Keeping Your Project Out of Court and Winning When You Get Dragged In
MN/DOT Environmental Stewardship and Streamlining Workshop
March 28, 2007
By Walter H. Rockenstein II (“Rocky”)
Rocky’s Rule No. 1 - Stop and Think

- Environmental Stewardship
- Streamlining
Rocky’s Rule No. 2 - Think Who, What, When, Where, Why, And How

• **Who’s In The Audience? Or Who Are The Stakeholders?**
  - The RGU Decision Maker
  - The Proposer
  - The Reviewing Agencies
  - The Public
– The Courts
  1. *Trout Unlimited Six Part Test*

  • Represents the RGU’s will and not its judgment;
  • RGU relies on factors which the Legislature had not intended it to consider;
  • RGU entirely failed to consider an important aspect of the problem;
  • RGU offers an explanation which runs counter to the evidence;
  • RGU’s decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise; and
  • Record lacks substantial evidence supporting the RGU finding.

• Trout Unlimited, Inc., et al. v. The Minnesota Department of Agriculture, 528 N.W.2d 903 (Ct. App. 1995)
2. *Pope County Mothers “Hard Look” Test*

- Intervene only where there is a combination of danger signals that suggest the RGU not taken a “hard look” at the salient problems and has not genuinely engaged in reasoned decision making
- *Pope County Mothers, et al. v. Minnesota Pollution Control Agency and Hancock Pro-Pork, 594 N.W.2d 233 (Ct. App. 1999)*
Rocky’s Rule No. 2 - Think Who, What, When, Where, Why, And How

– Stake Holders vs. Stake Drivers
Rocky’s Rule No. 2 - Think Who, What, When, Where, Why, And How

• What’s The Project? Or What Will Be The Major Issues?
  – Environmental Issues
    • Review the standard checklist
    • Think outside the box

  – Rocky’s Rule No. 3 – Don’t Forget Politics
Rocky’s Rule No. 2 - Think Who, What, When, Where, Why, And How

• **When Will It Occur? Or What Is The Schedule?**
  – Review Schedule
  – Project Schedule

• **Where Is It Located? Or What Is The Current Environment?**
  – Review Site And Ambient Environment
  – Look For Special Characteristics With Environmental Consequences
  – Rocky’s Rule No. 4 – Visit The Site
Rocky’s Rule No. 2 - Think Who, What, When, Where, Why, And How

- Why Is It Being Proposed? Or What Is The Purpose?
Rocky’s Rule No. 2 - Think Who, What, When, Where, Why, And How

• How Will It be Reviewed? Or What Rules Apply And How?
  – Rocky’s Rule No. 5 - Reread The Rules
  – Apply Rules To Project
  – Consider Recent Legislation and Court Cases
  – Consider Other Legal Issues
Rocky’s Rule No. 6 - Think Backwards

- **Think Backwards From The Decision-Makers Standpoint**
  - EAW
    - The Standard
      "An EIS shall be ordered for projects that have the potential for significant environmental effects."

Minn. Rules 4410.1700, subp. 1.
Rocky’s Rule No. 6 - Think Backwards

• The Criteria
  – Type, extent, and reversibility of environmental effects;
  – Cumulative potential effects of related or anticipated future projects;
  – The extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority; and
  – The extent to which environmental effects can be anticipated and controlled as a result of other available environmental studies undertaken by public agencies or the project proposer, including other EISs.

Minn. Rules 4410.1700, subp. 7.
Rocky’s Rule No. 6 - Think Backwards

– EIS

• The Standard
  “The RGU shall determine the adequacy of the final EIS.”

  Minn. Rules 4410.2800, subp. 1.
The Conditions
The final EIS shall be determined adequate if it:

- Addresses the potentially significant issues and alternatives raised in scoping so that all significant issues for which information can be reasonably obtained have been analyzed in conformance with the requirements on the content of an EIS.

- Provides response to the substantive comments received during the draft EIS review concerning issues raised in scoping.

- Was prepared in compliance with the procedures of act and the EQB rules.

Minn. Rules 4410.2800, subp. 4.
Rocky’s Rule No. 6 - Think Backwards

• Think Backwards Using Key Question

For this project, what information will the decision maker need to make these determinations?
Rocky’s Rule No. 7 - Write A Preliminary Plan

- **Outline The Issues And Record**
  - Rocky’s Rule No. 8 – Use Checklists Of Environmental And Social Issues
  - Effects Analysis
    - Use EAW form as convenient outline
    - First question – is significant analysis required?
    - If no, what information will be needed in the EAW or the Scoping EAW to eliminate this issue from further analysis?
    - If yes, what depth of analysis appears necessary for EAW or EIS?
Rocky’s Rule No. 7 - Write A Preliminary Plan

– Cumulative Effects Analysis

• For this environmental effect, how close must another project be to have a cumulative effect?

• Within this radius, are there any projects that might alter this environmental effect and how?

• If no, what information will be needed in the EAW or the Scoping EAW to demonstrate this?

