

**“Little NEPAs”: State Equivalents to the National Environmental Policy Act
in Indiana, Minnesota and Wisconsin**

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Introduction

Enacted by the U.S. Congress in 1969 and signed into law by President Richard Nixon in 1970, the National Environmental Policy Act of 1969 (NEPA) is the United States' flagship environmental law. Unlike, for example, the Endangered Species Act, another one of the many major environmental laws passed around the same time as NEPA, NEPA is a procedural law, requiring that all Federal actions be examined for their impacts on the natural and human environment. NEPA is often known best for the environmental assessments (EA) and environmental impact statements (EIS) that often require tremendous resources in the form of time, money, and technical expertise to complete, despite NEPA's intent to ensure that potential impacts on the natural and human environments are taken into account in decision making.

Since the enactment of NEPA, sixteen states, New York City, Puerto Rico, and the District of Columbia have enacted procedural laws similar to NEPA in their intent to require activities at a state level to document their impacts on the natural and human environment and to include environmental considerations in decision-making¹.

<u>State</u>	<u>Law or Regulation</u>
California	CAL. PUB. RES. CODE §§ 21000 - 21177
Connecticut	CONN. GEN. STAT. ANN. §§ 22a-1 to -1i
District of Columbia	D.C. STAT. §§ 8-109.01 to -109.11
Georgia	GA. CODE ANN. §§ 12-16-1 to -8, amended by 2004 Ga. Laws 463
Guam	Exec. Order No. 96-26
Hawaii	HAW REV. STAT. §§ 343-1 to -8, amended by 2000 Hawaii Laws Act 50
Indiana	IND. CODE §§ 13-12-4-1 to -10
Maryland	MD. NAT. RES. §§ 1-301 to -305
Massachusetts	MASS. GEN. LAWS ANN. Ch. 30, §§ 61 - 62H
Minnesota	MINN. STAT. ANN. §§ 116D.01 to -.11
Montana	MONT. CODE ANN. §§ 75-1-101 to -324
Nevada/California (Lake Tahoe)	Article VII, Tahoe Regional Planning Compact (NEV. REV. STAT. 277.220)
New Jersey	Exec. Order No. 215
New York	N.Y. ENVTL. CONSERV. §§ 8-0101 to -0117
North Carolina	N.C. GEN STAT. §§ 113A-1 to -13
Puerto Rico	12 P.R. LAWS ANN. §§ 1121-1127
South Dakota	S.D. CODIFIED LAWS §§ 34A-9-1 to -13
Virginia	VA. CODE ANN. §§ 10.1-1188 to -1192
Washington	WASH. REV. CODE ANN. §§ 43.21C.010 to .914
Wisconsin	WIS. STAT. ANN. §1.11

These “little NEPAs” vary widely in their requirements, impact, and effectiveness in encouraging state decision makers to take into account impacts on the natural environment. This paper will examine three little NEPAs of three Midwestern states – Indiana’s Indiana Environmental Policy Act (IEPA), Minnesota’s Minnesota Environmental Policy Act (MEPA), and Wisconsin’s Wisconsin Environmental Policy Act (WEPA). These three laws, while all having common roots in the explosion of environmental laws promulgated in the late 1960s and early 1970s and sharing the basic goal of NEPA to integrate environmental considerations into governmental decision making, have developed in different ways in response to different pressures and legislative environments.

Indiana – The Indiana Environmental Policy Act (IEPA)

The Indiana Environmental Policy Act (IEPA) was enacted in 1972, two years after NEPA’s enactment. As Indiana does not publish its legislative history, the exact thinking behind IEPA is not entirely clear, but given the support for environmental legislation in the country at large as well as actions on both the Federal and state level, it is likely that the motives behind IEPA were similar to those behind NEPA. Like NEPA, IEPA requires environmental impact analysis to be performed for actions significantly affecting the natural environment. The Indiana Court of Appeals has noted that the text of the IEPA “in parts parallels” NEPA “almost verbatim”². IEPA and NEPA parallel one another so closely that it will in some cases be more meaningful to discuss where it differs from other little NEPA laws rather than where it differs from NEPA.

