

DATE: August 17, 2012

TO: MPCA Citizen's Board

FROM: Kirk Koudelka 
Assistant Commissioner

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SUBJECT: **Legislative Review of Board Process for Permitting and Environmental Review****History of Citizens' Board and Decision-making Authority**

In statute (M.S. 116.02) the Minnesota Pollution Control Agency or "agency" is defined as the commissioner and eight members of the Citizens' Board. The Citizens' Board was created when the MPCA was created in 1967. MPCA staff numbered less than 20. As the MPCA took on more environmental protection and assistance tasks and increased in size, the Board's decision making workload escalated.

In 1996, major revisions were made to M.S. 116.02 (see language attached in memo) to scale back the Citizens' Board decision making workload. Subdivisions 6 through 10 were added to describe specific circumstances where the Board was to make a final decision. The only decisions the Citizens' Board must make related to environmental review and permits is on the scope and adequacy of Environmental Impact Statements (EISs) or if a variance is sought from certain state standards. Other decisions on permits and environmental review documents are brought before the Board only at the request of the Commissioner, a Board member, project proposer, or interested party. Adding subdivisions 6 through 10 narrowed the scope and under what circumstances items are brought before the Board. This change reduced the number of Citizens' Board decisions considerably.

In the five year period between 2007 and 2011, the Citizens' Board made decisions on 15 environmental review projects. Only one of those was a mandatory Board decision of an EIS adequacy determination. In contrast, during that same 5-year time period, the MPCA Commissioner made final decisions on 72 environmental review documents.

Between 2007 through 2011, the Citizens' Board made permit decisions on 9 individual projects and 4 general permits. The MPCA issues thousands of permits every year.

Legislative Language

During the Legislative Session, a bill was passed with the following language:

MINNESOTA POLLUTION CONTROL AGENCY CITIZEN'S BOARD REVIEW.

The evaluation of environmental governance under Executive Order 11-32 must include a review of the Minnesota Pollution Control Agency Citizen's Board's role in reviewing permits, environmental assessment worksheets, and environmental impact statements. The evaluation should include, but is not limited to, an examination of the benefits and drawbacks of the board

versus the agency's commissioner making final decisions on all or various subsets of permits and environmental reviews, along with how these matters are referred to the board versus the commissioner. Any recommendations must be reported to the chairs and ranking minority members of the senate and house of representatives committees having jurisdiction over the environment and natural resources.

Comments on Current Situation and Alternatives

MPCA staff have put together a document that describes the Citizens' Board as it exists today and three alternatives to decision-making on environmental review and permits. MPCA staff are coming before the Citizens' Board to get your reaction to the current way the Board operates, thoughts on alternatives presented, and feedback on the analysis of the benefits and drawbacks of each.

KK:cmbg

Attachment

MPCA Citizens' Board Decisions on Environmental Review and Permitting: Status Quo

MPCA Citizens' Board: In statute (M.S. 116.02) the Minnesota Pollution Control Agency or "agency" is defined as the commissioner and eight members of the Citizens' Board. The Citizens' Board was created when the MPCA was created in 1967. MPCA staff numbered less than 20. As the MPCA took on more environmental protection and assistance tasks and increased in size, the Board's decision making workload escalated.

In 1996, major revisions were made to M.S. 116.02 to scale back the Citizens' Board decision making workload. Subdivisions 6 through 10 were added to describe specific circumstances where the Board was to make a final decision. The only decisions the Citizens' Board must make related to environmental review and permits is on the scope and adequacy of Environmental Impact Statements (EISs) or if a variance is sought from certain state standards. Other decisions on permits and environmental review documents are brought before the Board only at the request of the Commissioner, a Board member, project proposer, or interested party. Adding subdivisions 6 through 10 narrowed the scope and under what circumstances items are brought before the Board. This change reduced the number of Citizens' Board decisions considerably.

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No other state permitting agency has a Citizens' Board. Counties and cities that prepare environmental review documents and permits often take these decisions before their county boards or city councils.

Characteristics

Duties/Authority: The Citizens' Board can make the following decisions on environmental review and permits (see M.S. 116.02, Subd. 6 through 10):

Environmental Review

- Petition for the preparation of an environmental assessment worksheet if project proposer or interested party requests it and the agency agrees.
- The need for an EIS following preparation of an EAW if requested by project proposer or interested party and the agency agrees or the commissioner recommends preparation of an EIS.
- The scope and adequacy of EISs.

