

LITTLE NEPAs: THE WISCONSIN ENVIRONMENTAL POLICY ACT

Shawna Bligh
The Session Law Firm

This is the first in a continuing series of articles focusing on "Little NEPAs." Little NEPAs are essentially state versions of the National Environmental Policy Act of 1969 (NEPA). While largely modeled on the federal statute, "Little NEPAs" often contain distinctive variations. Presently, fifteen states and the District of Columbia have enacted Little NEPAs.

This article focuses on the Wisconsin Environmental Policy Act (WEPA). § 1.11 Wis. Stats. Enacted in 1972, WEPA outlines the state's environmental policy. Like NEPA, WEPA is procedural in nature. *See Wis's Env'tl. Decade v. Pub. Serv. Comm'n*, 79 Wis. 2d 409, 415, 256 N.W.2d 149, 153 (Wis. 1977); *New Richmond v. Wis. Dep't. of Natural Res.*, 145 Wis.2d 535, 542, 428 N.W.2d 279, 282 (Wis. Ct. App. 1988).

WEPA requires state agencies, including the Wisconsin Department of Natural Resources (DNR), to gather and consider environmental information in its decision-making. WEPA applies only to the actions of state agencies. The law does not apply to local governments or private parties unless their actions involve state agency regulation or funding. *See Robinson v. Kunach*, 76 Wis.2d 436, 445, 251 N.W.2d 449, 452 (Wis. 1977).

A key component of WEPA is the Action Type List. The Action Type List places all DNR actions into one of four categories involving various levels of environmental analysis and public involvement. These four categories are outlined in Wisconsin's Administrative Code. WIS. ADMIN. CODE, N.R. § 150.03.

Type I actions are major actions which would significantly affect the quality of the human

environment. § 150.03(1). For example, establishment of land acquisition projects greater than 1,000 acres in size and involving a basic change in existing land use are classified as Type I actions. § 150.03(a).

Type II actions have the potential to cause significant environmental effects and may involve unresolved conflicts in the use of available resources. § 150.03(2). An example of a Type II action is habitat management involving the filling or draining of wetlands. § 150.03(2).

Type III actions normally do not have the potential to cause significant environmental effects, normally do not significantly affect energy usage and normally do not involve unresolved conflicts in the use of available resources. § 150.03(3). Type III actions include "promulgation of new rules or changes in existing rules when the implementation of the proposed rule will not have material impacts on the human environment. . . ." § 150.03(6)(a).

Finally, Type IV actions include (1) activities which are exempt by statute; (2) enforcement actions; (3) emergency activities to protect public health, safety, or the human environment; (4) ancillary activities which are part of a routine series of related department actions; or (5) actions which individually or cumulatively do not significantly affect the quality of the human environment, do not significantly affect energy usage, and do not involve unresolved conflicts in the use of available resources. § 150.03(4)(a-e).

Agencies use the Action Type List to determine the minimum environmental review process. WIS. ADMIN. CODE, § 150.20(1). Type IV actions generally do not require an environmental assessment (EA) or environmental impact statement (EIS). § 150.20.1(a). However, agencies may prepare and distribute an EA on proposed actions to aid agency decision-making if critical resources are affected or there may be substantial risk to human life, health, or safety. § 150.20.1(a). Type III actions do not require an EA or EIS unless (1) the proposed action may significantly

affect the quality of the human environment; (2) scarce resources may be affected; (3) substantial acute risk may arise to human life or health, or to significant natural resources due to failure of pollution control systems, fire or other reasonably foreseen failures at the proposed facility; or (iv) if an EA or EIS is required under another provision of WEPA. §§ 150.20(1)(b)(3)–150.20(1)(b)4.d. Type II actions require preparation of an EA and decision procedures of the EIS process. A full EIS is required if the proposed action significantly affects the quality of the human environment. § 150.20(1)(c). Type I actions require the full EIS process. § 150.20(d).

Under WEPA, the full EIS process requires issue identification procedures, environment analysis preparation and content requirements, EIS hearing procedures and issuance of a final agency decision. §§ 150.21-150.24.

Issue identification procedures include public notification of the proposed action, consideration of public comments, issue identification, and preparation of an environmental bulletin, which lists and briefly describes proposed actions involving type II or III actions. WIS. ADMIN. CODE, N.R. §150.21. Upon request, the environmental bulletin must be distributed to all interested individuals, organizations and agencies. § 150.21. Issue identification procedures inform the public about proposals that may affect the quality of the environment and help identify key issues at an early stage. § 150.21.

An environmental analysis document (either an EA or an EIS) must be an analytical document enabling environmental and economic factors to be considered in the development of a proposed action. § 150.22(1)(b). The document must be written in plain language and must include information that is important to evaluating reasonably foreseeable significant adverse impacts on the human environment, including identification of incomplete or unavailable information. § 150.22(1)(e).