• If yes, what depth of analysis appears necessary for EAW or EIS?
Rocky’s Rule No. 7 - Write A Preliminary Plan

– Mitigation

• What is proposed?

• What may be needed?

• Are there alternative forms of mitigation that should be analyzed?

• What level of analysis appears necessary to determine effectiveness?
Rocky’s Rule No. 7 - Write A Preliminary Plan

- Prepare A Preliminary Schedule
# Best Buy Headquarters Project EIS/ISP Schedule

<table>
<thead>
<tr>
<th>ID</th>
<th>Task Name</th>
<th>Duration</th>
<th>Start</th>
<th>Finish</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Environmental Impact Statement (EIS)</td>
<td>316 days</td>
<td>3/1/00</td>
<td>5/19/00</td>
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<tr>
<td>2</td>
<td>Scoping Environmental Assessment Worksheet (Scoping EAW)</td>
<td>145 days</td>
<td>6/1/00</td>
<td>7/24/00</td>
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<tr>
<td>3</td>
<td>Preparation of Scoping EAW (including draft Decision Document)</td>
<td>73 days</td>
<td>3/1/00</td>
<td>5/12/00</td>
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<tr>
<td>4</td>
<td>BRW prepares draft Scoping EAW</td>
<td>34 days</td>
<td>3/10/00</td>
<td>4/15/00</td>
</tr>
<tr>
<td>5</td>
<td>BRW prepares traffic analysis of potential alternatives</td>
<td>20 days</td>
<td>3/1/00</td>
<td>3/20/00</td>
</tr>
<tr>
<td>6</td>
<td>BRW sends alternatives analysis to Best Buy, Opus &amp; F&amp;B</td>
<td>0 days</td>
<td>3/2/00</td>
<td>3/21/00</td>
</tr>
<tr>
<td>7</td>
<td>Best Buy selects alternatives</td>
<td>0 days</td>
<td>3/2/00</td>
<td>3/24/00</td>
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<tr>
<td>8</td>
<td>BRW sends draft Scoping EAW to City staff, Best Buy, Opus &amp; F&amp;B</td>
<td>0 days</td>
<td>4/18/00</td>
<td>4/5/00</td>
</tr>
<tr>
<td>9</td>
<td>Best Buy, Opus &amp; F&amp;B review draft</td>
<td>7 days</td>
<td>4/19/00</td>
<td>4/25/00</td>
</tr>
<tr>
<td>10</td>
<td>City staff reviews draft &amp; adds material</td>
<td>7 days</td>
<td>4/19/00</td>
<td>4/25/00</td>
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<tr>
<td>11</td>
<td>City staff, Best Buy, Opus &amp; F&amp;B return draft comments &amp; additions to BRW</td>
<td>0 days</td>
<td>4/25/00</td>
<td>4/25/00</td>
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<tr>
<td>12</td>
<td>BRW prepares final version of Scoping EAW</td>
<td>7 days</td>
<td>4/26/00</td>
<td>5/2/00</td>
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<tr>
<td>13</td>
<td>BRW sends final version to City staff, Best Buy, Opus &amp; F&amp;B</td>
<td>0 days</td>
<td>5/2/00</td>
<td>5/2/00</td>
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<tr>
<td>14</td>
<td>City reviews, authorizes submittal to EGB &amp; signs Scoping EAW</td>
<td>3 days</td>
<td>5/5/00</td>
<td>5/5/00</td>
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<tr>
<td>15</td>
<td>City submits Scoping EAW &amp; notice to EGB</td>
<td>0 days</td>
<td>5/28/00</td>
<td>5/28/00</td>
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<tr>
<td>16</td>
<td>BRW prepares copies for distribution</td>
<td>4 days</td>
<td>5/5/00</td>
<td>5/12/00</td>
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<tr>
<td>17</td>
<td>City mails Scoping EAW to EGB mailing list and interested parties</td>
<td>0 days</td>
<td>5/12/00</td>
<td>5/12/00</td>
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<tr>
<td>18</td>
<td>Public Review of Scoping EAW</td>
<td>31 days</td>
<td>5/15/00</td>
<td>6/14/00</td>
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<tr>
<td>19</td>
<td>Notice of Availability of Scoping EAW appears in EGB Monitor</td>
<td>0 days</td>
<td>5/15/00</td>
<td>5/15/00</td>
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<tr>
<td>20</td>
<td>Scoping EAW made available at City Hall &amp; HCL Augsburg branch</td>
<td>0 days</td>
<td>5/15/00</td>
<td>5/15/00</td>
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<tr>
<td>21</td>
<td>City provides press release re scoping period &amp; scoping meeting</td>
<td>0 days</td>
<td>5/15/00</td>
<td>5/15/00</td>
</tr>
<tr>
<td>22</td>
<td>Notice published in local newspaper</td>
<td>0 days</td>
<td>5/15/00</td>
<td>5/15/00</td>
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<tr>
<td>23</td>
<td>30-day scoping period for public comment</td>
<td>30 days</td>
<td>5/15/00</td>
<td>6/14/00</td>
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</tbody>
</table>
Rocky’s Rule No. 9 - If It Ain’t In The Record, It Doesn’t Exist

– Public cannot comment on it.
– Decision makers cannot use it.
– Courts will not rely on it.
Rocky’s Rule No. 9 - If It Ain’t In The Record, It Doesn’t Exist

• Rocky’s Record Rules
  – Rocky’s Rule No. 10 – Load Up The Record With Good Science Written In Plain English
    • Data Counts; speculation doesn’t.
    • Pick consultants who can write plainly.

