



# Wisconsin Environmental Policy Act

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The Wisconsin Environmental Policy Act (WEPA), set forth in [s. 1.11, Stats.](#), requires state agencies to include a statement on environmental impacts in every recommendation, report, proposal for legislation, or other agency action, that significantly affects the quality of the human environment. WEPA is a procedural statute that requires an agency complete certain steps before reaching a final decision on any action that significantly affects the quality of the human environment, such as a permit application or proposed rulemaking. However, WEPA does not dictate an agency's particular final decision on that action.

The act was modeled after the National Environmental Policy Act (NEPA) passed by Congress in 1970. WEPA has been further developed through borrowed interpretations from NEPA and Wisconsin state court decisions. The most recent development came through *Applegate-Bader Farm, LLC v. Wisconsin Department of Revenue*, a 2021 Wisconsin Supreme Court opinion that generally expanded the ability of individuals to challenge an agency's WEPA procedures.

## STATE AGENCY REQUIREMENTS

WEPA is a procedural statute only, and therefore, does not dictate final agency decision making. Rather, WEPA only requires the agency takes a "hard look" at the environmental effects of the decision.<sup>1</sup> Nothing in WEPA precludes an agency from deciding that other factors hold more weight than the environmental factors. WEPA also does not require that the agency engage in remote or speculative analysis.<sup>2</sup>

Under WEPA, state agencies must create a detailed Environmental Impact Statement (EIS) for any major agency action that will significantly affect the quality of the human environment. The completed EIS must follow guidelines issued by the U.S. Council on Environmental Quality and must include: (1) the environmental impact of the proposed action; (2) any adverse environmental effects that cannot be avoided should the proposal be implemented; (3) alternatives to the proposed action; (4) the relationship between short-term uses of the human environment and the maintenance and enhancement of long-term productivity; (5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action; and (6) details of the beneficial aspects of the proposed project.<sup>3</sup>

State agencies have wide latitude in how they determine whether an EIS is needed. Some, such as the Public Service Commission (PSC) and the Department of Transportation, use the Environmental Assessment (EA) tool also used by federal agencies under NEPA. An EA is a less-detailed EIS which provides a cost-effective way to determine whether a full EIS is needed. On the other hand, the Department of Natural Resources (DNR), in lieu of developing EAs, conducts "strategic analyses" of broader natural resources issues. These analyses provide decision makers with information on issues, alternative courses of action and their environmental effects.<sup>4</sup> Regardless of the approach used, if an agency decides an EIS is not needed, the agency must still create a reviewable record that demonstrates that the agency's determination not to prepare an EIS was reasonable.<sup>5</sup>

The determination of whether an action requires an EIS hinges on the fact-specific question of whether the action significantly "affect[s] the quality of the human environment." DNR administers its WEPA process through ch. NR 150, Wis. Adm. Code, which lists certain agency actions that require a WEPA review process. Minor actions, such as educational activities, mapping, or temporary dam drawdowns, are specifically exempt from the EIS process.<sup>6</sup> If the type of action is not explicitly excluded from the WEPA process by ch. NR 150, then the DNR must follow the WEPA process and create a reviewable record that either leads to a no-EIS decision or to the creation of an EIS.<sup>7</sup> Other agencies, such as the PSC, also have regulations listing examples of actions that generally do not require an EIS, actions that may require an EIS, and actions that will always require an EIS.<sup>8</sup>

Within the fact-specific analysis of whether an action significantly affects the human environment, agencies must look at immediate as well as cumulative effects. The recent case of *Applegate-Bader Farms* clarified that an agency must consider both direct and indirect effects of the action when determining if it significantly affects the quality of the human environment.<sup>9</sup> Agency decisions on what significantly affects the human environment are reviewed using a reasonableness standard, with some level of deference granted to the agency's expertise when it appears that it was utilized.<sup>10</sup>

Finally, WEPA and agency regulations include various public hearing requirements. WEPA itself requires a public hearing on every major agency action aside from proposals for legislation.<sup>11</sup> Agency regulations may also set comment periods. For example, DNR rules set a minimum comment period on a draft EIS of 30 days; PSC rules set a comment period of 45 days.<sup>12</sup>