The contents of an EA or EIS must emphasize significant environmental issues. § 150.22(2). Under WEPA, an environmental analysis shall substantially

follow the regulations issued by the President's Council on Environmental Quality for EIS's, as well as provide an analysis of the environmental and economic implications of a proposed action. § 150.22(2); *see also* 40 C.F.R. §§ 1500–1508. The environmental analysis shall include a summary of the process used to identify major issues and the issues identified for detailed analysis. § 150.22(2)(a). An EA shall evaluate whether the proposed action is, or is not, a major action and whether the EIS process is required. § 150.22(2)(a).

In determining whether an EIS must be prepared, an agency must consider the short-term and long-term environmental effects, including secondary effects, particularly to geographically scarce resources such as historic or cultural resources, scenic and recreational resources, prime farmlands, threatened or endangered species or ecologically critical areas. § 150.22(2)(a)1. An agency must also consider the cumulative effects of repeated actions of the same type, or related actions or other activities occurring locally that can be reasonably anticipated and that would compound impacts. § 150.22(2)(a)(2).

Agencies must consider the degree of risk or uncertainty in predicting environmental effects, the degree to which the action may establish a precedent for future actions or foreclose future actions, including consistency with plans or policy of local, state or federal government, and the degree of controversy over the effects on the quality of the human environment. §§ 150.22(2)(a)3-5. Agencies must also consider mitigation measures, and evaluate the probable environmental consequences of the proposal and alternatives to the proposed actions. § 150.22(2)(c)-(e). Analysis must also include description and evaluation of required state or federal approvals or any other related analysis required under another rule, statute, federal regulation or law. § 150.22(2)(f)-(g).

When preparation of an EIS is required, the WEPA provides for EIS hearing procedures. §150.23. EIS hearing procedures require agencies to hold a public informational hearing on the proposed action and the EIS prior to making its decision. The hearing must be

held not less than 30 days after issuance of the EIS. § 150.23(1)(a). Hearings must generally be held in the locality affected. § 150.23(1)(b). Notice must be provided prior to hearings. § 150.23(1)(c).

After an EA or EIS and its public review have been completed, the agency must enter a final written decision on the proposed action. § 150.24.

A recent case discussing the application of WEPA is *Clean Wisconsin v. Pub. Serv. Comm'n*, 282 Wis. 2d 250, 700 N.W.2d 768 (Wis. 2005). *Clean Wisconsin* involved five separate actions seeking judicial review of a final decision and order of the Public Service Commission (PSC), which issued a Certificate of Public Convenience and Necessity (CPCN) to Wisconsin Electric Corporation (WEC) for the construction of two coal-fired electric power plants. *Id.* at 291-92, 700 N.W.2d at 788. Under Wisconsin law, utilities must provide “reasonably adequate service and facilities” to the public. Wis. STAT. § 196.03(1). The PSC is tasked with determining whether a utility is providing “reasonably adequate service.” *Id.* at 296, 700 N.W.2d at 790; *see also* Wis. STAT. § 196.37(1)-(3). In the late 1990s, due to increased energy demands, the WEC and regulatory agencies identified “a need for new baseload [power] generation after 2007.” *Id.* at 297, 700 N.W.2d at 790. The WEC determined that it could not satisfy this need without a “substantial increase in electric generation resources.” Therefore, WEC filed a CPCN application with the PSC in 2002. *Id.* at 297, 700 N.W.2d at 790.

When reviewing CPCN applications, the PSC must comply with the requirements of the Plant Siting Law. Wis. Stat. § 196.491(3)(d). Under the Plant Siting Law, the PSC must make certain express findings. One of these findings specifically triggers compliance with WEPA by requiring the PSC to determine whether the proposed facility will have undue adverse impact on environmental values, which include, but are not limited to, ecological balance, public health and welfare, historic sites, geological formations, the aesthetics of land and water, and recreational use. Wis. STAT. § 196.491(3)(d)(4). To assist in this determination and pursuant to WEPA, the PSC must prepare an EIS. *Id.*

at 299, 700 N.W.2d at 791; *see also* Wis. STAT. § 1.11(2); Wis. ADMIN. CODE § PSC 4.30 (June, 2000). The purpose of an EIS is to “inform the PSC and the public of significant environmental impacts of a proposed action and its alternatives, and reasonable methods of avoiding or minimizing adverse environmental effects.” *Id.* at 299, 700 N.W.2d at 792 (citing Wis. ADMIN. CODE § PSC 4.30(1)(a)). The court recognized that the PSC may prepare the EIS in conjunction with the Wisconsin DNR. *Id.* at 299, 700 N.W.2d at 792 (citing Wis. ADMIN. CODE § 4.60(3). ¶ 187).

At issue in *Clean Wisconsin* was the PSC’s determination of the adequacy of the EIS in considering the environmental impacts, *id.* at 374, 700 N.W.2d at 828, of the proposed project. *Clean Wisconsin* challenged the PSC’s determination, arguing that the EIS did not adequately consider the environmental impacts of the proposed project. The court disagreed. *Id.* at 375, 700 N.W.2d at 828.

