

## ENVIRONMENTAL REVIEW: STREAMLINING THE PROCESS OUT OF EXISTENCE

Near the end of the 2009 session, the Minnesota Legislature approved a mandate to the state Pollution Control Agency (PCA) requiring the agency to prepare and submit a report to the Legislature by February 15, 2010, identifying potential options for streamlining the environmental review process.

In response to this legislative mandate, senior PCA staffers prepared their report entitled *Environmental Review Streamlining*<sup>1</sup>, in which they considered various options for changing the environmental review process. Among the options being considered is that of eliminating the pathway of an Environmental Assessment Worksheet (EAW) possibly leading to an Environmental Impact Statement (EIS).<sup>2</sup> The PCA staffers prefer that the EAW become the final step of the environmental review process for most projects. If the Legislature were to eliminate this traditional pathway, public opponents of a proposed project would be unable to persuade the PCA Citizens Board or a district court judge to require further environmental review by way of an EIS.

Most public opponents of proposed projects first discover environmental review, not at the beginning of the process, but upon the RGU's later release of an EAW on the proposed project. The release of an EAW is the critical entry point of public awareness and feedback on proposed projects. People affected by proposed projects must have an adequate opportunity to review the EAW, determine whether it provides adequate or inadequate information regarding the potential for adverse environmental effects of the project, and participate in the environmental review process.

If the EAW is not adequate in identifying the potential adverse environmental impacts, public opponents, through direct persuasion to the PCA board or litigation in the courts, should then be able to persuade the PCA (or other RGUs) to prepare a more thorough analysis of the adverse public health and environmental impacts of the project through an environmental impact statement (EIS). Large project developers resist being pushed into preparing an EIS. An EIS is costly to the developer, delays the start of the development, and more importantly, forces the developer to focus upon and solve the usually severe adverse public health and environmental impacts of the project.

Over the 30 years of Minnesota environmental review, there have been numerous environmental review "streamlining" initiatives, most of which have succeeded in weakening the potential for strong environmental review of major industrial and agricultural projects. "Streamlining" of environmental review in 1997, 1999, 2003, 2004, 2006, and just last year in 2009, led to increasing thresholds for mandating EISs. All of these "streamlining" efforts were led by big agricultural producers, livestock feedlot, ethanol, or other industrial developers seeking to avoid environmental accountability for their proposed projects. There is no more need for additional "efficiencies" that would streamline meaningful environmental review out of existence. Last year's "streamlining" effort resulted in weakening opportunities for public opponents to seek environmental review of proposed developments, by making petitioning by opponents more difficult. Some developers, government units and business interests

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<sup>1</sup> Authored by Minnesota Pollution Control Agency senior staffers Beth Lockwood and Jess Richards, December 2009. Find the entire report at [http://www.pca.state.mn.us/programs/envr\\_p.html](http://www.pca.state.mn.us/programs/envr_p.html). Refer also to public presentation given on September 29, 2009 by Beth Lockwood.

<sup>2</sup> *Environmental Review Streamlining*, page 16, under the heading "Unlinking EAWs and EISs". See also Minnesota Statutes § 116D.04 for the official discussion of the role of environmental impact statements.

would like the Legislature to eliminate the public petition initiative altogether, or at least make the petition process so strict that it could rarely be used to challenge controversial projects.

Concerns about the delay in conducting environmental review is a primary reason PCA staffers give for seeking these changes. The PCA staffers, pressured by advocates for project developers, voice concern that the environmental review process they have used for over 30 years is causing project developers too much delay in the time required for them to get permits to build and operate their proposed developments.

Yet, in their report to the Legislature, the PCA staffers acknowledge<sup>3</sup> that a primary cause of delay in completing environmental review, comes from the project developers themselves. Failure of project developers to timely respond to PCA requests for information, lack of financing for proposed projects, and stubborn refusal of project developers to consider PCA-recommended changes in project specifications, are cited as common reasons for delay in completing environmental review. Therefore, the red herring that increased public participation too often delays the completion of environmental review and the permitting of otherwise worthwhile projects, is absurd.

The PCA staff 'reformists' have concluded that if the initial EAW is sufficient with them, no further environmental review should be required. They believe public opponents should be heard from early in the environmental review process, not at the end when the PCA staffers are finishing their work. They believe public opponents should not interfere with the work of the PCA staffers and the project developer's engineers.

Too often, public opponents to projects discover that PCA environmental review staffers look upon project developers as their "customers", and view their task as working with developers' engineers to enable projects to be developed. "No build" is rarely an option for PCA staffers encountering adverse environmental impacts. Rarely are PCA staffers opposed to projects under their review. Mitigation of unidentified hazards after the project is built becomes their recommended solution to environmental concerns. This might explain the vocal exasperation of PCA staffers frustrated over the delay of what they perceive to be the inevitable approval of projects being reviewed.