Permits

- Issuance, reissuance, modification, or revocation of a permit if the permittee or interested party requests it and the agency agrees; or
- A variance is sought in the permit application; or
- A contested case hearing request is pending.

In addition, a decision can come before the Board if the Commissioner, another Board Member, or interested party requests that a decision be made before the Board and that request is granted.

Staffing Resources: A part-time Board secretary manages administrative portions of Citizens' Board preparations and meetings. Staff bringing decisions before the Board must prepare Board documents that are mailed 10 days prior to the meeting. Environmental review and permitting projects that are brought before the MPCA Citizen's Board for decision are usually large projects that are controversial and have garnered a great deal of public interest. Generally it takes more staff time to prepare a project for a Board decision than it does for a decision by the Commissioner. While some of the documentation may be similar, the level of preparation needed for the presentation and Board Q&A adds staff time.

Membership: The Citizens' Board consists of the commissioner as Chair and eight members who are appointed by the governor and confirmed by the senate to four-year staggered terms. One member must be knowledgeable in the field of agriculture, and one member must be a representative of organized labor. All are voting members.

Location: All Board meetings take place at the MPCA offices located in St. Paul.

Authority needed for making change: Not applicable.

Evaluation of Status Quo

Impact on effectiveness of public input and engagement: Environmental review and permitting projects that are brought before the MPCA Citizen's Board for decision are usually large projects that are controversial and have garnered a great deal of public interest. By the time these projects are brought before the Citizens' Board they will have had at least a 30-day public comment period and some type of public meeting where the proposer and MPCA permitting staff are in attendance. Interested parties often value the opportunity to appear directly before the decision makers in a public forum at the point of decision. The Board allows citizens another clear entry into the agency's decision making process. The public may perceive a Citizen's Board as an important part of a checks and balances system on contentious government decisions. For the public at large, having a Citizen's Board overseeing the decisions of a state government agency can lend credibility to its decisions.

The Citizen's Board provides a rare opportunity for citizens to sit on a decision-making Board and be part of government decision-making. It connects citizens to its government.

Impact on efficiency and elimination of redundancies: The Citizens' Board is an independent decision making body that adds further thoughts, questions, and opinions to the conversation and decision. Appearing in front of the Citizen's Board requires agency staff to refine information and present it in a way that is both understandable to the broad audience but detailed enough for a decision to be made. A Board meeting allows the agency to carefully build a strong public record that supports the decision (is not arbitrary or capricious) and can be upheld under judicial review.

For interested parties, appearing before the Citizens' Board may give them the forum they need to voice their concerns and receive a response. Therefore, they do not feel the need to find another venue to air their concerns, such as the Court of Appeals, which can be costly and draw out the process even longer.

Proposers and interested parties may see a Board decision as an extra step before they can obtain an environmental review decision and/or a permit. Having a decision go before the Citizen's Board can add an average of 45 days to a project timeline. Project proposers may say this is not cost effective in today's economy. Decisions have to be made at the "speed of business."

Impact on mechanism for interagency coordination: NA

Impact on mechanism for interagency strategic thinking: NA

Impact on connection to the Governor's Office: There is less connection to the Governor's Office with a Citizens' Board because members serve a staggered 4 year term.

Impact on executive branch accountability: MPCA is an executive branch agency; therefore the accountability for decision still lies with executive branch.

MPCA Alternative 1: Commissioner makes final decisions on all environmental review and permitting documents

The Commissioner would have the final decision on all environmental review and permitting documents. There would be no opportunity for the Citizens' Board to make any decisions on these projects.

Characteristics

Duties/Authority: The final decision on all environmental review and permitting documents would rest solely with the MPCA Commissioner. Currently, the MPCA is the only state agency with a Citizens' Board that has the ability to make final permitting and environmental review decisions. County and city governments often take these decisions to county boards or city councils.

Staffing Resources: No special resources. There is staff already working on environmental review and permits.

Membership: NA

Location: NA

Authority needed for making change: Legislation is needed to remove all the Citizens' Board decision making authority on environmental review and permits.