  – Rocky’s Rule No. 11 – Document Decisions Not To Study An Effect
    • Public, decision makers, and courts need to know why
Rocky’s Rule No. 9 - If It Ain’t In The Record, It Doesn’t Exist

– Rocky’s Rule No. 12 – Document Check Your “Six”
  • Consider Other Public Information Not In The Record
  • Consider What Others Are Putting In the Record
    – What Is the quality of the information?
    – What is it intended to prove?
    – Does it warrant better analysis?
Rocky’s Rule No. 13 - If It Doesn’t Walk, Talk And Act Like Mitigation, It Ain’t Mitigation

• **What Is Mitigation**
  – Mitigation Means
    • Avoiding impacts altogether by not undertaking a certain project or parts of a project
    • Avoiding impacts by limiting the degree of magnitude of a project;
    • Minimizing impacts by repairing, rehabilitating, or restoring the affected environment;
Rocky’s Rule No. 13 - If It Doesn’t Walk, Talk And Act Like Mitigation, It Ain’t Mitigation

- Reducing or eliminating impacts over time by preservation or maintenance operations during the life of a project;
- Compensating for impacts by replacing or providing substitute resources or environments; or
- Reducing or avoiding impacts by implementation of pollution prevention measures.

See Minn. Rules 4410.0200, subp. 51.

- Mitigation Is Not
  - Identifying impacts
  - Monitoring alone
Rocky’s Rule No. 13 - If It Doesn’t Walk, Talk And Act Like Mitigation, It Ain’t Mitigation

• Rocky’s Rule No. 14 – Identify Mitigation As Mitigation And Describe It In Detail
  – Put mitigation in separate sections labeled as mitigation
  – Show how, and how much, each mitigation measure reduces a project impact
  – Estimate the cost of mitigation
  – In phased projects, link mitigation measures to project phases

• Rocky’s Rule No. 15 – Show How Mitigation Can Be Enforced
  – Stakeholders need to know how mitigation can be required
  – List all the enforcement options
Rocky’s Rule No. 13 - If It Doesn’t Walk, Talk And Act Like Mitigation, It Ain’t Mitigation

• Rocky’s Rule No. 16 – Make Your Client Aware That Consenting To Mitigation Means Paying For It
Rocky’s Rule No. 18 – Be Careful To Identify Every Comment

– Clear comments

» Chapter 1, Background On The Center, p. 4. This section should indicate that the land on which the Center is located was obtained from the Dakota people by treaty in 1805.

» Chapter 1, Relationship With Other Laws . . . , Mississippi River Corridor Critical Area . . . , p. 14. In discussing the Mississippi River Corridor Critical Areas statutes and regulations, the Draft EIS states, “. . . the executive order’s interim development regulations would have jurisdiction of future land uses by any nonfederal owner.” This conclusion is incorrect for an Indian Tribe occupying Trust Land. Laws of the State and its various political entities and subdivisions, with certain limited exceptions, do not have any force on Trust Land. Since the SMSC proposes to acquire the Center in trust, the Final EIS should discuss this important distinction.
– Multiple comments mixed together
– Garbled comments

2.21 See 2.2 for One to Three) What is the source of funds for the bridge? I heard that Best Buy was going to pay for 2/3 of the cost, where are the other funds to come from? Oh, wait I did find reference to this in the draft, does the payment of all service fees, that it states cover principal costs as well? Is this an approved use of TIF funding? In the event of Best-Buy failure can the city claim this dept in foreclosures to come from? And are there Agreements in place if the source of these funds is other than Best Buy or the City of Richfield?
Rocky’s Rule No. 17 - All Comments Deserve Good Responses

– Litigation comments

• The noise analysis does not include impacts on other relevant receptors.

• The carbon monoxide analysis does not include a sufficient number of receptor sites which are affected by the project and the analysis to date was based on a faulty and incomplete traffic analysis.

• The DEIS does not adequately consider the impacts of the proposed project in conjunction with other existing and planned projects or potential projects impacting the same relevant area of study.
Rocky’s Rule No. 17 – All Comments Deserve Good Responses

- **Respond Carefully To Every Comment**
  - Use side by side format as much as possible
  - Be certain your response addresses comment
  - Perform additional analysis if required and take credit for doing so
Rocky’s Rule No. 20 - Don’t Stick Your Head In The Sand

– Step back from time to time and look around
– Talk to a colleague or mentor
– Talk to your attorney
– Be flexible
– Don’t fall in love with the project
– Don’t fall in love with your analysis
– Don’t fall in love with the review schedule
Keeping Your Project Out of Court and Winning When You Get Dragged In

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By Walter H. Rockenstein II (“Rocky”)