

BASICS OF ENVIRONMENTAL REVIEW

Charles N. Nauen
David J. Zoll

Minnesota Environmental Institute
April 23, 2009

What is Environmental Review?

- Process for incorporating environmental considerations into government decisions and policy making
- National Environmental Policy Act (“NEPA”)
 - 42 U.S.C. 4332 *et seq.*
- Minnesota Environmental Policy Act (“MEPA”)
 - Minn. Stat. 116D.01 *et seq.*

When is Environmental Review Required?

- NEPA
 - Major federal action significantly impacting the environment.
- MEPA
 - State action or project which would result in the physical manipulation of the environment and has the potential for significant environmental effects.
- Examples
 - Highway and transit projects, environmental permits, approvals of residential developments, construction of major energy facilities.

Overview of the Federal Process

- Determine whether environmental review is necessary
 - Major federal action significantly impacting the environment?
 - Categorical Exclusion, Environmental Assessment (“EA”)
- Prepare Environmental Impact Statement (“EIS”)
 - Determine scope – impacts and alternatives to be considered
 - Prepare draft EIS and solicit public comments
 - Publish final EIS which responds to all public comments and updates analysis as necessary

Overview of MEPA

- Voluntary EIS
 - Project proponent elects to prepare an EIS
- Mandatory Environmental Review
 - Categories identified in Environmental Quality Board Rules
- Exemptions from Environmental Review
 - Similar to categorical exclusions under NEPA
- Citizen Petition
 - At least 25 citizens request that an Environmental Assessment Worksheet be required for a proposed project
- Phased or Connected Actions and Cumulative Effects

Environmental Assessment Worksheet

- Basic project information provided as responses to standardized questions
- Responsible Governmental Unit (“RGU”) reviews information to determine whether an EIS is necessary
- Mandatory, Discretionary, or Citizen Petition

Environmental Impact Statement

- Use the EAW to determine the scope of the EIS
 - A Scoping EAW is prepared for voluntary and mandatory EIS projects
- Multiple rounds of public comment
 - Draft scoping decision, draft EIS, final EIS
- Prepared by the RGU – project proponent pays all costs
- RGU determines whether the final EIS is adequate

Alternative and Impact Analysis

- Alternatives to the proposed project
 - No-build, sites, technologies, modified designs, modified scale, mitigation.
 - May exclude an alternative only if (1) would not satisfy need for project, (2) would not provide significant environmental benefit, or (3) another alternative under consideration would provide similar environmental benefit with less socioeconomic impact.
 - Do not need to analyze all conceivable alternatives
- Impacts of the proposed project
 - Direct/indirect and adverse/beneficial of project and alternatives
 - Environmental, economic, employment, and sociological

Judicial Review

- Decisions regarding need for or adequacy of environmental review are appealable to district court within 30 days.
- Standard of review: “arbitrary and capricious”
- Minnesota Environmental Rights Act (“MERA”)
 - Minn. Stat. 116B.01 *et seq.*
 - Puts teeth in MEPA
 - Prohibits actions likely to pollute, impair, or destroy the natural environment unless “there is no feasible and prudent alternative” and the action “is consistent with and reasonably necessary to public health, safety, and welfare....”

Common Issues

- Phased and connected actions
- Cumulative impacts
- Scope of alternatives considered
- Mitigation of potential impacts
- Moratorium on project construction
- Climate change...

The Lawyer's Role

- Make sure the client understands the purpose of environmental review
- Ensure the client complies with the regulations and the RGU does not overreach
- Review the record – must be complete and defensible
- Anticipate controversial issues and develop strategy for addressing them
- Manage communications between client, consultants, regulators, and the public

Charles N. Nauen
David J. Zoll

LOCKRIDGE
GRINDAL
NAUEN
P.L.L.P.

Attorneys at Law

100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401
612-339-6900
cnnauen@locklaw.com | djzoll@locklaw.com