Evaluation of Alternative 1 Compared to Status Quo

Impact on effectiveness of public input and engagement:

Drawbacks:

- Interested parties and proposers would not have a chance to appear directly before the decision makers in a public forum, voice their concerns, and have them addressed in real time.
- Part of the checks and balances system on contentious project decisions is gone.
- Although a public record is built, it may not stand up as well as through judicial review as the one built through the Citizens' Board process, which provides additional public meeting input and back and forth dialogue with refinement/resolution of issues.
- Loss of diversity of perspective from nine Board members to just Commissioner.

Benefits:

- Public input is not lost. Although not the same as a Board meeting, interested parties still have an opportunity to talk with MPCA staff, submit formal comments on the documents, and attend public informational meetings.

Impact on efficiency and elimination of redundancies:

Drawbacks:

- Interested parties may take their disputed issues to the Court of Appeals, potentially adding to the project timeline and costs.
- Building a stronger public record through presentations, questions, decisions from a 9-member Board would not exist.
- Citizens' Board meetings can and do have an impact on final permit and environmental review decisions. Project proposers have made changes to their projects as a result of testimony of interested parties in front of the Board. Although some of these changes may not have been significant to the project proposer, it made a difference to the citizens involved.

Benefits:

- Eliminating the Citizen's Board meeting step would remove an average of 45 days off project timelines, saving project proposers time and money in the short term. However, on controversial projects, the Commissioner may still want to meet with MPCA staff, proposers, and interested parties so the time savings might not be the full average 45 days.
- MPCA staff would not have to prepare a board presentation, but may still have to prepare a less formal presentation in front of the Commissioner.
- Cost savings to MPCA budget: per diem of Board Members because of reduced meetings (don't need to meet every month) and significant staff time.

Impact on interagency coordination: NA

Impact on interagency strategic thinking: NA

Impact on connection to the Governor's Office: More direct connection to the Governor's Office since the MPCA Commissioner is appointed by the Governor.

Impact on executive branch accountability: Same accountability.

MPCA Alternative 2: Modified Citizens' Board process on permits and environmental reviews – MPCA Commissioner ONLY can grant that a decision be made by the Citizen's Board

In this alternative, the MPCA Commissioner is the only one that can grant that a decision be made before the Citizens' Board. The Commissioner would benefit from a prescribed decision-making process so the decision on whether to bring a project before the Board is not seen as arbitrary or capricious.

Duties/Authority:

Anyone can make a request to the Commissioner (e.g., a Board member, project proposer, or interested party), but it is not automatically granted as most requests are currently. The Commissioner would not have to consult the Board to make the decision. The request would either be granted, or denied via written correspondence. The Commissioner could also send decisions on environmental review and permits to the Board on his/her own volition.

Statute Language Changes Example:

M.S. 116.02, subdivision 6 would read:

Subd. 6 Required decisions. The commissioner shall decide when the agency shall make final decisions on items (1) through (4). The agency shall make final decisions on items (5) through (7). ~~the following matters:~~

The rest of the language in subdivision 6 through 10 can remain the same.

The language change takes the authority for decisions on environmental review and permitting away from the Citizen's Board. The commissioner now solely makes the decision on environmental review and permit matters unless he/she decides it is prudent to bring the decision before the Citizen's Board. The Commissioner alone decides, after getting a request, whether the decision will be made by the Citizens' Board.

Staffing Resources: Unchanged.

Membership: Citizens' Board Membership does not change.

Location: All Board meetings take place at the MPCA offices located in St. Paul.

Authority needed for making change: Legislation is needed to change that the Commissioner decides what matters in environmental review and permitting are brought before the Citizens' Board.

Evaluation of Alternative 2 Compared to Status Quo:

Impact on effectiveness of public input and engagement:

Drawbacks:

- Limits public access to the Citizen's Board.
- Interested parties, project proposers, or Citizens' Board Members would have to make a strong case to the Commissioner in order for a decision to come before the Citizens' Board. Currently, requests for permits and environmental review to come before Board are mostly granted.
- Commissioner has added responsibility and accountability to the public when the request is denied.
- Drawbacks from Alternative 1 apply if Commissioner denies the request to have the Citizens' Board make the decision.
- Following a prescribed decision-making process to decide what decisions come before the Board could also take time.