The court stated “[t]he purpose of WEPA is to insure that agencies consider environmental impacts during decision making.” *Id.* at 375, 700 N.W.2d at 828 (citing *Boehm v. Dep’t. of Natural Res.*, 174 Wis. 2d 657, 665, 497 N.W.2d 445, 449 (Wis. 1993)). This purpose includes “effecting an across-the-board adjustment of priorities in the decision-making processes of state agencies.” *Id.* at 375, 700 N.W.2d at 829 (citing *Wis. Env’tl. Decade, Inc. v. PSC*, 79 Wis. 2d 409, 416, 256 N.W.2d 149, 153 (Wis. 1977) (*WED III*)). WEPA “requires that agencies consider and evaluate the environmental consequences of alternatives available to them and undertake that consideration in the framework provided by [§ 1.11].” *Id.* at 375, 700 N.W.2d at 829 (citing *Boehm*, 174 Wis. 2d, 657, 665, 497 N.W.2d 445, 449). Pursuant to WEPA, “protection of the environment is an essential mandate of every state agency and an essential component of state policy.” *Id.* at 375, 700 N.W.2d at 829 (citing *WED III*, 79 Wis. 2d 409, 416, 256 N.W.2d 149, 153 (Wis. 1977)). However, “WEPA does not directly control agency discretion; rather, it represents an important procedural step agencies must take during their decision-making process.” *Id.* at 375, 700 N.W.2d at 829. Therefore,

as long as the “adverse environmental consequences of the proposed action are adequately evaluated, WEPA does not prevent an agency from determining that other values outweigh the environmental costs.” *Id.* at 375, 700 N.W.2d at 829 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351, 109 S. Ct. 1835, 1846 (1989)).

Specifically addressing the purpose and adequacy of the EIS, the court stated, “the purpose of the EIS is to enable agencies to take a ‘hard look’ at the environmental consequences of a proposed action. *Id.* at 376, 700 N.W.2d at 829 (citing *Milwaukee Brewers Baseball Club v. DHSS*, 130 Wis. 2d 56, 72, 387 N.W.2d 245, 251 (Wis. 1986); *Wis. Env’tl. Decade v. Pub. Serv. Comm’n*, 98 Wis. 2d 682, 690, 298 N.W.2d 205, 208 (Wis. Ct. App. 1980)(*WED IV*)). Further, the court stated “[t]o the extent that relevant information is complete and available, the EIS ‘shall evaluate reasonably foreseeable, significant effects to the human environment. . . .’ *id.* at 376, 700 N.W.2d at 829 (citing WIS. ADMIN. CODE § PSC 4.30(1)(b)), while reasonable alternatives are to be considered, every potentiality need not be evaluated, as ‘the duty of an agency to prepare an EIS does not require it to engage in remote and speculative analysis.’” *Milwaukee Brewers Baseball Club*, 130 Wis. 2d 56, 72, 387 N.W.2d 245, 251 (citing *Vt Yankee Nuclear Power Corp. v. Natural Res.*, 700 N.W.2d at 830; *Def. Council*, 435 U.S. 519, 551, 98 S. Ct. 1197, 1215 (1978)). The adequacy of an EIS must be assessed in light of the “rule of reason,” which requires it “furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible.” *Id.* at 377, 700 N.W.2d at 830 (citing *N.Y. v. Kleppe*, 429 U.S. 1307, 1311, 98 S. Ct. 4, 6 (1976); *Milwaukee Brewers Baseball Club*, 130 Wis. 2d 56, 72, 387 N.W.2d 245, 251 (Wis. 1986)). The court stated “we are also mindful that ‘no matter how exhaustive the discussion of environmental impacts in a particular EIS might be, a challenger can always point to a potentiality that was not addressed.’” *Id.* at 377, 700 N.W.2d at 829 (quoting *Citizens’ Util. Bd. V. Pub. Serv. Comm’n*,

211 Wis. 2d 537, 554, 565 N.W.2d 554, 562 (Wis. Ct. App. 1997)).

Next, the court addressed its standard of review of the PSC’s determination of the adequacy of the EIS, stating its “review of an EIS is narrow.” *Id.* at 376, 700 N.W.2d at 829. The court continued, “the PSC’s determination that an EIS is adequate is a conclusion of law to which this court accords great weight and deference.” *Id.* at 376, 700 N.W.2d at 829 (citing *Citizens’ Util. Bd.*, 211 Wis. 2d 537, 550, 565 N.W.2d 554, 562).

Seeking to clarify its role regarding review of an agency’s determination of the adequacy of an EIS, the court stated that it was not the court’s role to “evaluate the adequacy of the EIS” but to “instead evaluate whether the PSC’s determination that the EIS was adequate was reasonable.” *Id.* (citing *Citizens’ Util. Bd.*, 211 Wis. 2d 537, 553-54, 565 N.W.2d 554, 563). Only when there exists no rational basis for determining that an EIS is adequate, will the court overturn an agency’s determination. *Id.* at 376, 700 N.W.2d at 829.

Further, “Clean Wisconsin bears the burden of demonstrating that the PSC’s determination that the EIS was adequate was without a rational basis.” *Id.* at 376, 700 N.W.2d at 829. Because Clean Wisconsin failed to meet this burden, the court must uphold the “PSC’s determination of the adequacy of the EIS.” *Id.* at 399, 700 N.W.2d at 841.