get analyzed and discussed.

“You never see the EQB proposing anything or coming up with a legislative idea,” he says.

“It’s become a monthly or once-every-other-month meeting now, and I think they view it as an imposition on their time. The DNR doesn’t want the Department of Agriculture telling it what to do with the state forests and the Department of Agriculture doesn’t want anybody telling it what to do about anything.”

Other likely future challenges include ever-bigger feedlots, surface water quality and quantity, controversies over solar gardens and wind farms, agricultural pollution, our changing population and possible climate migration, PFAs, invasive species, and genetic engineering.

Structural challenges

The EQB has been shunted from one agency to another in its 50 years of existence. Staffing has gone up and down — mostly down — depending on Minnesota’s public resources.

It started in the Office of Planning. In 2005 the legislature rewrote some of the authorizing statutes to move energy projects to the Department of Commerce and the Public Utilities Commission. This change cut EQB’s staff in half, from about ten to about five.

Some retirements were not filled, the budget was smaller, and the EQB’s home, Minnesota Planning, was eliminated. EQB was moved to the Pollution Control Agency.

In 2011, responding to the State Auditor’s report, Governor Mark Dayton issued an executive order to review the functions of EQB and revitalize it. It took time to resume some of the responsibilities, including publishing the EQB Monitor, responding to other governments asking for help, and organizing an environmental congress. Currently the staff is seven.

The proposers of MEPA and the EQB planned to create a body like the national Council on Environmental Quality, where three members of the public with exceptional experience in environmental issues are appointed by the President.

That was the model the Minnesota legislature attempted to follow. In an article in Minnesota History magazine (winter 2018), State Senator Bob Dunn, Republican sponsor of the MEPA legislation, said he envisioned a small board of just three “strong, independent, knowledgeable, and experienced citizens” who would be appointed by the governor and advised by relevant agency heads.

“Some of the people who headed the agencies weren’t very pleased with that,” Dunn says.

As Chuck Dayton puts it, they “vigorously opposed having another state body ordering them to do EISs.”

Legislators reached a compromise, putting agency heads and three public members on the Board.

Dayton served as one of the first public members. He says, “The real power was in the hands of the agencies. This led to the adoption of mandatory thresholds for EISs that are very high, and almost never triggered.”

Currently the Board consists of the heads of nine state agencies and eight public representatives, one from each Congressional district appointed by the governor. Most environmental activists would prefer to see stronger public member control of the board.

“Having citizens on the Board gives the body more independence,” says Byron Starns. “They can balance the bureaucratic agencies and be more accessible to citizens. They may think differently about issues, perhaps with a broader perspective.”



Some observers point to a lack of leadership on the Board. “I think the EQB suffers from a lack of leadership that, to be fair, is likely the result of its structure,” says Kevin Reuther, Chief Legal officer at the Minnesota Center for Environmental Advocacy. “Each of the agency executives/commissioners confronts hard decisions in their main job at their own agency. They don’t have the political capital to also push through hard decisions at EQB. It’s much easier to look for consensus — but consensus is often elusive.”

Not only do agency heads understandably need to concentrate their energies on their own agencies; they have no built-in incentive to build up the EQB or expand its role. One of the realities of bureaucracies is that each agency has its own expertise, authorities, and stakeholders; they tend to operate independently in a way that focuses in that space.

The Citizens Board of the Minnesota Pollution Control Agency was eliminated by the legislature in 2015, after it recommended more studies of a proposed 9,000-cow dairy farm near Chokio. With that experience in mind, most observers are skeptical about the chances of moving toward more citizen control at EQB anytime soon.

WHY IS IT SO HARD TO MAKE CHANGES?



There have been many studies aimed at improving the Minnesota environmental review process. One that Gregg Downing recalls concluded that “the only thing we can agree on is that we can't agree on how to improve anything.”

Here is Downing's explanation of why it is so hard to devise improvements that would be widely accepted:

“You have to have buy-in, or at least acceptance, from a pretty wide variety of interests — economic and environmental — and if you can't get that, you probably aren't going to be successful, because somebody with influence in the legislature will probably just get involved and undo it there.

When I first started working at the legislature, they never touched environmental review, except to authorize the EQB broadly on its tasks. But as time went on, they got more and more involved, to the point where they would exempt specific projects from EISs and tell the Board they couldn't adopt categories for certain things, or they had to adopt it for others. To make any broadscale reforms you usually ran into that same reality, that it probably politically just wasn't going to make it.”

That reality has been in place for a long time. “After the mid-90s the staff was very hesitant to go to the legislature to make any statutory changes for fear of

opening a Pandora's Box, and it would get out of our control and bad things could happen,” says Downing. “So, unless there was something clearly necessary to fix, we decided to just try to stick to using the administrative rulemaking process to make changes.”

So far, most of the changes have been to exempt certain classes of projects, or to raise thresholds for mandatory reviews, particularly in the agricultural industry. The result is that fewer projects require environmental review.

Still, there is wide scope for change in the rulemaking process, and also in less formal approaches. The section on climate change recently incorporated in the EAW form is a case in point. It was added after much discussion and effort to bring everyone on board, but not by going through a rulemaking process. A similar approach could be used to add information about alternatives to the proposed action.

Small changes are possible.

But climate change is an urgent, existential challenge. It calls on us to be tough-minded, inventive, and ready to sharpen all the tools our predecessors were farsighted enough to create. ■

APPENDIX

Minnesota Statute 116D.01

The purposes of Laws 1973, chapter 412, are:

- (1) to declare a state policy that will encourage productive and enjoyable harmony between human beings and their environment;
- (2) to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of human beings; and
- (3) to enrich the understanding of the ecological systems and natural resources important to the state and to the nation.

Minnesota Statute 116D.02, Declaration of State Environmental Policy

The legislature, recognizing the profound impact of human activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high density urbanization, industrial expansion, resources exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of human beings, declares that it is the continuing policy of the state government, in cooperation with federal and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which human beings and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of the state's people...

Minnesota Statute 116D.04, Environmental Impact Statements

Subd. 2a, When prepared.

(a) Where there is potential for significant environmental effects resulting from any major governmental action, the action must be preceded by a detailed environmental impact statement prepared by the responsible governmental unit. The environmental impact statement must be an analytical rather than an encyclopedic document that describes the proposed action in detail, analyzes its significant environmental impacts, discusses appropriate alternatives to the proposed action and their impacts, and explores methods by which adverse environmental impacts of an action could be mitigated. The environmental impact statement must also analyze those economic, employment, and sociological effects that cannot be avoided should the action be implemented. To ensure its use in the decision-making process, the environmental impact statement must be prepared as early as practical in the formulation of an action...

Subd. 6, Prohibitions.

No state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction. Economic considerations alone shall not justify such conduct.