Benefits:

- If the Commissioner denies the request, public input is not lost. Interested parties still have an opportunity to talk with MPCA staff, submit formal comments on the documents, and attend public informational meetings.
- Interested parties, project proposers, or Citizens' Board Members would have to make a strong case to the Commissioner in order for a decision to come before the Citizens' Board. Although a drawback to the status quo, this is also a benefit in that there has to be a tangible, thoughtful reason to spend Citizens' Board and extra staff time for a decision.

Impact on efficiencies and elimination of redundancies:

Drawbacks:

- Drawbacks from Alternative 1 apply if Commissioner denies the request to have the agency make the decision.

Benefits:

- The Commissioner now has discretion on what environmental review and permitting decisions come before the Board. In most cases, discretion adds to efficiency. In this case, the Commissioner would only recommend Citizens' Board decisions where assistance from the full Citizens' Board could benefit the final outcome.

Impact on interagency coordination: NA

Impact on interagency strategic thinking: NA

Impact on connection to the Governor's Office: Increases the connection to the Governor as compared to status quo but lessens the connection as compared to alternative 1.

Impact on executive branch accountability: Same accountability.

MPCA Alternative 3: Modified Citizens' Board process on permits and environmental reviews – Environmental Review decisions remain with the Citizens' Board, MPCA Commissioner ONLY can grant that a permit decision be made by the Citizen's Board

In this third alternative, the current status of environmental review decisions is unchanged. However, the MPCA Commissioner is the only one that can grant that a permit decision be made before the Citizens' Board per request from a Board member, project proposer, or interested party.

Duties/Authority:

Environmental review decisions would come before the Citizens' Board when requested as is the current practice. Citizens' Board review of environmental review decisions requested by interested parties seems to be a good fit for public engagement and participation for the following reasons:

- Environmental review must be completed before any permits can be issued.
- One purpose of environmental review is to capture all the impacts of the whole project in a readable form for the public all in one document.
- Environmental review covers issues that are subject to permits such as air emissions, water discharges, stormwater runoff, water appropriation, and solid waste.
- It also covers issues that are either narrowly covered or not covered in permits: noise, odor, visual impairment, traffic patterns, compatibility with land use plans, historical resources, soils, and fish and wildlife. These issues may be of great concern to the public and may not be adequately covered in a permit, but are covered in environmental review.
- At the MPCA, environmental review staff and permit engineers work closely together for efficiency of both documents. Permits conditions are described in the relevant portions of the environmental review documents. Permit engineers often are asked questions by Board Members at Citizens' Board meetings where the decision on environmental review is made.

Permits would come before the Citizen's Board for decision only if the MPCA Commissioner granted the request from a Board member, project proposer, or interested party. Permits are highly technical documents written for the company's facility operator to maintain compliance with all local, state, and federal standards for release of specific pollutants. Permits are extremely specialized and a facility may need more than one type of permit. Each permit needed by a facility only covers a certain media. For example, an air permit only covers emissions to the air; water permits covers discharges to surface or groundwater; water appropriations permit says how much water can be drawn from groundwater. Permits cannot be issued until environmental review is complete.

Statute Language Changes Example:

M.S. 116.02, subdivision 6 would read:

Subd. 6 Required decisions. The commissioner shall decide when the agency shall make final decisions on item (4). The agency shall make final decisions on items (1) through (3) and (5) through (7). ~~the following matters:~~

The rest of the language in subdivision 6 though 10 can remain the same.

Staffing Resources: Unchanged.

Membership: Citizens' Board Membership does not change.

Location: All Board meetings take place at the MPCA offices located in St. Paul.

Authority needed for making change: Legislation is needed to change that the Commissioner decides what matters in permitting are brought before the Citizens' Board.

Evaluation of Alternative 3 Compared to Status Quo:

Impact on effectiveness of public input and engagement:

Drawbacks:

- For permits, it limits public access to the Citizen's Board.
- Interested parties, project proposers, or Citizens' Board Members would have to make a strong case to the Commissioner in order for a permitting decision to come before the Citizens' Board.
- Drawbacks from Alternative 1 apply if Commissioner denies the request to have the Citizens' Board make the permitting decision.