IEPA is administered by the Indiana Department of Emergency Management. Initially, the Indiana state agency conducting the action makes a determination as to whether IEPA will apply to the action. There is a very wide range of actions that are exempted from review under IEPA. These include:

- 1) Some actions of the Water Pollution Control Board, the Air Pollution Control Board, and the Solid Waste Management Board are categorically exempted from IEPA, as are minor and emergency actions.
- 2) IEPA only applies to actions directly undertaken by state agencies. IEPA specifically states that:

nothing in this chapter shall be construed to require an environmental impact statement for the issuance of a license or permit by any agency of the state.

This effectively excludes all permitting and licensing actions by the state from consideration under IEPA.

- 3) IEPA explicitly exempts local government from having to comply. This removes a wide range of activities, including construction and zoning, from the need to comply with IEPA.

Also, like NEPA but unlike the little NEPAs of California and other states, IEPA does not require a preference for alternatives that provide for the least level of adverse impacts to the environment. And also like NEPA, but unlike many other little NEPAs such as California's and Washington's, IEPA does not establish a standard of judicial review.

Challenging an Indiana state agency's action under IEPA has been extremely rare. The first challenge to a state agency action was not filed until 2002, when the Indiana Forest Alliance (IFA) filed the first-ever lawsuit invoking the IEPA. The state reacted to this lawsuit and the threat of other lawsuits by exempting the Indiana Division of Forestry from the IEPA. The IFA described it this way³:

In response to the continued litigation by IFA, and the threat of new litigation to stop the strategic plan, the IDNR pushes Senate Bill 354 to amend the classified forest program through the state legislature. The bill contains a rider that exempts the Division of Forestry from the Indiana Environmental Act. Kyle Hupfer, IDNR Director, admits during a hearing in the Senate Natural Resources that, "we don't have time to do studies. We need to get rid of these lawsuits."

The Indiana Environmental Protection Act (Protection Act) has been suggested as another avenue to challenge an agency's decision under IEPA. Under the Protection Act, any individual or legal entity may sue an alleged polluter, regardless of whether or not the individual or legal entity is directly harmed by the polluter's activity. If an agency did not prepare an impact statement for an activity, it might be possible to sue the agency under the Protection Act to prevent that action until the appropriate review under IEPA is completed.

There are two main problems with the notion of using the Protection Act in this manner, however. First, many important terms such as "environment" and "significantly" are not clearly defined in the law, and Indiana courts have interpreted these terms quite restrictively. Procedural hurdles, such as a mandatory ninety-day waiting period from receiving notice of a suit under the

Protection Act in which the agency can take action to eliminate the pollution, takes control of the action away from the plaintiff and can discourage individuals and groups from taking action.

The IEPA has been called a “forgotten” law. The many major areas under IEPA that are exempted from requirements to comply with the law make it somewhat difficult to discern the actual impact of IEPA for better or for worse. There is some significance to the fact that the law still exists and has not been repealed, however. Given the appropriate political context, it is not unimaginable that IEPA could live up to its stated goals of helping to preserve the natural environment through informing governmental decision making.

Minnesota – The Minnesota Environmental Policy Act (MEPA)

The creation of the Minnesota Environmental Policy Act (MEPA), like that of other little NEPAs, came as a result of a growing environmental consciousness that spawned most of the United States’ signature environmental laws and a huge number of similar efforts on the state and local levels. In 1967, the Minnesota Pollution Control Agency was created. In 1969, the Minnesota House ordered a study of the state’s water resource and pollution issues, drainage laws, and flood control. The study concluded that the piece-meal approach that had been taken to address land- and water-related issues throughout the state required comprehensive state policy to address. MEPA was passed overwhelmingly by the Minnesota Legislature in 1973.