While advocating for an unlinking of EAWs and EISs, the PCA staffers admit that an EAW would not lead to any determination of whether there is a potential for significant adverse environmental impacts for proposed developments. Yet, PCA staffers acknowledge that public opponents often identify significant environmental issues that have not been considered adequately in the EAW.

During 2002-2005, SEMEP representatives opposed the proposed Heartland Energy tire burning project designated for the City of Preston. This industrial project would have been located immediately adjacent to an existing ethanol plant, and near homes, schools and senior citizen care facilities. The tire burning plant would have emitted, through its tall stack, unimaginable quantities of dioxins, particulates and other toxins in the air. During environmental review of the proposed project, the PCA staffers refused to consider the cumulative potential adverse impact of air emissions from both neighboring facilities. The PCA staffers refused to compel the production of an EIS following the completion of an EAW that did not even skim the surface of adverse impacts from this proposed tire burning project.

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<sup>3</sup> *Environmental Review Streamlining*, pages 11-12.

Representatives of Southeastern Minnesotans for Environmental Protection (SEMPEP) went to court, and were able to obtain a court order from Judge Joseph F. Weiners<sup>4</sup>, mandating the PCA to conduct a more extensive review of this proposed nightmare. Judge Weiners recognized that there was no similar tire burning plant operating anywhere within the United States, and that no EIS had ever been prepared anywhere within the United States for such a tire burning plant. Judge Weiners also recognized that the PCA was obligated to give the proposed tire burning plant a “hard look” and not ignore potential hazards such as the cumulative impact of toxic air emissions from both the proposed tire burning plant and its neighboring ethanol facility.

Following the begrudging and half-hearted additional review of the PCA staffers, the PCA board was dissatisfied with the level of environmental review up to that point, and mandated a further EIS level review of the project. The developer dropped the project, and the tire burning plant was never built. Yet, this positive result would never have been achieved without strong public opposition and pressure placed upon a recalcitrant PCA staff by a district court judge understanding the need for strong environmental review. The existing environmental review remedies available to the public are vital, and should not be eliminated for the singular unworthy purpose of trying to make life easier for PCA staffers.

The Heartland Energy proposed tire burning plant is certainly not the isolated example of the need for remedies for public opposition to weak PCA environmental review. Minnesota Center for Environmental Advocacy (MCEA) has recently had several cases in courts against PCA, seeking more enhanced environmental review of proposed mining operations, large livestock feedlots, municipal waste water treatment facilities and ethanol plants. Olmsted County Concerned Citizens (OC<sub>3</sub>) currently has litigation pending against PCA seeking enhanced environment review of a proposed ethanol facility near Eyota.

Minnesota environmental review has had the good side effect of transforming placid people into environmental and conservation activists and warriors. People who were drawn to local project battles saw the process of environmental review as an incentive to participate because the public could persuade the PCA board or courts to order an increased level of environmental review. This is a good thing. The environmental review process has spawned many environmental and conservation workers who were challenged by that first project in which they participated. Most people involved in environmental and conservation work and efforts have war stories about the proposed development they opposed that triggered their permanent interest in this work.

Many communities have very good hydrologists, geologists, physicians, public health specialists and other scientists living in their midst whose expertise can match if not exceed that of some PCA staffers. When these local scientists and experts weigh in on the adverse environmental impacts of some of these controversial projects, PCA staffers should listen and work with community experts; not just feel their expertise is being threatened. PCA scientists do not have a knowledge monopoly on the science or facts of the project. PCA staffers tend to work closely with project engineers, and look upon public opponents as outliers. Local scientists and experts will have considerable depth of factual information on the sites being subjected to proposed developments. PCA staffers should welcome the contribution of this information; not reject it because the information might tend to conflict with the “facts” accepted by PCA staffers. There is often a legitimate reason for large numbers of public opponents weighing in on controversial proposed projects.

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<sup>4</sup> *Southeastern Minnesotans for Environmental Protection (SEMPEP) v. Minnesota Pollution Control Agency*, Decision of Judge Joseph F. Weiners, Olmsted County District Court (February 17, 2004)

The only environmental leverage available to public opponents to challenge controversial projects should not be taken away by the Legislature in 2010. Even the PCA staffers in their report worry that some of these streamlining ideas could have the “potential to erode the public participation process.”<sup>5</sup> Environmental groups and individuals should now gear up to advocate against these proposed PCA staff-sponsored ‘reforms’. If these proposed changes are drafted into bills introduced at the 2010 legislative session, environmental groups and individuals should urge legislators to refuse to pass such bills. It appears to be time again to fight for retaining the environmental review infrastructure that has served Minnesota people well.

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<sup>5</sup> *Environmental Review Streamlining*, page 20.