Benefits:

- If the Commissioner denies the request to bring a permit before the Citizens' Board, public input is not lost. Although not the same as a Board meeting, interested parties still have an opportunity to talk with MPCA staff, submit formal comments on the documents, and attend public informational meetings. This public input takes place regardless of Citizen Board involvement.
- Interested parties, project proposers, or Citizens' Board Members would have to make a strong case to the Commissioner in order for a permitting decision to come before the Citizens' Board. Although a drawback to the status quo, this is also a benefit in that there has to be a tangible, thoughtful reason to spend Citizens' Board and extra staff time for a permitting decision.

Impact on efficiencies and elimination of redundancies:

Drawbacks:

- Drawbacks from Alternative 1 apply if Commissioner denies the request to have the Citizens' Board agency make the permitting decision.

Benefits:

- The Commissioner now has discretion on what permitting decisions come before the Board. In most cases, discretion adds to efficiency. In this case, the Commissioner would only recommend Citizens' Board decisions where assistance from the full Citizens' Board could benefit the final permitting outcome.

Impact on interagency coordination: NA

Impact on interagency strategic thinking: NA

Impact on connection to the Governor's Office: Increases the connection to the Governor as compared to status quo but lessens the connection as compared to alternative 1.

Impact on executive branch accountability: Increases the executive branch accountability as compared to status quo but lessens it as compared to alternative 1.

Current Statutory Language

M.S. 116.02, Subd. 6. Required decisions.

The agency shall make final decisions on the following matters:

(1) a petition for the preparation of an environmental assessment worksheet, if the project proposer or a person commenting on the proposal requests that the decision be made by the agency and the agency requests that it make the decision under subdivision 8;

(2) the need for an environmental impact statement following preparation of an environmental assessment worksheet under applicable rules, if:

(i) the agency has received a request for an environmental impact statement;

(ii) the project proposer or a person commenting on the proposal requests that the declaration be made by the agency and the agency requests that it make the decision under subdivision 8; or

(iii) the commissioner is recommending preparation of an environmental impact statement;

(3) the scope and adequacy of environmental impact statements;

(4) issuance, reissuance, modification, or revocation of a permit if:

(i) a variance is sought in the permit application or a contested case hearing request is pending; or

(ii) the permit applicant, the permittee, or a person commenting on the permit action requests that the decision be made by the agency and the agency requests that it make the decision under subdivision 8;

(5) final adoption or amendment of agency rules for which a public hearing is required under section 14.25 or for which the commissioner decides to proceed directly to a public hearing under section 14.14, subdivision 1;

(6) approval or denial of an application for a variance from an agency rule if:

(i) granting the variance request would change an air, soil, or water quality standard;

(ii) the commissioner has determined that granting the variance would have a significant environmental impact; or

(iii) the applicant or a person commenting on the variance request requests that the decision be made by the agency and the agency requests that it make the decision under subdivision 8; and

(7) whether to reopen, rescind, or reverse a decision of the agency.

Subd. 7. Additional decisions.

The commissioner may request that the agency make additional decisions or provide advice to the commissioner.

Subd. 8. Other actions.

Any other action not specifically within the authority of the commissioner shall be made by the agency if:

(1) prior to the commissioner's final decision on the action, one or more members of the agency notify the commissioner of their request that the decision be made by the agency; or

(2) any person submits a petition to the commissioner requesting that the decision be made by the agency and the commissioner grants the petition.

If the commissioner denies a petition submitted under clause (2), the commissioner shall advise the agency and the petitioner of the reasons for the denial.

Subd. 10. Changing decisions.

(a) The agency must not reopen, rescind, or reverse a decision of the agency except upon:

(1) the affirmative vote of two-thirds of the agency; or

(2) a finding that there was an irregularity in a hearing related to the decision, an error of law, or a newly discovered material issue of fact.

(b) The requirements in paragraph (a) are minimum requirements and do not limit the agency's authority under sections 14.06 and 116.07, subdivision 3, to adopt rules:

(1) applying the requirement in paragraph (a), clause (1) or (2), to certain decisions of the agency; or

(2) establishing additional or more stringent requirements for reopening, rescinding, or reversing decisions of the agency.