MEPA, like nearly all little NEPAs, mandates the use of environmental impact analyses. MEPA establishes that all government actions and many private actions that significantly impact or that *could* potentially significantly impact the environment and that do not fall under designated exceptions must first have an Environmental Assessment Worksheet (EAW) completed. If the EAW results in a Finding of No Significant Impact (FONSI), further review is not necessary. However, if the EAW determines that the action is likely to have significant impacts, then an Environmental Impact Statement (EIS) must be prepared. Upon completion, the EIS is submitted to the local or state agency with the greatest approval authority over the project for review of the document. Only upon approval of the EIS by the agency may the action be legally undertaken.

An EIS is mandatory for any major governmental action or any major private action (*major* is

defined here as having more than local significance) that has or may have significant environmental effects. Actions include:

- 1) All state and local agency actions;
- 2) Some private actions including new agricultural operations (except for those specifically exempted; see below); and
- 3) Actions of greater than local significance that are determined to be of concern as a result of citizen petition. This petition must have signatures from at least 500 Minnesota voters.

Several categories of projects have been designated as exempt from environmental review, regardless of the level of potential impacts. These categories include:

- 1) Feedlots;
- 2) Mixed-use residential and industrial-commercial developments;
- 3) Campgrounds;
- 4) Highway projects;
- 5) Nonmetallic mineral mining;
- 6) Ethanol plants; and
- 7) Sports facilities

It is interesting to note that these exempted categories are not defined in terms of impacts to the natural environment, but rather in terms of size, density, or type of development. Successful industry and interest-group lobbying has played an important role in the development of these categories over time.

MEPA, like many laws, has been subject to a number of significant changes over the years. These changes include limitation of the petition provision to only those projects or actions of greater than local significance. Decisions as to whether an EAW or EIS are sufficient have also been devolved from the state Environmental Quality Board (EQB) to the “local, county or state agency having the most approval authority over a project.”

Minnesota is a leader in environmental regulation among states. In many cases, state environmental laws and even Federal laws implemented on the state level have more stringent requirements imposed by Minnesota than their counterparts on the Federal level. Several laws impose state-specific requirements. These include the 1989 Minnesota Ground Water Protection

Act that requires that “groundwater be maintained in its natural condition, free from any degradation caused by human activities” and the 1991 Wetlands Conservation Act, which created a “no net loss” policy for wetlands.

Land-use planning is well-supported on the state level as well, with laws and policies such as 1975’s Metropolitan Land Planning Act and 1997’s Community-Based Planning Act. These laws provide local governments with the tools and authority to make zoning and regulatory approvals conform to the goals of the community in areas including the environment. Review of conditional-use permits and planned-unit developments often entails high levels of scrutiny related to transportation, energy efficiency, and stormwater.

While not as explicit as in the statutes of some other states, MEPA and NEPA compliance efforts are often very closely integrated. Slight differences between the two processes appear in such projects, such as the lack of a requirement to publish the Notice of Intent to prepare an EIS in the Minnesota EQB Monitor.

Wisconsin – The Wisconsin Environmental Policy Act (WEPA)

The Wisconsin Environmental Policy Act (WEPA) became effective in 1972. Closely patterned after NEPA, WEPA requires that environmental impact assessments be prepared with every recommendation or report on legislative proposals and other activities significantly affecting the human environment. Unlike IEPA, WEPA consideration is required for applicable actions before permits or approvals are granted.

In most aspects, WEPA is nearly identical to NEPA. One difference is the use of action type lists, required under Executive Order 26 (EO 26), which create a classification scheme for actions that guides the level of review under WEPA required. This is reminiscent in some ways of NEPA’s categorical exclusions, but Wisconsin’s action types go further in helping to prescribe the level of review for actions that are not completely excluded from WEPA consideration.