## WEPA AND THE LEGISLATURE

Legislation, unlike an agency action, is not subject to WEPA requirements. However, the Legislature still interacts with the WEPA process. For instance, WEPA requires that each agency submit to the Assembly and Senate chief clerks an annual report detailing the number of EAs (or equivalent thereof) and EISs completed within that year.<sup>13</sup> Additionally, Wisconsin courts have held that legislative acts may change the WEPA requirements within certain situations. In cases where the Legislature has selected a project site in legislation, an agency is not required to include alternative sites within its EIS as the alternative sites are too remote a possibility.<sup>14</sup> Legislatively set deadlines may also alter the EIS process, such as not requiring the draft EIS or comment stage.<sup>15</sup>

## WEPA INTERACTIONS WITH NEPA

WEPA was deliberately modeled after NEPA, allowing Wisconsin courts to adopt interpretations of NEPA and apply them to WEPA. Federal court interpretations of NEPA are persuasive authority on interpreting questions about WEPA. Wisconsin courts have therefore adopted a number of interpretations from NEPA. Finally, if a state, federal, or local agency must also comply with NEPA, DNR regulations allow DNR to adopt the NEPA EIS as a valid WEPA EIS.<sup>16</sup>

## CITIZEN ENFORCEMENT AND STANDING

As described previously, WEPA is a procedural statute that does not require state agencies to take any specific final action.<sup>17</sup> WEPA's enforcement generally comes through citizen suits challenging agency compliance with procedural requirements. Affected individuals may only sue the agency for a lack of process or consideration in reaching its final decision, not the final decision itself. In *Applegate-Bader Farms*, the court held that a plaintiff has standing to challenge an agency's WEPA procedure for a final action that directly or indirectly affects the human environment or the plaintiff.<sup>18</sup>

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<sup>1</sup> *Clean Wisconsin v. Pub. Serv. Comm'n*, 2005 WI 93, ¶ 189.

<sup>2</sup> *Wisconsin Environmental Decade, Inc. v. Pub. Serv. Comm'n*, 105 Wis. 2d 457 (1981).

<sup>3</sup> [s. 1.11 \(2\) \(c\), Stats.](#)

<sup>4</sup> [s. NR 150.10, Wis. Adm. Code](#); current strategic analyses are being developed with respect to Door Peninsula coastal management, wild rice management, and fish passage at dams.

<sup>5</sup> *Applegate-Bader Farm, LLC v. Wisconsin Dep't of Revenue*, 2021 WI 26.

<sup>6</sup> [s. NR 150.20 \(1m\), Wis. Adm. Code](#).

<sup>7</sup> [Current EIS-required projects](#) include relocation of the Enbridge Oil Pipeline, golf course construction, and a stream diversion.

<sup>8</sup> [s. PSC 4.70, Tables 1-3, Wis. Adm. Code](#).

<sup>9</sup> *Applegate-Bader Farm, LLC v. Wisconsin Dep't of Revenue*, 2021 WI 26.

<sup>10</sup> *Family Farm Defenders, Inc. v. Wis. Dep't of Natural Res.*, 2014 WI App 24.

<sup>11</sup> [s. 1.11 \(2\) \(d\), Stats.](#)

<sup>12</sup> [s. NR 150.30 \(3\) \(c\), Wis. Adm. Code](#); [s. PSC 4.50, Wis. Adm. Code](#).

<sup>13</sup> [s. 1.11 \(2\) \(j\), Stats.](#)

<sup>14</sup> *Shoreline Park Preservation, Inc. v. DOA*, 195 Wis. 2d 750 (Ct. App. 1995).

<sup>15</sup> *Responsible Use of Rural & Agricultural Land v. PSC*, 2000 WI 129.

<sup>16</sup> [s. NR 150.40 \(2\), Wis. Adm. Code](#); see e.g., [National Park Service, Ice Age National Scenic Trail Finding of No Significant Impact](#) (10/1/2021).

<sup>17</sup> *Friends of the Black River Forest v. Wis. Dep't of Natural Res.*, 404 Wis. 2d 590 (2021).

<sup>18</sup> *Applegate-Bader Farm, LLC v. Wisconsin Dep't of Revenue*, 2021 WI 26.