For example, the Wisconsin Department of Natural Resources (WDNR)’s action type lists are found in Wisconsin’s Administrative Code N.R. § 150.03:

- 1) Type I: Actions that may have a major effect on the human environment. (§150.03(1))
- 2) Type II: Actions that have the potential to cause significant environmental effects and may involve unresolved conflicts in the use of available resources. (§ 150.03(2))
- 3) Type III: Actions that normally do not have the potential to cause significant environmental effects, significantly affect energy usage or involve unresolved conflicts in the use of available resources. (§ 150.03(3))
- 4) Type IV: Actions that (1) 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)

In addition to environmental impact analysis, section 1.11(2)(e) of WEPA requires state agencies to develop alternatives in any proposal that involve unresolved conflicts concerning alternative uses of resources. Section 1.11(2)(h) requires agencies to use ecological information in the planning and development of resource-oriented projects.

Each agency implements WEPA individually. EO 26 required the establishment of a WEPA Interagency Committee to help coordinate WEPA implementation across Wisconsin state government.

Changes in NR 150 between 1979 and 1986 resulted in revisions to action type lists for the WDNR's action type lists, downgrading several categories and resulting in fewer documents being produced. *Wis. Environmental Decade v. DNR & General Growth Devel. Corp.* in 1983 held that only significant physical impacts could compel preparation of an EIS - socioeconomic impacts alone nor political pressure or public controversy were insufficient.

Integration of WEPA implementation with NEPA as well as other applicable local environmental laws is encouraged in the WEPA statute. When environmental review for a project or action is required under both WEPA and NEPA, WEPA allows joint documents satisfying both WEPA and NEPA to be prepared. For example, the Wisconsin Department of Transportation's Chapter Trans 400.03 states that:

(2) Where another state or federal agency has concurrent responsibility with the department for a proposed EA action, a joint environmental assessment, or EA, may be

prepared with the other agency if the EA meets the requirements of this chapter. The department shall make an independent judgment on the need for an environmental impact statement, or EIS, in accordance with this chapter.

(3) Where a proposed action involves another state or federal agency approval or decision, and it has been determined that an EIS shall be prepared in accordance with NEPA or WEPA, the WEPA requirement for an EIS under this chapter may be waived if:

(a) A joint EIS is prepared; or

(b) After review of the other state or federal EIS by the department, it appears that the requirements as to content of the EIS prescribed in s. 1.11, Stats., and this chapter have been met, and the EIS was developed and prepared through appropriate participation by the department with the other agencies in a coordinated effort to satisfy the requirement of NEPA and WEPA.

(4) If the joint EIS under sub. (3) appears to comply with the requirements of WEPA and this chapter, public hearings shall be held in accordance with this chapter unless they are held in Wisconsin by the lead agency with effective participation by the department.

Integration with NEPA and other regulations

The three little NEPAs discussed here each have different relationships to the Federal NEPA. Indiana's IEPA, true to its description as a "forgotten" environmental law, has an unclear relationship with NEPA. There does not seem to be anything standing in the way of using documents intended to apply to NEPA on a Federal level to satisfy IEPA, but there is very little guidance available on how to do so. The limited scope of IEPA also makes it somewhat less likely that there would be the kind of overlap seen in other state environmental impact assessment laws.

Minnesota's MEPA, while not having a great deal of official guidance on the subject, is, in practice, often complied with in an integrated process with NEPA. A detailed description of the MEPA compliance process from the Minnesota Department of Transportation details a very closely integrated process to satisfy both NEPA and MEPA requirements.⁴

Wisconsin's WEPA has the most explicit guidance on WEPA/NEPA integration. While each agency has its own enabling legislation for WEPA, the language for the state Department of Transportation clearly encourages close integration of WEPA and NEPA compliance efforts.

The only state bordering Minnesota, Wisconsin or Indiana not considered here that has a little NEPA of their own is South Dakota (North Dakota may require an EIS before the transfer of state owned land to Federal agencies). The South Dakota Environmental Policy Act does not have any integration with MEPA, WEPA or IEPA.

Canada's equivalent of NEPA is the Canadian Environmental Assessment Act (CEAA), which requires the preparation of an EA for projects conducted by the Federal government and to certain private sector projects, listed on the Inclusion List, that involve Federal approvals, lands or funds. Provincial environmental impact assessment laws generally appear to have a roughly similar relationship to CEAA that the little NEPAs to with NEPA. One exception is that, at the request of the responsible authority (roughly analogous to NEPA's lead agency), the Minister of the Environment may recommend that a review board be appointed to review an environmental assessment that jointly involves the Federal government and other jurisdictions (previous to the passage of Bill C-9 in 2010, the Minister could refer an environmental assessment to a review panel without needing the responsible authority to request the referral. Currently, review boards are less likely to be appointed than they previously were). Neither the CEAA, Ontario's Environmental Assessment Act nor Manitoba's Environment Act have any significant impact on implementation of the little NEPAs of Minnesota or Wisconsin.

Comparisons

It is interesting to consider similarities in state governance among Indiana, Minnesota and Wisconsin as well as their differences and consider how these similarities and differences may impact their little NEPAs. All three states generally follow the legal principle of Dillon's Rule for determining local government authority. Dillon's Rule emphasizes the preeminence of state government over local government by holding that local governments only have those powers expressly granted by the state legislature through the state constitution or legislative action or those powers necessarily implied by that grant. In Indiana, however, Dillon's Rule applies only to township governments.

All three states are also Home Rule states, a concept originating in Missouri in 1875 which means that local government may exercise any functions that are not expressly prohibited by state statute. Indiana adopted legislative home rule, allowing local government to exercise a range of powers, but leaves those powers open to being modified or removed by action of the state legislature, unlike in Minnesota and Wisconsin where the principle of home rule is in the state constitution and cannot be revoked merely by statute.

Indiana's IEPA is by far the weakest of the three laws examined. Not only are there are huge areas of exemption under the IEPA, but the legislature has shown itself willing to expand those areas of exemption to head off challenges to the law, as evidenced by the recent removal of Indiana state forestry activities from having to comply with IEPA after a nonprofit sued under the law. Making IEPA more effective could be done through a reduction in its exemptions, especially the exemptions for routine permitting and licensing activities. This would not necessarily lead to an explosion of paperwork. Washington State's State Environmental Policy Act can often be complied with through the relatively simple SEPA Checklist. The form that IEPA compliance takes is less important than working to promote the goals of the IEPA and the law it was modeled after, NEPA – to make governmental decisions take into account environmental considerations.

Minnesota's MEPA is, in many respects, an exemplary law. MEPA's Environmental Quality Board parallels in places the role of the Federal Council on Environmental Quality to coordinate MEPA compliance and MEPA/NEPA integration. Even the vigorous debates on its effectiveness over the past several decades can be read as a sign of health compared to the relative indifference that Indiana's IEPA appears to be regarded with. Like IEPA, however, the potential for the state legislature to nibble away at the scope of the law through increasing exemptions is real. Integration of the MEPA process into Minnesota's vigorous local and regional planning culture will help MEPA weather the effects of interest group lobbying on the state level.

The situation of Wisconsin's WEPA is similar to that of MEPA in many respects. WEPA is more decentralized than MEPA; each agency administers WEPA relatively autonomously. One

exception has been the change of direction in Wisconsin state government since 2010. While some proposals to exempt certain mining and industrial projects from state environmental law were rejected, the general thrust of the state's government has been towards a pushback against many of the state's environmental regulations, especially those that may impose burdens on large projects.

As seen in each of the little NEPAs discussed above, legislatures have often attempted to nip away at the environmental laws enacted decades ago. NEPA has not been immune from this. In July 2012, MAP-21, the new U.S. Federal surface transportation bill, was finally passed with important provisions to "streamline" the NEPA process for surface transportation projects. According to the American Planning Association's analysis of MAP-21⁵, these changes include:

- 1) *Reconstruction of transportation infrastructure that is damaged or destroyed by a disaster is exempt from NEPA review provided the replacement matches the previous design and specifications;*
- 2) *Projects taking place in existing rights-of-way will proceed under a categorical exclusion;*
- 3) *Categorical exclusions under NEPA are provided to projects receiving less than \$5 million in federal funds or cost less than \$30 million in total (of which no more than 15 percent is federal funds);*
- 4) *The limit on filing a judicial challenge to a NEPA Record of Decision (ROD) is reduced from 180 days to 150 days;*
- 5) *Agencies are now subject to financial penalties for failure to render certain review and permitting decisions by deadlines unless they can establish an adequate reason for delay;*
- 6) *U.S. DOT will be required to meet a four-year deadline for completion of permits, approvals, reviews or studies required for projects that have been in NEPA review without a ROD for at least two years.*

While this primarily applies to the U.S. Department of Transportation (DOT), a provision making the DOT the lead agency for all surface transportation projects potentially expands the scope of these changes to include *any* surface transportation project that DOT participates in (personal communication, 2012).

NEPA can legitimately be considered one of the most influential and widely emulated environmental laws in the world. The little NEPAs of Indiana, Minnesota and Wisconsin were born in the same environment that gave birth to NEPA as well as many environmental laws

policymakers, planners, practitioners and citizens take for granted today. Each little NEPA has developed in response to its local context while at the same time being subject to universal pressures.

Each of the little NEPAs discussed in this paper have lessons not only for the states but for Federal planners and policymakers as well. Indiana's IEPA is a cautionary tale, the story of a potentially effective law rendered ineffective through overly broad exemptions and a legislature in practice indifferent at best and hostile at worst. Minnesota's MEPA and Wisconsin's WEPA owe a great deal of their effectiveness to a vibrant overall planning culture in both states. Federal efforts to promote planning in general including Metropolitan Planning Organizations (Department of Transportation), hazard mitigation planning (Federal Emergency Management Agency), and multi-agency efforts such as the Office of Sustainable Communities, a joint effort of the Environmental Protection Agency, the Department of Housing and Urban Development, and the Department of Transportation, develop a culture of planning which can help to enhance NEPA's effectiveness.

Little NEPAs, in their implementation, struggle with many of the same issues that NEPA does. Unwieldy environmental impact assessments often buried in specialist jargon and a process that can sometimes seem virtually endless are ripe for new approaches and for reform.

Unfortunately, these very real problems have provided an easy pretext for those interested less in reform than in simply gutting the laws that are part of society's attempt to learn to live differently in relation to its environment. The lessons of the little NEPAs can help guide NEPA to meet its challenges today and tomorrow.

Despite these very real challenges, both NEPA and the little NEPAs share a common philosophical basis in the belief that providing more information for both decision-makers and the general public can lead to better outcomes for the natural and human environment. If policymakers and practitioners alike can remain open to learning from the successes, failures and challenges of NEPA, IEPA, MEPA, WEPA and the other little NEPAs, environmental impact assessment laws will continue to have a meaningful, beneficial impact for decades to come.

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¹ Council on Environmental Quality. *State Environmental Planning Information*. Retrieved from <http://ceq.hss.doe.gov/nepa/regs/states/states.cfm>. Last updated December 4, 2011.

² *Indiana State Highway Commission v. Ziliak*, 428 N.E.2d 275, 281 (1981 Ind. App.).

³ Indiana Forest Alliance. *History of the Indiana Forest Alliance*. Retrieved from http://www.indianaforestalliance.org/new_site/pages-x/history.html, August 13, 2012.

⁴ *Minnesota Department of Transportation*. EIS Process Overview. Retrieved from <http://dotapp7.dot.state.mn.us/edms/download?docId=613708> .

⁵ Jordan, J. (2012). Inside MAP-21: NEPA and project delivery. APA Policy News for Planners; retrieved from <http://blogs.planning.org/policy/2012/07/16/inside-map-21-nepa-and-project-delivery/> .